

O/0735/26

TRADE MARKS ACT 1994

IN THE MATTER OF APPLICATION NO. 4166973

**IN THE NAME OF VELOCITY MARKETPLACES LIMITED
TO REGISTER THE FOLLOWING TRADE MARK:**

Vision

IN CLASSES 9 AND 42

AND

IN THE MATTER OF OPPOSITION THERETO

UNDER NO. 454891

BY

EVEX ACQUICO GMBH

BACKGROUND AND PLEADINGS

1. Velocity Marketplaces Limited, (“the applicant”) applied to register the trade mark shown on the cover of this decision (UK trade mark (“UKTM”) no: 4166973) in the UK on 28 February 2025. It was accepted and published in the Trade Marks Journal on 28 March 2025 in respect of the following goods/services¹:

- Class 9 Computer software, in relation to Enterprise resource planning [ERP] software; E-commerce software Technology; Business Software in relation to E- Commerce; none of the aforesaid goods being in relation to financial services and technology, payment services and systems, or transaction card services or FinOps or any services related to the consumption and use of public cloud services.
- Class 42 Software-as-a-service (SaaS) featuring computer software for companies, for use in the fields of: (i) Enterprise Resource Planning (ERP); software as a service (SaaS) services featuring software for human resources management, software for content management, software to allow users to perform electronic business transactions in the field of e-commerce, and software for use by others in business management; implementation and use of e-commerce software systems for others; Software-as-a service (SAAS) in fields relating to, namely, Enterprise Resource Planning (ERP); Programming of software for e-commerce platforms; Hosting of e-commerce platforms on the Internet; Computer software technical support services; Software as a service (SaaS) namely software using artificial intelligence for advertising and sales optimization, media planning and strategy development; software as a service namely software for advertising optimization and intelligence in the field of e-commerce; none of the aforesaid services being in relation to financial services and technology, payment services and systems, or transaction card services or FinOps or any services related to the consumption and use of public cloud services.

¹ This specification was amended on 18 July 2025 following the filing of a TM21B

2. On 26 June 2025, EVEX AcquiCo GmbH (“the opponent”) opposed the trade mark on the basis of Section 5(2)(b) of the Trade Marks Act 1994 (“the Act”). This is on the basis of its earlier International Trade Mark:

International trade mark no: WO1840330

EVEX Vision

International registration date: 13 December 2024;

UK Designation date: 13 December 2024;

Date of protection in the UK: 8 May 2025;

Priority date: 14 November 2024.²

The following goods are relied upon in this opposition:

Class 9 Software.

3. Under section 5(2)(b) of the Act, the opponent claims that there is a likelihood of confusion on the basis that the marks are similar, and the goods/services are either identical or highly similar leading to a likelihood of confusion, including a likelihood of association, and that the contested mark should be refused registration.

4. The applicant filed a defence and counterstatement denying the claims made.

5. In accordance with section 6 of the Act, the mark relied upon by the opponent is considered an earlier mark. The mark had not been registered for five years as at the date of application for the contested mark and so, in accordance with section 6A of the Act, it is not subject to proof of use; the opponent may rely upon all the goods of its registration as claimed.

REPRESENTATION

6. The opponent is represented by Lewis Silkin LLP. The applicant is represented by Agile IP LLP. No evidence has been filed, however, the opponent filed written submissions during the evidence rounds. Neither party requested a hearing, however,

² Priority country: Germany. Trade mark from which priority was claimed: 30 2024 121 436

the applicant filed written submissions in lieu. The parties' submissions will be referred to as and where appropriate in this decision. This decision is taken following a careful perusal of the papers.

RELEVANCE OF EU LAW

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

DECISION

Section 5(2)(b)

8. Section 5(2)(b) of the Act is as follows:

“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”.

9. Section 5A of the Act states as follows:

“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.”

RELEVANT LAW

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

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

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

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

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

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

(f) and beyond the usual case, where the overall impression created by a mark depends heavily on the dominant features of the mark, it is quite 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 the earlier mark to mind, is not sufficient;

(j) the reputation of a mark does not give grounds for presuming a likelihood of confusion simply because of a likelihood of association in the strict sense; and

(k) if the association between the marks creates a risk that the public might believe that the respective goods or services come from the same or economically linked undertakings, there is a likelihood of confusion.

COMPARISON OF GOODS AND SERVICES

11. The competing goods/services are as follows:

The opponent's goods	The applicant's goods
Class 9 - Software.	Class 9 – Computer software, in relation to Enterprise resource planning [ERP] software; E-commerce software Technology; Business Software in relation to E- Commerce; none of the aforesaid goods being in relation to financial services and technology, payment services and systems, or transaction card services or FinOps or any services related to the consumption and use of public cloud services.
	Class 42 - Software-as-a-service (SaaS) featuring computer software for

	companies, for use in the fields of: (i) Enterprise Resource Planning (ERP); software as a service (SaaS) services featuring software for human resources management, software for content management, software to allow users to perform electronic business transactions in the field of e-commerce, and software for use by others in business management; implementation and use of e-commerce software systems for others; Software-as-a service (SAAS) in fields relating to, namely, Enterprise Resource Planning (ERP); Programming of software for e-commerce platforms; Hosting of e-commerce platforms on the Internet; Computer software technical support services; Software as a service (SaaS) namely software using artificial intelligence for advertising and sales optimization, media planning and strategy development; software as a service namely software for advertising optimization and intelligence in the field of e-commerce; none of the aforesaid services being in relation to financial services and technology, payment services and systems, or transaction card services or FinOps or any services related to the consumption and use of public cloud services.
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12. 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 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.”

13. The relevant factors identified by Jacob J. (as he then was) in the *Treat* case, [1996] R.P.C. 281, for assessing similarity were:

- (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.

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. In *Kurt Hesse v OHIM*, Case C-50/15 P, the CJEU stated that complementarity is an autonomous criterion capable of being the sole basis for the existence of similarity between goods. In *Boston Scientific Ltd v Office for Harmonization in the Internal Market (Trade Marks and Designs) (OHIM)*, Case T-325/06, the General Court stated that “complementary” means:

“...there is a close connection between them, in the sense that one is indispensable or important for the use of the other in such a way that customers may think that the responsibility for those goods lies with the same undertaking.”

16. In *Sanco SA v OHIM*, Case T-249/11, the General Court indicated that goods and services may be regarded as ‘complementary’ and therefore similar to a degree in circumstances where the nature and purpose of the respective goods and services are very different, i.e. *chicken* against *transport services for chickens*. The purpose of examining whether there is a complementary relationship between goods/services is to assess whether the relevant public are liable to believe that responsibility for the goods/services lies with the same undertaking or with economically connected undertakings. As Mr Daniel Alexander Q.C. noted as the Appointed Person in *Sandra Amalia Mary Elliot v LRC Holdings Limited* BL O/255/13:

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

Whilst on the other hand:

“.....it is neither necessary nor sufficient for a finding of similarity that the goods in question must be used together or that they are sold together.”

17. I bear in mind that it is permissible to group goods together for the purposes of the assessment.³

18. The opponent submits as follows:

“13. As such, despite the services of the Application Mark relating to ERP or e-commerce software, these terms nonetheless unequivocally fall within the broader category of software covered by the Earlier Mark. The goods in class 9 of the Opposed Application, are at least highly similar, if not identical to the class 9 goods of the Earlier Mark, insofar as they are all subsets of the class 9 software goods covered by the Earlier Mark.

14. The class 42 services are also similar, insofar as the SaaS and related services covered by the Application Mark similarly fall within the broader class 9 category of software covered by the Earlier Mark. The Opponent refers to the established cases *Oberhauser v. OHIM and Petit Liberto (Fifties)*, Case T-104/0; *Aventis Parma v. OHIM*, Case T-95/07; and *British Sky Broadcasting v. Microsoft Corp.* [2013] EWHC, wherein it was recognised that there is identity between goods/services where the later, narrower term is included within the earlier, broader category. Comparably, denim clothing was recognised as identical to clothing in the *Oberhauser* case referenced above. Similarly, the Class 9 and 42 software related goods and services of the Application Mark fall within the broader category of software in the Earlier Mark”.

19. The applicant submits as follows:

“18. The goods and services of the Applicant are specifically defined – they predominantly relate to specific goods of Enterprise Resource Planning (ERP).

³ *Separode* Trade Mark O/399/10

19. The Opponent relies upon the specification “software” in Class 9, which represents an extremely broad category of goods encompassing a wide range of unrelated products and functionalities.

20. As recognised by recent case law in *SkyKick UK Ltd v Sky Ltd*, the term software is inherently broad and capable of covering an extensive range of goods with very different purposes and uses.

21. Software products may range from operating systems and cybersecurity programs to industry specific applications, enterprise platforms, analytics tools and consumer applications. Such products may differ significantly in their purpose, intended users, technical functionality and channels of trade.

22. Accordingly, whilst certain of the Applicant’s software goods may technically fall within the broad category of software, the fact that goods fall within that category does not necessarily mean that consumers would expect them to originate from the same undertaking.”

Class 9

Computer software, in relation to Enterprise resource planning [ERP] software; E-commerce software Technology; Business Software in relation to E- Commerce; none of the aforesaid goods being in relation to financial services and technology, payment services and systems, or transaction card services or FinOps or any services related to the consumption and use of public cloud services.

20. I note that the applicant’s specification in Class 9 includes the limitation “*none of the aforesaid goods being in relation to financial services and technology, payment services and systems, or transaction card services or FinOps or any services related to the consumption and use of public cloud services*”. As above, I must consider the parties’ terms using the core of their possible meanings, and in this instance, I find that all of the terms are types of computer software. I note the applicant’s submissions, however, the opponent’s specification includes the broad term *software* which would encompass the applicant’s terms above, and as such, I find them to be identical on the principles outlined in *Meric*.

Class 42

Software-as-a-service (SaaS) featuring computer software for companies, for use in the fields of: (i) Enterprise Resource Planning (ERP); software as a service (SaaS) services featuring software for human resources management, software for content management, software to allow users to perform electronic business transactions in the field of e-commerce, and software for use by others in business management; Software-as-a service (SAAS) in fields relating to, namely, Enterprise Resource Planning (ERP); Software as a service (SaaS) namely software using artificial intelligence for advertising and sales optimization, media planning and strategy development; software as a service namely software for advertising optimization and intelligence in the field of e-commerce; none of the aforesaid services being in relation to financial services and technology, payment services and systems, or transaction card services or FinOps or any services related to the consumption and use of public cloud services.

21. The applicant's above terms all include *software as a service*. The opponent relies on its Class 9 goods, *software*. Whilst I acknowledge that services are not the same as goods, there will be an overlap in end users of the applicant's above services and the opponent's goods. The goods and services may be in competition, with the user electing either *software as a service* or alternatively choosing to purchase comparable *software* as goods. With regard to the specific nature of the respective goods and services i.e. the applicant's services being used in the fields of enterprise resource planning and for advertising and sales against the opponent's broad term, *software*, the method of use and nature of the goods and services will be different, although the essential experience of the user of the software may be highly comparable, and there is likely to be an overlap in trade channels. I also find that the goods/services may be complementary, as Ms Emma Himsworth stated,⁴ "the question of whether goods are 'complementary' is to be distinguished from use in combination, where goods are merely used together, whether for choice or convenience." Consumers of the goods/services would believe that they are capable of being provided by the same or a related commercial undertaking, and

⁴ sitting as the Appointed Person in *Everest Dairies Limited v Everest Food Products Private Limited*, [23] O/0107/23.

that one is important or indispensable to the other. I do not consider that the applicant's limitation changes my overall assessment for the reasons set out above. I consider the holder's terms to be similar to the opponent's to a medium degree.

Programming of software for e-commerce platforms; implementation and use of e-commerce software systems for others; none of the aforesaid services being in relation to financial services and technology, payment services and systems, or transaction card services or FinOps or any services related to the consumption and use of public cloud services.

22. In the absence of specific submissions, I consider the above term to relate to a technical service connected with the programming, deployment and operation of software systems for e-commerce. The method of use and nature of the goods and services will be different; however, users and trade channels may overlap. I do not consider that the goods/services are in competition, however, they may be complementary as the average consumer is likely to assume that the economic entity providing the applicant's services would also provide the software that requires programming, or that the system requires to run. I do not consider that the applicant's limitation changes my overall assessment for the reasons set out above. As a result, I find the goods/services to be similar to a medium degree.

Hosting of e-commerce platforms on the Internet; none of the aforesaid services being in relation to financial services and technology, payment services and systems, or transaction card services or FinOps or any services related to the consumption and use of public cloud services.

23. I understand hosting services for e-commerce to be websites or mobile applications in which people can upload items, such as images or goods, for others to view/purchase. I find that there will be an overlap in end users of the applicant's above services and the opponent's goods in Class 9. The respective goods and services may be in competition, for example, the consumer may elect to either access the services via the internet or "cloud" or alternatively purchase equivalent apparatus or software as goods, with an overlap in trade channels. However, the method of use and nature of the goods and services will be different. I do not consider that the applicant's limitation changes my overall assessment for the reasons set out above.

Consequently, I consider the goods and services at issue to be similar to a medium degree.

Computer software technical support services; none of the aforesaid services being in relation to financial services and technology, payment services and systems, or transaction card services or FinOps or any services related to the consumption and use of public cloud services.

24. Generally speaking, it is common for software providers to offer updates to develop the software and to provide continuing technical support for users of software. As such, I find that these services share a degree of similarity with the opponent's *software* in Class 9 on the basis that the opponent's goods are indispensable to the above services, and consumers would assume that they arise from the same undertaking, and as a result, these goods and services are complementary. The trade channels will overlap as companies that offer software may also offer technical support services in relation to that software. Users will also overlap. The purpose and nature of the goods/services is different, as is the method of use. I do not find the goods/services to be in competition, as one cannot replace the other. Consequently, I am of the view that the respective goods/services are similar to a medium degree.

AVERAGE CONSUMER AND THE PURCHASING ACT

25. The average consumer is deemed to be reasonably well informed and reasonably observant and circumspect. For the purpose of assessing the likelihood of confusion, it must be borne in mind that the average consumer's level of attention is likely to vary according to the category of goods or services in question: *Lloyd Schuhfabrik Meyer*, Case C-342/97.

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

(a) Consumers who are ill-informed or careless, or consumers with specialised knowledge or who are excessively careful are excluded from consideration;

(b) The average consumer provides a standard which enables the courts to strike a balance between the competing interests involved, such as trade mark owners, their competitors and consumers;

(c) The average consumer is neither a single hypothetical person nor a mathematical average; assessment from the perspective of the average consumer does not involve a statistical test. There is no single meaning rule and if, having regard to the perceptions and expectations of the average consumer, the court considers that a significant proportion of the relevant public is likely to be confused, a finding of infringement may properly be made;

(d) Assessment from the perspective of the average consumer is intended to facilitate adjudication of trade mark disputes by providing an objective criterion, by promoting consistency of assessment and by enabling courts and tribunals to determine such issues so far as possible without the need for evidence;

(e) The average consumer's level of attention varies according to the category of goods or services in question; and

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

27. I consider that the goods and services at issue will be purchased by both the general public and business or professional consumers, with the latter seeking out the more specialised goods/services such as *implementation and use of e-commerce software systems for others* and *Software-as-a service (SAAS) in fields relating to, namely, Enterprise Resource Planning (ERP)*. The goods/services will be sold through a range of channels, including from physical premises as well as via the internet and they may be sourced through specialist providers. For business consumers, purchase of the goods/services at issue will be an equally visual and aural process. Due to the nature of the goods/services at issue, the price and frequency of purchase is likely to vary. Considerations such as costs, quality and suitability will be considered. Business consumers may also consider contract terms. Given the nature of the goods/services,

and their importance to the target consumer, I would expect the level of attention paid during the selection and purchasing process to be between a medium and high degree as a result.

28. For the general public, the costs of the purchase will vary, but they are likely to be at the lower end of the scale than for the business user/professional, and various factors will be taken into account such as the item's capacity and capabilities, as well as delivery methods. I consider that, in this instance, the selection process would be predominantly visual, although aural considerations will play a part, for example, if advice is obtained from sales assistants. When selecting the goods/services prior to purchase, the consumer will want to ensure that they are appropriate to their own specific needs, taking into account reviews, quality, ease of use, suitability of the product and the reputation of the provider. I would expect members of the general public to pay a medium degree of attention to the purchasing process.

COMPARISON OF MARKS

29. 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.”

30. 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.

31. The respective trade marks are shown below:

Earlier trade mark	Contested trade mark
EVEX Vision	Vision

Overall impression

32. The earlier mark is a word only mark consisting of the words 'EVEX Vision'. There are no other elements contributing to the mark. I find EVEX to be the dominant element of the mark, due to its position within the mark, and it is more distinctive for the reasons set out below.

33. The contested mark is a word only mark consisting of the word 'Vision'. There are no other elements contributing to the mark and so the overall impression lies in the entirety of the word.

Visual comparison

34. The opponent submits:

"First, the Opponent disagrees that the respective marks are visually dissimilar. Although the Earlier Mark contains the word element EVEX, both marks contain the identical word element 'Vision'. This is an equally distinctive element of the Earlier Mark insofar as it has no specific relation to its registered goods, and consumers will accordingly attribute this word as having brand origin significance. As such, the fact the sole element of the Application Mark, and a highly distinctive and equally dominant element of the Earlier Mark are identical, strongly contributes to a finding of visual similarity, and thus, likelihood of confusion."

35. The applicant submits:

“7. Visually, the marks differ clearly. The Earlier Mark contains two elements whereas the Applicant’s Mark consists solely of the single word VISION. Only one element of the Earlier Mark is shared with the Applicant’s Mark.

8. In addition, it is well established that consumers generally attach greater importance to the beginning of a mark since this is the element that is most likely to attract the consumers attention”.

36. A word trade mark protects the notional use of the word itself irrespective of font capitalisation or otherwise and therefore the difference in casing will have little impact on the assessment. The competing marks are similar to the extent that they share the identical word VISION. The difference in the marks comes from the addition of the word EVEX at the beginning of the earlier mark. As a general rule the beginning of a mark tends to have more impact, as per the matter of *El Corte Inglés, SA v OHIM*,⁵ and I find this to be the case. Weighing up the differences against the similarities, I consider there to be a medium degree of visual similarity between the marks.

Aural comparison

37. The opponent submits:

“There is a high likelihood that EVEX VISION will be referred to or perceived aurally simply as ‘VISION’ or ‘the VISION range.’ This is especially true in hurried oral communication, telephone enquiries, or word-of-mouth recommendations, where the initial qualifier may be dropped or misheard. Even where the prefix EVEX is articulated, the repetition of the identical second word produces a strong aural resemblance and a natural association with the earlier VISION mark.”

38. The applicant submits:

⁵ Cases T-183/02 and T-184/02

“Aurally, the marks share the word VISION, However, the Earlier Mark also contains the additional element EVEX, with the result that it will be pronounced as EV-EX VISION, whereas the Applicant’s Mark will pronounced simply as VISION. That additional element materially changes the overall sound of the Earlier Mark”.

39. I note the opponent’s submissions that its mark will be referred to by use of VISION only, however, I do not agree with this. The earlier mark comprises of the words EVEX VISION. I find that EVEX will either be pronounced E-VEX or EE-VEX. VISION is an ordinary English word and would be pronounced as such. The contested mark solely contains the word VISION. The point of aural overlap lies with this and the second word of the earlier mark, as VISION will be pronounced identically in both. The first word in the earlier mark, EVEX, has two syllables, and as there is no comparator in the contested mark, this will be a point of difference between the marks. Overall, I find the marks to be aurally similar to a medium degree.

Conceptual Comparison

40. The opponent submits:

“In relation to the conceptual similarities, the Opponent considers that the shared distinctive word VISION is identical within both marks and thus is unquestionably conceptually identical. The word ‘EVEX’ has no specific English language meaning and therefore cannot be attributed any conceptual meaning. Therefore, the marks are conceptually highly similar.”

41. The applicant submits:

“In the present case, the marks share only the word VISION. In the context of software and technology goods and services, that term is commonly used in a suggestive or allusive manner to refer to analytics, insight, monitoring or forward-looking capability. It therefore possesses a relatively low degree of inherent distinctiveness in this field.”

42. For a conceptual message to be relevant it must be capable of immediate grasp by the average consumer, as highlighted in numerous judgments of the GC and the CJEU⁶.

43. I consider that a significant proportion of consumers will view EVEX as being a made-up word and it will not convey any meaning. As such, this element is rendered conceptually neutral to a significant proportion of consumers.

44. VISION is a dictionary word, which has several meanings including:⁷

- a. An idea or mental image of something;
- b. A view of the future;
- c. The ability to see.

I note the applicant's submissions that in the context of software and technology goods and services, VISION is commonly used in a suggestive or allusive manner, however, I do not agree that this is the case and I have no evidence before me in support of this. VISION appears identically in both marks, and I find that it is not allusive or descriptive in respect of either mark. Given that EVEX is conceptually neutral, to the extent that the marks are capable of conveying a meaning, I find them to be conceptually identical.

Distinctive character of the earlier trade mark

45. 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).

⁶ *Ruiz Picasso v OHIM* [2006] e.c.r.-I-643; [2006] E.T.M.R 29

⁷ VISION | English meaning - Cambridge Dictionary

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)."

46. Registered trade marks possess varying degrees of inherent distinctive character, ranging from the very low, because they are suggestive or allusive of a characteristic of the goods, to those with high inherent distinctive character, such as invented words which have no allusive qualities. No evidence has been filed in support of the opponent's mark having an enhanced degree of distinctive character, and therefore, I only have the inherent position to consider.

47. The earlier mark comprises of the words, EVEX Vision. As set out above, I consider that the average consumer would interpret EVEX as being a made-up word – which by itself makes it highly distinctive - and VISION as having its ordinary dictionary meaning. The word VISION is commonly understood, and in this instance, it does not allude to the goods at issue, being software. I consider that the earlier mark is inherently distinctive to a high degree, but the common element, VISION, is distinctive to only a medium degree.

GLOBAL ASSESSMENT – Conclusions on Likelihood of Confusion

48. Confusion can be direct or indirect. Direct confusion involves the average consumer mistaking one mark for the other, while indirect confusion is where the average consumer realises the marks are not the same but puts the similarity that exists between the marks and the goods and services down to the responsible undertakings being the same or related. There is no scientific formula to apply in determining whether there is a likelihood of confusion; rather, it is a global assessment

where a number of factors need to be borne in mind. The first is the interdependency principle, i.e. a lesser degree of similarity between the respective trade marks may be offset by a greater degree of similarity between the respective goods and services and vice versa. As I mentioned above, it is necessary for me to keep in mind the distinctive character of the opponent's trade mark, the average consumer for the goods and services, and the nature of the purchasing process. In doing so, I must be alive to the fact that the average consumer rarely has the opportunity to make direct comparisons between trade marks and must instead rely upon the imperfect picture of them that he has retained in his mind.

49. I have found as follows:

- The goods/services at issue range from being identical on the principles outlined in *Meric* to similar to a medium degree;
- The average consumer will be both the general public and business or professional consumers. Business users will select the contested goods/services via an equally visual and aural process, whereas members of the general public will select the goods/services by primarily visual means, although I do not discount an aural component;
- The level of attention paid will be between a medium and high degree for business users and a medium degree for members of the general public;
- The marks are visually similar to a medium degree;
- The marks are aurally similar to a medium degree;
- EVEX is conceptually neutral. To the extent that the marks are capable of conveying a meaning, they are conceptually identical;
- The earlier mark overall to be inherently distinctive to a high degree, but the common element, VISION, is distinctive to only a medium degree.

50. Taking all of the above into account and bearing in mind the principle of imperfect recollection, I do not consider that consumers would misremember or inaccurately recall which mark was which. Even though both marks share the identical word

VISION (which is not descriptive or allusive of the goods/services at issue), the additional word, EVEX, in the earlier mark will not be overlooked, and I do not consider that this word will not be pronounced. I have found EVEX to be both the distinctive and dominant element of the mark due to its position at the beginning of the mark and the fact that it is a made-up word, and it is therefore more likely to draw the attention of the consumer. As a result, I do not find that consumers will be directly confused by the marks as a result of the common presence of VISION and I do not find that the consumer is likely to mistake one mark for another. Consequently, I do not consider that there exists a likelihood of direct confusion between the marks, even on identical goods/services.

51. This leads me to consider indirect confusion. In *L.A. Sugar Limited v By Back Beat Inc*, 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 as a whole, I conclude that it is another brand of the owner of the earlier mark’.

17. Instances where one may expect the average consumer to reach such a conclusion tend to fall into one or more of three categories:

(a) where the common element is so strikingly distinctive (either inherently or through use) that the average consumer would assume that no-one else but the brand owner would be using it in a trade mark at all. This may apply even where the other elements of the

later mark are quite distinctive in their own right (“26 RED TESCO” would no doubt be such a case).

(b) where the later mark simply adds a non-distinctive element to the earlier mark, of the kind which one would expect to find in a sub-brand or brand extension (terms such as “LITE”, “EXPRESS”, “WORLDWIDE”, “MINI”, etc.).

(c) where the earlier mark comprises a number of elements, and a change of one element appears entirely logical and consistent with a brand extension (“FAT FACE” to “BRAT FACE” for example).”

52. These three categories are not exhaustive; rather, they were intended to be illustrative of the general approach, as has been confirmed by the Court of Appeal. I recognise that a finding of indirect confusion should not be made merely because the competing marks share a common element. In this connection, it is not sufficient that a mark merely calls to mind another mark: this is mere association not indirect confusion.⁸

53. In *Liverpool Gin Distillery Ltd & Ors v Sazerac Brands, LLC & Ors* [2021] EWCA Civ 1207, Arnold LJ referred to the comments of James Mellor QC (as he then was), sitting as the Appointed Person in *Cheeky Italian Ltd v Sutaria* (O/219/16), where he said at [16] that “a finding of a likelihood of indirect confusion is not a consolation prize for those who fail to establish a likelihood of direct confusion”. Arnold LJ agreed, pointing out that there must be a “proper basis” for concluding that there is a likelihood of indirect confusion where there is no likelihood of direct confusion.

54. In *Whyte and Mackay Ltd v Origin Wine UK Ltd and Another* [2015] EWHC 1271 (Ch), Arnold J. (as he then was) 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:

⁸ *Duebros Limited v Heirler Cenovis GmbH*, BL O/547/17

“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.

20 The second point is that this principle can only apply in circumstances where the average consumer would perceive the relevant part of the composite mark to have distinctive significance independently of the whole. It does not apply where the average consumer would perceive the composite mark as a unit having a different meaning to the meanings of the separate components. That includes the situation where the meaning of one of the components is qualified by another component, as with a surname and a first name (e.g. BECKER and BARBARA BECKER).

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.”

55. When considering these competing marks, I find that in the earlier mark, VISION, has a distinctive significance which is independent of the significance of the mark as

a whole. In this instance, the goods/services range from being identical to similar to a medium degree, and therefore, when encountering the opponent's mark on similar or identical goods/services, consumers are likely to consider that VISION is a sub brand being used independently with EVEX VISION being a combination of the house brand and sub brand. As such, when they encounter the applicant's mark, are likely to assume that the two are economically related. It is my view that the average consumer, when paying between a medium and high degree of attention, will notice that VISION appears identically in both marks, and when taking account of the common element, the consumer is likely to conclude that both marks arise from the same or economically linked undertakings. As a result of this, I find a likelihood of indirect confusion.

FINAL REMARKS

56. The opposition succeeds in its entirety under section 5(2)(b).

COSTS

57. The opponent has been successful and therefore, is entitled to a contribution towards their costs based upon the scale published in Tribunal Practice Notice 1/2023 which governs costs in proceedings issued after 1 February 2023. In the circumstances, I award the applicant the sum of £800.00 as a contribution towards the costs of proceedings. The sum is calculated as follows:

Filing a notice of opposition and considering the applicant's counterstatement:	£250.00
Preparing submissions-in-lieu and considering the applicant's submissions-in-lieu:	£450.00
Official fee:	£100.00
Total:	£800. 00

58. I therefore order Velocity Marketplaces Limited to pay EVEX AcquiCo GmbH the sum of £800.00. The above sum should 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 14th day of August 2026

LA Bailey

For the Registrar