

**O/0598/25**

**TRADE MARKS ACT 1994**

**IN THE MATTER OF APPLICATION NO UK00003770879**

**BY CUMMINS INC.**

**TO REGISTER**

**ACCELERA**

**AS A TRADE MARK IN CLASSES 7, 9, 11, 37, 39, 40 & 42**

**AND**

**AND IN THE MATTER OF OPPOSITION THERETO**

**UNDER NO 436777**

**BY ACCELLERON SWITZERLAND LTD**

## BACKGROUND AND PLEADINGS

1. Cummins Inc. (“the applicant”) applied to register the trade mark shown on the cover page of this decision in the UK on 28 March 2022. The mark claims a priority date of 17 March 2022 on the basis of the applicant’s earlier registration from the United States of America, being numbered ‘97/317194’. The application was accepted and published in the Trade Marks Journal on 8 July 2022 in respect of the following goods and services:

**Class 7:** *Portable proton exchange membrane (PEM); hydrogen fuel dispensers for hydrogen fueling stations; hydrogen refuelers, namely hydrogen refueling stations.*

**Class 9:** *Hydrogen fuel cells; electrolyzers; hydrogen power storage systems, namely systems containing an electrolyzer for converting electrical energy to hydrogen gas, a means of storing the hydrogen and means for converting the hydrogen back to electrical energy.*

**Class 11:** *Hydrogen purifiers; rectifying demisters.*

**Class 37:** *Operation of hydrogen refueling stations and related services, namely maintenance and installation of hydrogen refueling stations; hydrogen dispensing services; hydrogen fueling services.*

**Class 39:** *Hydrogen storage services; electricity supply and distribution, namely, distribution of hydrogen gas, natural gas and electricity.*

**Class 40:** *Electricity generation; generation of power; commissioning and providing systems for the generation energy; hydrogen generation services.*

**Class 42:** *Engineering services in the field of electrical power and natural gas production; consulting services in the field of design and development of*

*fuel cell test stations, designing industrial and commercial hydrogen systems;  
technical operation of hydrogen refueling stations.*<sup>1</sup>

2. On 10 October 2022, Accelleron Switzerland Ltd (“the opponent”) filed a notice of opposition on the basis of section 5(2)(b) of the Trade Marks Act 1994 (“the Act”). The opposition is directed at the applicant’s mark in its entirety. The opponent relies on the following trade mark:

ACCELLERON

IR Registration no. WO0000001677646

Date of protection of international registration in the UK 15 December 2022

International registration date 6 April 2022

Priority date 5 November 2021 (Switzerland)

Priority claimed from 773553 mark

Relying on all its goods and services, as listed in **Annex 1**.

(“the opponent’s mark”)

3. The opponent submits that there is a likelihood of confusion because the marks at issue are visually and aurally similar to a high degree. Further, the opponent submits that the respective goods and services are identical or similar. The applicant filed a defence and counterstatement denying the claims made.

4. The applicant filed evidence in chief and the opponent filed evidence in reply. A hearing took place before me on 7 January 2025, via video conference. The opponent was represented by Mr Ian Silcock of Gatehouse Law; Mr Silcock was instructed by Wilson Gunn who have represented the opponent throughout these proceedings. The applicant was represented by Mr Andrew Norris KC of Hogarth Chambers; Mr Norris was instructed by Edwin Coe LLP who have represented the applicant throughout these proceedings.

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<sup>1</sup> The specification filed was initially for a wider collection of goods and services. However, the applicant filed a TM21B on 23 December 2024 which was accepted by the Registry on the 3 January 2025. This specification limited the applicant’s goods and services to those shown above at paragraph 1. The opponent confirmed that this did not resolve the opposition.

5. The provisions of the act relied upon in these proceedings are assimilated law as they are derived from an EU law. Although the UK has left the EU section 6(3)(a) of the European Union (Withdrawal) Act 2018 (as amended by Schedule 2 of the retained EU Law (Revocation and Reform) Act 2023) requires tribunals applying assimilated law to follow assimilated EU case law. That is why this decision refers to decisions of the EU courts which predate the UK's withdrawal from the EU.

## **EVIDENCE**

6. The applicant filed evidence in the form of the witness statement of Ms Claire Lehr dated 7 June 2023, which is accompanied by two exhibits, CL1-2. Ms Lehr is a partner at the applicant's representative firm. The evidence has been provided to demonstrate marks on the UK and EU registers where marks begin with ACCEL/ACCELL. Additionally, the evidence includes screenshots of websites/social media pages showing the use of some of the marks identified on the aforementioned registers.

7. The opponent filed evidence in reply in the form of four witness statements, two witness statements from Ms Patrizia Aberle and two witness statements from Mr Dirk Bergmann, all dated 19 June 2024. Mr Bergmann is the CTO of the opponent, a position he has held for three years. Ms Aberle is the Head of Group IP, a position she has held for three years. The witness statements are accompanied by 6 exhibits, being exhibits 1-6. The evidence has been provided to demonstrate both parties' webpages and products offered by the parties.

8. I do not intend to summarise the parties' evidence and submissions in full at this stage. However, I have taken them all into consideration in reaching my decision and will refer to them below, where necessary.

## **PRELIMINARY ISSUES**

9. There were several preliminary issues that needed to be addressed at the beginning of the hearing, namely: i) the witness statements of Ms Aberle and Mr Bergmann, ii) EUIPO decisions that were filed by the opponent, iii) a family of marks

pleading and iv) a request for off-scale costs by the applicant. I will deal with the matter of off-scale costs later on in the decision in the costs section, if necessary. However, I shall address the remainder of the preliminary issues now. I will also address evidence that has been provided on the state of the register.

#### Witness statements of the opponent

10. The first preliminary issue pertains to the witness statements of Ms Aberle and Mr Bergmann. Initially, when the witness statements and supporting evidence were filed with the registry, a single witness statement was filed by both parties. The registry deemed this to be inappropriate, and the opponent was directed that a separate witness statement be filed for each witness. This is because it was unclear which witnesses' personal knowledge was being relied upon at any point in the witness statement. In response, the same witness statement was provided by Mr Bergmann and Ms Aberle separately and they were signed separately. This was accepted by the registry.

11. At the hearing, the applicant submitted that the registry was mistaken in accepting the two highly similar witness statements that were filed. For the most part, the applicant's critique was on the validity of the evidence and the weight that should be attached to it. At the hearing, I held to proceed on the basis that both witness statements were duly filed. This is on the basis that both witnesses had signed a statement of truth, and I did not consider that I had been given a reason to challenge the validity of those statements. Despite this, I do note the criticisms that were raised by the applicant and will assess the evidence at face value attributing the level of weight that I deem to be appropriate to the evidence/submissions. Some of the evidence submitted is not evidence of fact, rather, they are submissions primarily in relation to the goods and services comparison. I acknowledge that the goods and services comparison is a notional assessment and accordingly I am not bound to take this as evidence of fact; the level of weight I will attribute to these submissions will differ from evidence of fact. That being said, I do not consider that much turns on this issue. While the submissions of the applicant are noted, the conclusions I will reach in this decision will be based on my assessment of the evidence. The outcomes that I

reach in this decision will have been reached regardless of the applicant's challenges to the admissibility and criticisms of the evidence.

### EUIPO decisions

12. Moving on to the EUIPO decisions filed by the opponent. In its skeleton argument, the opponent relied on decisions from the EUIPO between the same parties, however, it did not file them within its bundle of authorities. There was contention between the parties as to whether these could be relied upon in these proceedings. The opponent conceded that it would not rely on the EUIPO decisions filed and that it would withdraw that point from the skeleton argument in order to avoid any argument on the point. It was on that basis that I agreed to disregard the EUIPO decisions filed and their supporting submissions. Whilst this was agreed between the parties and I upheld on that basis, it is very ordinary within the course of proceedings that EUIPO decisions are let into proceedings for consideration; as evidence of EUIPO proceedings is not binding on the tribunal.

### State of the register

13. I note that the applicant submitted evidence, in the witness statement of Ms Clare Lehr, concerning the state of the register in the form of a report conducted on CerberusIP.<sup>2</sup> This report provides a list of trade marks on the UK and EU register that begin with ACCEL/ACCELL and other prefixes such as AXXEL, CELERA, XCEL. Exhibit CL2 contains website and social media snapshots demonstrating the use of some of those marks in the UK. The witness statement of Ms Lehr states that this evidence demonstrates that *“there is not only co-existence of ACCEL/ACCELL marks on the register, there is also marketplace co-existence, with consumers used to seeing and distinguishing between ACCEL/ACCELL formative marks on goods and services provided by different entities.”* Ms Lehr goes on to submit that this strongly suggests that there has been no actual confusion and that there continues to be a lack of actual confusion by the average consumers concerning the various marks. It is submitted that the average consumer will just as easily be able to distinguish between the applicant's trade mark and the opponent's trade mark, as they have been doing with the “formative

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<sup>2</sup> Exhibit CL1

marks for a number of years.” For the reasons that I will now explain, these search results do little to assist the applicant.

14. I note that in the case of *Zero Industry Srl v OHIM*, Case T-400/06, the General Court (“GC”) stated that:

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

15. I find that the existence of registered third-party marks containing the element ACCEL/ACCELL does not provide much assistance in relation to the assessment of the distinctiveness of the marks or the likelihood of confusion. Whilst the applicant has filed evidence of some of web pages from marks identified in the report, for most of the marks on the report this has not been provided. In addition, even for those marks where evidence has been provided of website pages, no information has been provided to clarify whether consumers have or have not been confused by the presence of such marks. This does little to assist the applicant as the assessment that I must undertake is based on the perception of the average consumer. The outcome of this opposition will be determined after making a global assessment whilst taking into account all relevant factors and the state of the register offers little to that assessment.

**Section 5(2)(b): legislation and case law**

16. Section 5(2)(b) of the Act reads as follows:

“(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 or association with the earlier trade mark.”

17. Section 5A of the Act is as follows:

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

18. Given its priority date, the opponent’s mark qualifies as an earlier trade mark pursuant to section 6 of the Trade Marks Act. The applicant requested that the opponent provide proof of use of its mark. However, the opponent’s mark did not complete its registration process more than five years before the priority date of the application. The condition of use, therefore, does not apply to the registration. Consequently, the opponent can rely on all the goods and services in its registration.

19. 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:

(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 impression 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 might wrongly believe that the respective goods or services come from the same or economically-linked undertakings, there is a likelihood of confusion.

## **COMPARISON OF THE GOODS AND SERVICES**

20. The applicant's goods are listed in paragraph 1 above. The opponent's goods are listed in **Annex 1**.

21. When making the comparison, all relevant factors relating to the goods in the specifications should be taken into account. In the judgment of the Court of Justice of the European Union ("CJEU") in *Canon*, Case C-39/97, the court stated at paragraph 23 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."

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

(a) The respective 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.

23. In *Boston Scientific Ltd v OHIM*, Case T-325/06, the General Court (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 the responsibility for those goods lies with the same undertaking.”

24. I also note that section 60A(1)(a) of the Act provides that goods and services 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, nor dissimilar to each other on the ground that they appear in different classes under the Nice Classification.

### Class 7

#### *Portable proton exchange membrane (PEM)*

25. The opponent compared the applicant’s goods with “*parts for motors, engines, propellers, propulsion systems and power generation systems*” in its specification, it is between these goods that they submit there is identity. The applicant’s witness statement outlined that applicant’s goods are a type of fuel cell that generates electricity through the chemical reactions between hydrogen and

oxygen.<sup>3</sup> Accordingly, I consider that it falls in the broader category of “*parts for [...] power generation systems*” as it is a “part” that is used within a hydrogen power generation system. Where goods in the specification of one party are included in a broader term from the other party’s specification, those goods are considered to be identical: see *Gérard Meric v OHIM*, Case T-133/05, paragraph 29. Therefore, I consider the goods to be identical on the principle outlined in *Meric*.

*Hydrogen fuel dispensers for hydrogen fueling stations; hydrogen refuelers, namely hydrogen refueling stations*

26. The opponent submitted the applicant’s services above are at least similar to “*parts for motors, engines, propellers, propulsion systems and power generation systems*” and “*motors and engines for land vehicles*” in the opponent’s specification.<sup>4</sup> In relation to the comparison with “*parts for motors, engines, propellers, propulsion systems and power generation systems*” the opponent submits there is similarity on the basis that:

*“Hydrogen is used as a fuel for motors, engines, propulsion systems and power generation systems. Further, hydrogen refuellers are used for refuelling these systems with the hydrogen fuel. Thereby, hydrogen power generation (sub) systems and their components and refuelers form a complementary good to parts for power generation systems, and use the same consumers and channels of trade”<sup>5</sup>*

In response, the applicant submits that there is no similarity between the goods on the basis that the nature, trade channels, users and purposes are very specific, they do not overlap in the method of use and there is no complementarity, nor any competition.

27. It is my understanding that “*hydrogen fuel dispensers for hydrogen fueling stations*” in the applicant’s specification, is akin to how a petrol station is used to

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<sup>3</sup> Witness statement of Dirk Bergmann, pg 4

<sup>4</sup> Opponent’s skeleton argument, pg 12

<sup>5</sup> Witness statement of Dirk Bergmann, pg 6

refill petrol or diesel in vehicles; it is used to dispense hydrogen fuels into vehicles etc, either in a gas or liquid form. I also consider this to be the case in relation to “*hydrogen refuelers, namely hydrogen refueling stations*” in the applicant’s specification. I will compare these goods collectively on that basis.

28. I will compare these goods with the opponent’s “*parts for motors, engines, propellers, propulsion systems and power generation systems*” in the opponent’s specification. It is my view that the goods will differ in nature and method of use. I consider that there may be an overlap in trade channels. I recognise that the trade channels will be more niche but consider that the relevant public may be able to purchase the goods via the same channels of trade. Further, I consider that there is a distinct possibility that the goods may be produced by the same providers, for example, in relation to hydrogen refuelers (which may be used in hydrogen power generation) and hydrogen power generation parts, as the provider may specialise in the field of hydrogen power generation. In addition, taking into consideration the relationship between the goods, as outlined by the opponent (which aligns with my understanding of the systems), I consider that there may be an overlap in users. This is on the basis that a hydrogen power generation company, for example, may use refuelers and purchase parts for its power generation systems to repair them. I do not consider that the goods are in competition, as a consumer looking to dispense hydrogen is not going to purchase a part for a motor, engine, propeller, propulsion system or power generation system as an alternative. As hydrogen refuellers may be the only method used by a hydrogen power generation plant to generate electricity from hydrogen (if they do not produce their own hydrogen), they may be used alongside parts of power generation systems to generate electricity. I already stated that I consider that there may be an overlap in producers. However, I do not consider that there may be a complementary relationship between the goods. It is not my view that a fuelling station and power generation system, are sufficiently close for parts of power generation systems to be important/indispensable to *hydrogen fuel dispensers for hydrogen fueling stations* in the way that the case law requires. Taking the above into account, I consider the goods to be similar to a low degree.

Class 9

### *Hydrogen fuel cells*

29. A hydrogen fuel cell converts hydrogen and oxygen, through a chemical reaction in the cell, to produce electricity. These cells have various applications and can be used in hydrogen powered vehicles, hydrogen power plants or even laptops. The opponent submits that “*parts for motors, engines, propellers, propulsion systems and power generation systems*” (in class 7) and “*motors and engines for land vehicles*” (in class 12) in its specification are identical to the applicant’s class 9 goods. I note that the opponent’s goods have not been limited and can, therefore, include goods for use in hydrogen vehicles and hydrogen power generation systems. The opponent submitted that “*power generation systems*” are “*one or more devices that alone or together generate power (e.g. electrical power) from any kind of energy*” and that propulsion systems are “*one or more devices that alone or together generate propulsion (e.g. mechanical energy or movement) from any kind of energy [...] Such propulsion systems are a main area of application for fuel cells, alternative energy generation and hydrogen related technologies*”<sup>6</sup> Both of these definitions align with my understanding of the terms. As hydrogen power cells are used in hydrogen fuel cell power plants to generate electricity, I consider that the applicant’s goods are included in the broader category of “*parts for motors, engines, propellers, propulsion systems and power generation systems*” (in class 7). I consider the goods to be identical on the principle outlined in *Meric*. However, if I am mistaken, I consider the marks to be at least highly similar.

### *Electrolyzers.*

30. Electrolysers are devices that use electricity to split water into hydrogen and oxygen through electrolysis. The opponent submits that these goods are identical or highly similar to “*parts for motors, engines, propellers, propulsion systems and power generation systems*” (in class 7)” and “*motors and engines for land vehicles*” (in class 12) on the basis that they “*generate hydrogen power from electricity and*

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<sup>6</sup> Witness statement of Dirk Bergman, pg 2

*are therefore used for generating power.*<sup>7</sup> I agree with the opponent that the applicant's goods are these goods are encompassed by the opponent's term in class 7 and, therefore, they are identical on the principle outlined in *Meric*. If I am mistaken, I consider the goods to be highly similar, on the basis that there is a potential overlap in purpose and nature, alongside an overlap in users, method of use and trade channels. In addition, I consider that there may be competition between the goods.

*Hydrogen power storage systems, namely systems containing an electrolyzer for converting electrical energy to hydrogen gas, a means of storing the hydrogen and means for converting the hydrogen back to electrical energy.*

31. The opponent submits that the applicant's goods and "*parts for motors, engines, propellers, propulsion systems and power generation systems*" and "*motors and engines for land vehicles*" in the opponent's specification are similar or identical.<sup>8</sup> In relation to "*parts for motors, engines, propellers, propulsion systems and power generation systems*" the opponent submits this to be the case on the basis that "*hydrogen power storage systems are a combination of electrolyzers and the fuel cells ("means for converting the hydrogen back to electrical energy")*" and are therefore similar. The opponent went onto state that "*hydrogen power storage is regularly used in engines and power generating systems and provided to the same consumers, and therefore similar due to their complementary nature.*"<sup>9</sup>

32. It is my view that the goods will differ in method of use and nature. However, I consider that there may be an overlap in trade channels. I note that the opponent's goods are not limited and, therefore, can apply to hydrogen-based systems. Taking this into account, I consider that there may be an overlap in trade channels as the average consumer may purchase hydrogen power storage systems and, for example, parts for a hydrogen power generation system from the same provider. I also consider that there is a possibility that the average consumer may presume that they are provided by the same undertaking. Given that the opponent's goods include

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<sup>7</sup> Witness statement of Dirk Bergmann, pg 9

<sup>8</sup> Skeleton argument of the opponent

<sup>9</sup> Witness statement of Dirk Bergmann, pg 10

parts for power generation systems and my understanding that hydrogen power storage systems are used in hydrogen power generation systems; I consider that there will be an overlap in users. In my view, the goods are not in competition. I am not of the view that the opponent's goods are also for the storage of hydrogen, nor do I consider that they can be said to cover parts for hydrogen storing system – therefore, I am unable to identify any complementarity between them. Taking this into account, I consider the goods to be similar to a low to medium degree.

### Class 11

33. In making my comparison between the applicant's goods in class 11 and the opponent's specification, I note that the Nice Classification explanatory note states that this class includes *“mainly environmental control apparatus and installations, in particular, the purposes of lighting, cooking, cooling and sanitizing.”* Further, it states that class 11 does not include, in particular *“current generators, generators of electricity (Class 7).”* I have taken this into account in making my comparison of the goods.

### *Hydrogen purifiers*

34. The opponent submits that the applicant's goods are similar to *“parts for motors, engines, propellers, propulsion systems and power generation systems”* in class 7 and *“motors and engines for land vehicles”* (in class 12) in the opponent's specification.<sup>10</sup> It is my understanding that hydrogen purifiers are used to remove impurities from hydrogen gas to ensure that it is pure before hydrogen is used. The opponent submitted that the goods are similar on the basis that *“hydrogen generator systems, such as electrolyzers, generate hydrogen power, and are therefore parts for power generation systems. The goods related to hydrogen generation are therefore identical or at least highly similar to parts for power generation systems.”*<sup>11</sup> Given that the Nice classification explanatory note states that this class includes *“mainly environmental control apparatus and installations, in particular, the*

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<sup>10</sup> Opponent's skeleton argument

<sup>11</sup> Witness statement of Dirk Bergmann

*purposes of lighting, cooking, cooling and sanitizing*”, I do not consider that it includes the opponent’s goods to allow them to be found to be identical. Therefore, I disagree with the opponent on the identity of the goods. I consider that the nature and the purpose of the goods will differ. This is on the basis that the purpose of the opponent’s goods is to be used to repair motors, engines, propellers and propulsion systems to facilitate the movement of the vehicle or to generate power, whereas the applicant’s goods can be used to purify hydrogen. I consider that the method of use of the goods will also differ. I am of the view that there may be an overlap in the trade channels and users of the goods. On the basis that hydrogen purifiers can be used in the hydrogen power generation system, to ensure the purity of hydrogen before it is used to convert hydrogen into electricity, I am unable to determine that generation systems use hydrogen purifiers. Therefore, I am unable to identify any complementarity between the goods. Therefore, I consider these goods to be similar to a low degree.

#### *Rectifying demisters*

35. In the absence of any evidence to the contrary, I consider that the opponent’s goods are used to remove mist by converting it into liquid. Taking into consideration, the Nice classification and the respective similarity in the goods, I consider that the better comparison between the application and the opponent’s goods is *“parts for motors, engines, propellers, propulsion systems and power generation systems”* in class 7. I consider that the nature of the goods will differ. This is on the basis that the purpose of the opponent’s goods is to be used to repair motors, engines, propellers and propulsion systems to facilitate the movement of the vehicle or to generate power, whereas the applicant’s goods can be used to demist condensation and improve the field of vision. Therefore, how the goods will be used will also differ. I do consider that the trade channels may overlap as I am of the view that the same suppliers may share the goods. Further, I consider that there may be an overlap in users. I do not consider that there is any competition, nor does my limited understanding of the goods lead me to believe that there is any complementarity. Taking the above into account, I find the goods to be similar to a low degree.

#### Class 37

*Operation of hydrogen refueling stations and related services, namely maintenance and installation of hydrogen refueling stations*

36. The opponent submits that the applicant's services are similar to "*installation, maintenance and repair of turbochargers, motors, engines, propellers, propulsion systems and power generation systems; installation, maintenance and repair of plants, motors, engines, propulsion systems and power generation systems that contain turbochargers*" in the opponent's specification. It also submitted that there was similarity with "*parts for motors, engines, propellers, propulsion systems and power generation systems*" (in class 7) "*installation, maintenance and repair of plants, motors, engines, propulsion systems and power generation systems that contain turbochargers*"(in class 37) and "*motors and engines for land vehicles*" (in class 12).<sup>12</sup> In relation to the similarity with the services the opponent submits that this is on the basis that "*the refuelling of fuel cell systems (i.e power generation systems) with hydrogen is a form of maintenance, and related services are therefore identical or at least highly similar to the maintenance of power generation systems.*"<sup>13</sup>

37. I consider that the services offer the better comparison. I do not consider that the services will overlap in nature or purpose, as the applicant's services maintain and install hydrogen fuelling services that receive and store hydrogen to be dispensed to customers. Whereas the opponent's services install, maintain and repair various parts of vehicles, propulsion systems and power generation systems. It is not my view that hydrogen refuelling stations are a power generation system. I consider that there may be an overlap in users, as, for example, owners of a hydrogen power generation system may also own hydrogen refuelling stations, and seek professionals to install, maintain and repair their systems. I also consider that there may be an overlap in provider, as a company that specialises in operating/maintaining hydrogen fuelling stations may also possess the knowledge and skill required to install and maintain a hydrogen power generation system, for

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<sup>12</sup> Skeleton argument of the opponent

<sup>13</sup> Witness statement of Mr Dirk Bergmann, pg 13

example. The technical specialists required to provide the services may overlap. Taking this into account, I consider that the services will overlap in trade channels. I do not consider that the services are complementary nor are they in competition. Therefore, I find the services to be similar to a low degree.

38. Moving on to compare “*hydrogen fueling services*” and “*hydrogen dispensing services*” in the applicant’s specification. I note that the opponent submits that these services are similar to “*installation, maintenance and repair of turbochargers, motors, engines, propellers, propulsion systems and power generation systems*” and “*installation, maintenance and repair of plants, motors, engines, propulsion systems and power generation systems that contain turbochargers*” in the opponent’s specification. It also submitted that there was similarity with “*parts for motors, engines, propellers, propulsion systems and power generation systems*” (in class 7) *installation, maintenance and repair of plants, motors, engines, propulsion systems and power generation systems that contain turbochargers*”(in class 37) and “*motors and engines for land vehicles*” (in class 12).<sup>14</sup> I consider that the services offer the better comparator. The opponent submits that the services are similar for the same reasons provided above in relation to the other services in class 37. I do not consider that these services share the same nature or purpose as one of the services provides the services to fill vehicles with hydrogen fuel and the opponent’s services maintain, install or repair *turbochargers, motors, engines, propellers, propulsion systems and power generation systems.*” In addition, I do not consider that they will be used the same and therefore differ in their method of use. I am not of the view that the providers of the services will overlap, as I consider that an energy supply company may provide the applicant’s services; I consider an engineering company would provide the opponent’s services. I do not consider that the services are in competition, as the users will not select a service to install, repair or maintain an engine, for example, if they wished for a service to provide hydrogen. Further, I am unable to see any complementarity between the services. In addition, I do not consider that the services will target the same users. Therefore, I consider the services to be dissimilar.

### Class 39

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<sup>14</sup> Skeleton argument of the opponent

39. The opponent submits that the applicant's services in classes 39 are similar to *"installation, maintenance and repair of turbochargers, motors, engines, propellers, propulsion systems and power generation systems"* (in class 37) and *"electronic control and regulation devices for power generation systems, including instruments for measuring of temperatures, pressures, velocities and vibrations within a power generation system"* and *"sensors (measurement apparatus) for power generation systems"* (in class 9) in its specification.<sup>15</sup> The opponent also went onto submit that there was similarity with a range of other goods in classes 9 and 12.<sup>16</sup> In relation to those listed, the similarity is submitted on the basis that *"the storage supply and distribution of different forms of power (hydrogen, gas, electricity) is part of the maintenance, operation, control and the regulation of power generation systems, and, therefore, identical or at least highly similar to the latter."*<sup>17</sup> The opponent goes on to submit that *"we note that the opposed application's services are erroneous since hydrogen and natural gas are not a form of electricity."*<sup>18</sup> Whilst the opponent's comments concerning the applicant's specification are noted, it is not the place of these proceedings to challenge the terms recorded in the applicant's specification. Therefore, I shall not do that and will assess the services as they are registered.

40. I am mindful that all of the goods and services that the opponent has submitted to be similar to the applicant's services are for use in power generation systems whereas the applicant's services do not generate power, rather they either store, supply or distribute hydrogen, natural gas or electricity.

#### *Hydrogen storage services*

41. I consider that the applicant's services involve the containment and preservation of hydrogen in a form that can easily be transported. As per *Raleigh*

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<sup>15</sup> Witness statement of Dirk Bergmann

<sup>16</sup> Skeleton Argument of the opponent

<sup>17</sup> Witness statement of Dirk Bergmann

<sup>18</sup> Witness statement of Mr Dirk Bergmann

*International*,<sup>19</sup> I do not consider that the applicant's services and the opponent's above listed goods and services are either identical or self-evidently similar. The applicant's services are specific in nature and use, and without evidence to the contrary, I see nothing which suggests to me an overlap in nature, purpose or method of use with the opponent's goods and services. I do not consider the goods and services to either be in competition or complementary, and the goods and services are likely to have different users and different channels of trade, although I accept that there may be some overlap. Pragmatically, taking into account, the guidance of Iain Purvis, KC in *Unicorn Studio*,<sup>20</sup> I find the applicant's services to be dissimilar to the opponent's goods and services.

*Electricity supply and distribution, namely, distribution of hydrogen gas, natural gas and electricity*

42. I consider that the applicant's services involves the supply and distribution of hydrogen, natural gas and electricity. Applying the reasoning above, I consider that these services are dissimilar to the opponent's goods and services.

#### Class 40

*Electricity generation; generation of power; commissioning and providing systems for the generation energy*

43. I consider that all of the applicant's services are used for the generation of electricity or power and, therefore, I have considered it to be appropriate to conduct my comparison of these services collectively. The opponent submits that the applicant's goods above are similar to "*installation, maintenance and repair of turbochargers, motors, engines, propellers, propulsion systems and power generation systems*" (in class 37) and "*computer software for the use in connection*

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<sup>19</sup> In *RALEIGH INTERNATIONAL* Trade Mark [2001] RPC 11,[24] Mr Geoffrey Hobbs QC (as he then was), sitting as the Appointed Person, observed that when the goods are not identical or self-evidently similar, the opposition should be supported by evidence as to their similarity

<sup>20</sup> In *Unicorn Studio Inc v Veronese* Case CH-2023-000214, Iain Purvis, KC, sitting as deputy High Court judge, stated that any finding of similarity (between the goods) requires the exercise of common sense.

*with power generation systems”, “computer software for the control and regulation of power generation systems, including for measuring of temperatures, pressures, velocities and vibrations within a power generation system”, “electronic control and regulation devices for power generation systems, including instruments for measuring of temperatures, pressures, velocities and vibrations within a power generation system”, “sensors (measurement apparatus) for generating data for power generation systems” and “sensors (measurement apparatus) for power generation systems”(in class 9).<sup>21</sup> The opponent also submits that the services are similar to “motors and engines for land vehicles” in its specification.<sup>22</sup>*

44. Comparing the applicant’s services and the opponent’s goods and services, I consider that the goods and services are different in nature, purpose and method of use. They do not target the same relevant public or share the same distribution channels. Furthermore, the goods and services are not complementary or in competition, as they are not usually produced or provided by the same undertakings. Therefore, I consider the goods and services to be dissimilar.

#### *Hydrogen generation services*

45. Applying the reasoning above, I consider that the applicant’s services are also dissimilar.

#### Class 42

#### *Engineering services in the field of electrical power and natural gas production*

46. In relation to the applicant’s services the opponent submits that this term is identical to “*engineering services in the field of computer software and hardware for use in connection with turbochargers, motors, engines, propellers, propulsion systems and power generation systems*” and “*design, development, installation, maintenance and repair of electronic control and regulation devices for*

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<sup>21</sup> Witness statement of Dirk Bergmann, pg 15

<sup>22</sup> Skeleton arguments of the opponent

*turbochargers, motors, engines, propellers, propulsion systems and power generation systems*” in the opponent’s specification. It also submits that the services are similar to the remainder of the goods and services in class 42 of its specification.

<sup>23</sup> The opponent submits that this is the case because:

*“engineering services in the field of electrical power is identical to the protected engineering services(which cover both computer software and hardware, i.e. all fields). The protected field of applications includes power generation systems, which includes electrical power and “natural gas production” as a form of power.”*<sup>24</sup>

47. The opponent also submitted that the services are similar to *“parts for motors, engines, propellers, propulsion systems and power generation systems”* in its specification on the basis that they are complementary, operate in the same field, usually share the same origin and would be provided by the same channels. In relation to the identity between the opponent’s design and development services and the applicant’s services’ the opponent merely says that they *“significantly overlap.”*<sup>25</sup> Whilst it is not my view that there is any identity between the applicant’s services and the services in the opponent’s specification, I do consider that there may be some similarity. As I consider that the opponent’s class 42 services are a better comparator, I will conduct my comparison based on those services.

48. I agree with the opponent and consider that the services may share the same providers. In addition, I consider that the services will share the same trade channels. In my view, a consumer looking to hire a company to operate a hydrogen refuelling station may also hire the opponent’s services to potentially design, develop, install, maintain or repair a power generation system. Consequently, I consider that there will be an overlap in users. I consider that the nature and core purpose will overlap, as they are both engineering services. However, I do recognise that the specific subject of the engineering services will differ. I am of the view that

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<sup>23</sup> Skeleton Argument of the opponent

<sup>24</sup> Witness statement of Dirk Bergmann, pg 23

<sup>25</sup> Witness statement of Dirk Bergmann

there may be a difference in how they are used. Taking all of the above into account, I consider that the services are similar to a medium degree.

*Technical operation of hydrogen refueling stations*

49. The opponent submits that the applicant's services are identical/similar to "design, development, installation, maintenance and repair of the electronic control and regulation devices for turbochargers, motors, engines, propellers, propulsion systems and power generation systems" in the opponent's specification and the remainder of the opponent's services in class 42.<sup>26</sup> In relation to the above term, the opponent submits that they are identical/ similar this is on the basis that:

*"the technical operation of refuelling stations constitutes a complementary service to "installation, maintenance and repair of electronic control and regulation devices", as usually the technical operation also includes the installation of control and regulation devices, which are parts of refuelling stations to be able to control the submission of fuel. As these services specifically relate to technical operation not simply to "operation of refuelling stations", a consumer would expect a specific technical expertise of the services provider and as such could anticipate the compared services to come from the same provider with the same origin."*<sup>27</sup>

I consider that the above term in the opponent's specification is the best comparator I could identify, and where the greater reasoning in relation to the similarity was provided by the opponent, therefore, I conducted my comparison using the above term. I consider that a company looking for someone to operate a hydrogen refuelling station may also hire the opponent's services to potentially design, develop, install, maintain or repair a power generation system. Consequently, I consider that there will be an overlap in users. I do not consider that the nature and the core purpose would overlap. Taking the above into account, I find the services to be similar to a low degree.

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<sup>26</sup> Skeleton Argument of the Opponent

<sup>27</sup> Witness statement of Dirk Bergmann

*Consulting services in the field of design and development of fuel cell test stations, designing industrial and commercial hydrogen systems*

50. I note that the opponent submits that these services are identical/or similar to the opponent's class 42. In relation to "*industrial analysis and industrial research services in the area of turbochargers, motors, engines, propellers, propulsion systems and power generation systems*" and "*engineering services in the fields of computer software and hardware for use in connection with turbochargers, motors, engines, propellers, propulsion systems and power generation systems*" in the opponent's specification, the opponent submits that this is on the basis that industrial analysis and industrial research services in power generation will include consulting services as it is a subcategory of the services offered.<sup>28</sup> The example is provided of the opponent acting as a consultant for its customers on power generation solutions containing turbochargers. However, I am reminded that just because this is the service being offered by the opponent in relation to its customers, this does not mean that the fair and notional meaning of the term will include consultancy services. I have to be cautious in not interpreting the term widely beyond the core of the possible meaning attributable.<sup>29</sup> It is noted that the opponent also submits that the services are provided by the same source and have to be considered complementary. I consider this to be the better comparator and have conducted my comparison on that basis.

51. Contrary to the opponent's submissions, I am not of the view that the services are identical, not even on the principle outlined in *Meric*. However, that does not negate that there may be some similarity between the services at issue. I consider that the services operate in the same field of energy generation and that there may be an overlap in users. I consider that the purposes and methods of use of the services will differ, as analysis/research services will study data and provide information that can be used to make decisions. They will use their findings to develop strategies and implement them, usually by working directly with employees

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<sup>28</sup> Witness statement of Dirk Bergmann, pg 18

<sup>29</sup> *YouView Ltd v Total Ltd* [2012] EWHC 3158 (Ch) at [12]

to adjust processes and procedures. Whereas in a consultancy service, the consultant provides expert advice on a range of topics in a particular area (in this case energy generation). They will work with clients to address challenges that organisations face, and unlike analysts and researchers, they do not make changes within the company, rather they advise clients on how to handle situations more effectively to achieve the desired results. Despite this, I do consider that they may be provided by the same undertaking, and they will share the same trade channels. I do not consider that the services are in competition. Taking all the above into account, I consider that the services are similar to at least a low degree.

52. Some degree of similarity between goods and services is necessary to engage the test for likelihood of confusion.<sup>30</sup> My findings above mean that the opposition aimed against those services I have found to be dissimilar will fail. I have set out below those services that I have found dissimilar:

*Class 37: hydrogen fueling services; hydrogen dispensing services.*

*Class 39: hydrogen storage services; electricity supply and distribution, namely, distribution of hydrogen gas, natural gas and electricity.*

*Class 40: Electricity generation; generation of power; commissioning and providing systems for the generation energy; hydrogen generation services*

## **THE AVERAGE CONSUMER AND THE PURCHASING PROCESS**

53. As the case law above indicates, it is necessary for me to determine who the average consumer is for the respective parties' goods and services. I must then determine the manner in which the goods and services are likely to be selected by the average consumer. 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. (as he then was) described the average consumer in these terms:

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<sup>30</sup> *eSure Insurance v Direct Line Insurance*, [2008] ETMR 77 CA, 49

“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.”

54. At the hearing, the applicant submitted that all of the goods and services at issue are highly technical and scientifically complex. The opponent submitted that, as the average consumer must be assessed in relation to each good and service at issue, there are different classes of the average consumer. Contrary to the applicant’s position, the opponent submitted that it cannot be assumed that the average consumer will always be a highly specialised team of individuals. The opponent went on to submit that the items may not be as high value as submitted by the applicant’s representative, rather, this is a changing field of industry and fuel cells that may cost a fortune now may cost less in the future. Finally, the opponent submitted that individuals such as mechanics may purchase the goods and even if a specialised team was to make the purchasing decision, the actual act of purchase may be left to a lower ranking person in the organisation and imperfect recollection may apply.

55. I agree with the opponent that there will be different members of the average consumer; I consider that it will consist of the business users and specialists. Indeed, these goods and services may be specialised goods and services that are directed at business customers with specific professional knowledge or expertise in the field of power generation and vehicle maintenance and/or repair.

56. In relation to the goods and services at issue, they are most likely to be sold through retail outlets (or its online equivalents) or from the website or the premises of a specialist provider, for example, a specialist hydrogen power generator supplier. Consequently, I do not discount aural considerations in the form of, for example, advice received from a salesperson or a provider of specialised goods/services or word-of-mouth recommendations.

57. Whilst I understand the point that the opponent is attempting to make in relation to the costs associated with developing technology in the longer term; my assessment is not concerned with the future costs associated, nor can I predict future costs of such goods and services. Therefore, my assessment of the cost of the goods and services at issue will be based on the present day. I consider that the cost of the goods will vary from low value for goods such as hydrogen cells for laptops, for example, to high value for goods such as hydrogen power storage systems. Further, I consider that the frequency of the purchases will also vary from relatively frequent for goods such as parts to infrequent purchases of hydrogen power storage systems.

58. I consider that when assessing the goods and services at issue the average consumer will consider factors such as quality, reviews, suitability, safety ratings, cost and durability (in relation to the goods at issue). The level of attention paid by the average consumer will be high for the goods and services and medium for others.

## **COMPARISON OF MARKS**

59. 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.”

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

61. The respective trade marks are shown below:

Applicant's mark	Opponent's mark
ACCELERA	ACCELLERON

62. The applicant submits that the similarity of the marks is confined to the common stem of "ACCEL." The applicant went on to submit that this common element is seen by the average consumer as describing a characteristic of *"complex and technologically driven goods and services, namely acceleration."* The applicant submits that this is a desired characteristic and, as such *"there is a low level of distinctiveness in the common stem."* When looking at each mark as a whole, the applicant submits that the descriptive characteristic is what is common between them. In addition, the applicant submits that both marks are invented words with no clear conceptual similarity when considered as a whole.

63. The opponent, on the other hand, argues that the marks are highly aurally and visually similar. Conceptually, the opponent submits that neither of the words have dictionary meaning and are invented words and that consequently, they possess a high degree of inherent distinctive character. The opponent went on to submit that to the extent that they possess any meaning, the meaning will be *"allusive to high energy states, characteristics or concepts, by evoking the concepts of acceleration and/or accelerants."*

64. The applicant's mark comprises of the word "Accelera"; the opponent's mark comprises of the word 'Accelleron'. As there are no other elements, the overall impression of the marks lies in the combination and arrangement of these letters.

65. Visually, the marks coincide in seven letters, out of eight and ten in the applicant's and opponent's marks, respectively. They share the letters 'ACCELER', the point of difference lies in the additional letter 'L' present in between the letters L-E in the opponent's mark and the endings which are 'A' and 'ON' respectively. Taking this into account, I agree with the opponent and find the marks to be visually similar to a high degree.

66. Aurally, I consider that the marks will share the pronunciation of ACCELER/ACCELLER. The endings will differ, being pronounced 'AH' and 'ON' respectively. Taking the above into account, I agree with the opponent that the marks are aurally similar to a high degree.

67. Conceptually, the opponent submitted at the hearing that the marks have no dictionary meaning as they are invented words. The opponent went onto submit that the marks both convey the concept of acceleration and/or of accelerants; side by side they are of the view that the marks would have a very high degree of similarity.

68. The parties agree that the marks are invented words with no ordinary dictionary meaning. The opponent went on to submit that to the extent that they possess any meaning, the meaning will be *"allusive to high energy states, characteristics or concepts, by evoking the concepts of acceleration and/or accelerants."* The applicant submits that the common element, that it identifies as being 'ACCEL' describes acceleration, and that this element possesses a low distinctiveness in the common stem.

69. Both parties identify the same meaning will be attributed to the shared 'ACCEL' element in the marks. As this view is held by both parties, I do not consider it appropriate for me to disagree with this. Further, I also recognise that in the case of *Usinor SA v OHIM*, the GC found that whilst the average consumer perceives the mark as a whole, they will break the mark down into verbal elements which suggest a concrete meaning or resemble words known to them.<sup>31</sup> As I am accepting that both marks share the same meaning associated with 'ACCEL' this is a point of conceptual

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<sup>31</sup> Case T-189/05

similarity between the marks. On this basis, I consider the marks to be conceptually similar to a medium degree, on the basis of the shared 'ACCEL' element.

## **THE DISTINCTIVE CHARACTER OF THE OPPONENT'S MARK**

70. 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).”

71. Registered trade marks possess varying degrees of inherent distinctive character through use, ranging from the very low, because they are suggestive or allusive of a characteristic of the goods and services, to those with a high inherent distinctive character, such as invented words which have no allusive qualities.

72. The opponent submits that its mark has no ordinary dictionary meaning and is, instead, an invented word possessing a high degree of inherent distinctive character.

Whereas at the hearing the applicant submitted that the descriptive aspect of 'ACCEL' as discussed above impacts the distinctive character of the earlier mark and makes it more difficult to acquire a high level of distinctive character. The applicant's submissions into inherent distinctive character bled into discussions on enhanced distinctive character. The evidence provided by the opponent does not support any claim of enhanced distinctive character, therefore, I have only the inherent distinctive character to consider.

73. The opponent's mark consists of the word 'ACCELLERON'. This is not, as far as I am aware, nor is it submitted by either party to be, an ordinary dictionary word with an obvious meaning that would be immediately graspable by the majority of average consumers. As submitted by both parties, I find that the mark will be viewed as an invented word. That being said, as I have set out above, the 'ACCEL' element of the mark will be viewed by the average consumer as referring to the word 'acceleration'. Therefore, despite technically being invented, the consumer will still derive some meaning from the mark. Whilst I recognise that both parties submit that the mark will be allusive of the goods and services at issue, my assessment is in relation to the average consumer and their perception, in relation to the distinctive character. I do not consider that the average consumer will perceive 'ACCEL' as being allusive of the opponent's goods or services at issue. As mentioned in the preliminary issues there are limitations with the applicant's evidence on the state of the register, I determined that the applicant's evidence is of little use in these circumstances, and they will not constitute part of my assessment in the distinctive character of the mark. While invented, the fact that the consumer would derive the word 'acceleration' from the mark would be such that it would not be inherently distinctive to a high degree. Consequently, taking all of the above into account, I find the mark to have a medium degree of inherent distinctive character.

## **LIKELIHOOD OF CONFUSION**

74. Confusion can be direct or indirect. Direct confusion involves the average consumer mistaking one mark for the other, while indirect confusion is where the average consumer realises the marks are not the same but puts the similarity that exists between the marks and the goods and services down to the responsible

undertakings being the same or related. There is no scientific formula to apply in determining whether there is a likelihood of confusion; rather, it is a global assessment where a number of factors need to be borne in mind. The first is the interdependency principle, i.e. a lesser degree of similarity between the respective trade marks may be offset by a greater degree of similarity between the respective goods and services or vice versa. As I mentioned above, it is necessary for me to keep in mind the distinctive character of the opponent's trade marks, the average consumer of the goods and services and the nature of the purchasing process. In doing so, I must be mindful of the fact that the average consumer rarely has the opportunity to make direct comparisons between trade marks and must instead rely upon the imperfect picture of them that he has retained in his mind.

75. I have found that the goods and services at issue will range in similarity, from being identical to similar to a low degree. I have found the marks to be visually and aurally similar to a high degree and conceptually similar to a medium degree. I have found that the average consumer will consist of business users and specialists who will select the goods and services via primarily visual means. Although, I do not discount aural considerations. I found the degree of attention will be high for some of the goods and services and medium for others. I have found that the opponent's mark enjoys a medium degree of inherent distinctive character.

76. Whilst I note that the parties' marks differ in the presence of the additional letter 'L', which is present in between the letters L-E in the opponent's mark, and the endings which are 'A' and 'ON' respectively; I consider that the differences between the marks are insufficient to avoid confusion. I am of the view that the average consumer will overlook or misremember the differences between the marks. This is particularly the case given that the marks coincide in seven letters, out of eight and ten respectively. They share the letters 'ACCELER'. This point of similarity between the marks is at the beginning of the marks where the average consumer tends to focus their attention.<sup>32</sup> I consider this to be the case, especially bearing in mind that the average consumer rarely has the opportunity to make a direct comparison between the marks and has to rely on their imperfect recollection of them. Consequently, I consider there to be a

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<sup>32</sup> *El Corte Inglés, SA v OHIM*, Cases T-183/02 and T-184/02

likelihood of direct confusion. I consider that this finding extends to the goods and services that I found to be similar to a low degree, especially in light of the higher degree of similarity between the marks. Further, the degree of similarity is such that this finding also applies regardless of the level of attention paid by the consumer.

## CONCLUSION

77. The opposition succeeds in part for the following goods and services which will be refused:

**Class 7:** *Portable proton exchange membrane (PEM); hydrogen fuel dispensers for hydrogen fueling stations; hydrogen refuelers, namely hydrogen refueling stations.*

**Class 9:** *Hydrogen fuel cells; electrolyzers; hydrogen power storage systems, namely systems containing an electrolyzer for converting electrical energy to hydrogen gas, a means of storing the hydrogen and means for converting the hydrogen back to electrical energy.*

**Class 11:** *Hydrogen purifiers; rectifying demisters.*

**Class 37:** *Operation of hydrogen refueling stations and related services, namely maintenance and installation of hydrogen refueling stations*

**Class 42:** *Engineering services in the field of electrical power and natural gas production; consulting services in the field of design and development of fuel cell test stations, designing industrial and commercial hydrogen systems; technical operation of hydrogen refueling stations.<sup>33</sup>*

78. The application will proceed to registration for the following goods and services, against which the opposition has been unsuccessful:

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<sup>33</sup> The specification filed was initially for a wider collection of goods and services. However, the applicant filed a TM21B on 23 December 2024 which was accepted by the Registry on the 3 January 2025. This specification limited the applicant's goods and services to those shown above at paragraph 1.

*Class 37: hydrogen fueling services; hydrogen dispensing services.*

*Class 39: hydrogen storage services; electricity supply and distribution, namely, distribution of hydrogen gas, natural gas and electricity.*

*Class 40: Electricity generation; generation of power; commissioning and providing systems for the generation energy; hydrogen generation services*

79. The applicant made a request for off-scale costs in the event of their success in the opposition, of which it made its submissions at the hearing. As evidence of unreasonable behaviour, the applicant submitted that it had to expend additional effort following the filing of the opponent's joint witness statements. Further, it submits that at each stage of the opposition, the applicant's submissions (especially concerning the goods and services) changed, and they had to expend additional time and effort accordingly, I have carefully considered both parties' comments and submissions. Whilst I recognise that the last-minute changes to submissions would have caused the applicant's representatives to reassess preparations for the hearings, I consider that the majority of the other elements have remained the same and there was overlap in the submissions concerning the goods and services. I do not consider that there was an intention by the opponent to delay, frustrate or unreasonably increase the costs/burden on the other party; the opponent confirmed that this was not their intention either. I do not find any merit in any allegations to justify off scale costs, the opponent's behaviour has not been unreasonable to warrant anything other than on-scale costs for the applicant.

80. In the circumstances, both parties have experienced a level of success in the opposition, with the opponent having a greater level of success. A cost award will therefore be made to the opponent, but it has been adjusted to account for the differing levels of success. However, as the greater level of success has been enjoyed by the opponent, they will be awarded adjusted costs (taking into consideration the applicant's success), therefore, a discussion of off-scale costs is not necessary in the current circumstances. The opponent's cost will be awarded based on the scale

published in Tribunal Practice Notice 1/2016, as the proceedings commenced before 1 February 2023. The sum is calculated as follows:

Preparing a notice of opposition and considering the counterstatement	£100
Preparing evidence and considering the applicant's evidence	£200
Preparing for an attending a hearing	£350
Official fees	£100
<b>Total</b>	<b>£750</b>

81. I therefore order Cummins Inc to pay Accelleron Switzerland Ltd the sum of £750. This sum is to be paid within 21 days of the expiry of the appeal period or, if there is an appeal, within 21 days of the conclusion of the appeal proceedings.

**Dated this 1<sup>st</sup> day of July 2025**

**A Klass**

**For the registrar**

**The Comptroller General**

## **Annex 1**

### Class 7

Turbochargers; parts for motors, engines, propellers, propulsion systems and power generation systems; turbines; compressors; turbochargers for internal combustion engines, particularly diesel engines and gas engines for powering ships, for stationary current-generating installations and for heavy-oil internal combustion engines; parts and accessories for turbochargers, particularly turbines, compressors, bearings, lubrication and cooling devices, gas and air chambers, air filters, shock absorbers and electricity generators; none of the aforesaid goods intended for road vehicles.

### Class 9

Computer software for the use in connection with turbochargers, motors, engines, propellers, propulsion systems and power generation systems; Computer software for the control and regulation of turbochargers, motors, engines, propellers, propulsion systems and power generation systems, including for measuring of temperatures, pressures, velocities and vibrations within a turbocharger, motor, engine, propeller, propulsion system and power generation system; electronic control and regulation devices for turbochargers, motors, engines, propellers, propulsion systems and power generation systems, including instruments for measuring of temperatures, pressures, velocities and vibrations within a turbocharger, motor, engine, propeller, propulsion system and power generation system; sensors (measurement apparatus) for generating data for turbochargers, motors, engines, propellers, propulsion systems and power generation systems; sensors (measurement apparatus) for turbochargers, motors, engines, propellers, propulsion systems and power generation systems.

### Class 12

Motors and engines for land vehicles.

### Class 37

Installation, maintenance and repair of turbochargers, motors, engines, propellers, propulsion systems and power generation systems; Installation, maintenance and repair of plants, motors, engines, propulsion systems and power generation systems that contain turbochargers; provision of information on installation, maintenance and repair of turbochargers, motors, engines, propellers, propulsion systems and power generation systems.

### Class 38

Provision of access to databases and computer and communication networks for use in connection with the installation, maintenance and repair of turbochargers, of plants, motors and engines that contain turbochargers, of propellers, of propulsion systems and of power generation systems.

### Class 42

Quality control and authentication services; Design, development, installation, maintenance and repair of computer software for use in connection with turbochargers, motors, engines, propellers, propulsion systems and power generation systems; design, development, installation, maintenance and repair of computer software for the control and regulation of turbochargers, motors, engines, propellers, propulsion systems and power generation systems, including for measuring of temperatures, pressures, velocities and vibrations within a turbocharger, motor, engine, propeller, propulsion system or power generation system; design and development of electronic control and regulation devices for turbochargers, motors, engines, propellers, propulsion systems and power generation systems, including instruments for measuring of temperatures, pressures, velocities and vibrations within a turbocharger, motor, engine, propeller, propulsion system and power generation system; installation, maintenance and repair of computer software in relation to electronic control and regulation devices for turbochargers, motors, engines, propellers, propulsion systems and power generation systems, including instruments for measuring of temperatures, pressures, velocities and vibrations within a turbocharger, motor, engine, propeller, propulsion system and power generation

system; design and development of sensors (measurement apparatus) for generating data for turbochargers, motors, engines, propellers, propulsion systems and power generation systems; installation maintenance and repair of computer software in relation to sensors (measurement apparatus) for generating data for turbochargers, motors, engines, propellers, propulsion systems and power generation systems; design and development of sensors (measurement apparatus) for turbochargers, motors, engines, propellers, propulsion systems and power generation systems; installation, maintenance and repair of computer software in relation to sensors (measurement apparatus) for turbochargers, motors, engines, propellers, propulsion systems and power generation systems; engineering services in the field of computer software and hardware for use in connection with turbochargers, motors, engines, propellers, propulsion systems and power generation systems; industrial analysis and industrial research services in the area of turbochargers, motors, engines, propellers, propulsion systems and power generation systems; design, development, installation, maintenance and repair of computer software; software as a service (SaaS); design and development of computer hardware and software for industrial applications; design and development of software for evaluation and calculation of data.