

BL O/1073/24

TRADE MARKS ACT 1994

**IN THE MATTER OF
TRADE MARK APPLICATION NO. 3965605
BY XTM INTERNATIONAL LTD
TO REGISTER THE TRADE MARK:**



IN CLASSES 9 AND 42

**AND
IN THE MATTER OF OPPOSITION THERETO
UNDER NO. 600003173
BY RITTAL GMBH & CO. KG**

BACKGROUND AND PLEADINGS

1. On 10 October 2023, XTM International Ltd (“the applicant”) applied to register the trade mark shown on the cover page of this decision (“the contested mark”) in the UK. The application was accepted and published for opposition purposes on 27 October 2023, in respect of goods and services in Classes 9 and 42.¹

2. The application is opposed by Rittal GmbH & Co. KG (“the opponent”). The fast track opposition was filed on 17 January 2024 and is based upon section 5(2)(b) of the Trade Marks Act 1994 (“the Act”). The opposition is directed against all the goods and services in the application. The opponent relies upon the following comparable mark:²



UK trade mark registration number 917969224

Filing date: 15 October 2018

Registration date: 15 February 2019

Registered in Classes 6 and 9

For the purpose of these proceedings the opponent relies on some of the goods in Class 9.³

3. The above mark qualifies as an earlier mark under section 6(1) of the Act. As it had not completed its registration procedure more than five years before the application date for the contested mark, it is not subject to the use provisions contained in section 6A of the Act.

¹ See the goods and services comparison at paragraph 22.

² Under Article 54 of the Withdrawal Agreement between the UK and the EU, the UK IPO created comparable UK trade marks for all right holders with an existing registered EUTM or International Registration designating the EU. As a result, the opponent’s mark was converted into a comparable UK trade mark. Comparable UK marks are now recorded in the UK trade mark register, have the same legal status as if they had been applied for and registered under UK law, and the original filing dates remain the same. See also Tribunal Practice Notice (“TPN”) 2/2020 End of Transition Period – impact on tribunal proceedings.

³ See the goods and services comparison at paragraph 22.

4. In its notice of opposition, the opponent claims that the respective marks are near identical and that the respective goods and services are either identical or highly similar. The applicant filed a counterstatement denying the grounds of opposition.

5. Rules 20(1)-(3) of the Trade Marks Rules (the provisions which provide for the filing of evidence) do not apply in fast track oppositions but Rule 20(4) does. It reads:

“The registrar may, at any time, give leave to either party to file evidence upon such terms as the registrar thinks fit.”

6. The effect of the above is to require parties to seek leave in order to file evidence in fast track oppositions. On 20 March 2024, the applicant sought leave to file evidence in the form of a witness statement,⁴ accompanied by two exhibits (JS1-JS2). However, in accordance with Tribunal Practice Notice 2/2013, the Tribunal refused the applicant’s request.

7. Rule 62(5) (as amended) states that arguments in fast track proceedings shall be heard orally only if (i) the Office requests it or (ii) either party to the proceedings requests it and the Registrar considers that oral proceedings are necessary to deal with the case justly and at proportionate cost. Otherwise, written arguments will be taken. A hearing was neither requested nor considered necessary.

8. The opponent is represented by BOEHMERT & BOEHMERT Anwaltspartnerschaft mbB, whereas the applicant is unrepresented. Only the opponent chose to file written submissions.⁵ This decision is taken following a careful review of the papers before me, keeping all submissions in mind.

PRELIMINARY ISSUES

9. The applicant has raised points in its counterstatement which I intend to address before going any further into the merits of this opposition. This is because it is

⁴ Witness statement of Claire-Loise Cook [Senior Legal Counsel of the opponent].

⁵ Dated 13 March 2024.

necessary to explain why, as a matter of law, the points raised will have no bearing on the outcome of this opposition.

10. In its counterstatement, the applicant submits the following:

“The Defendant disagrees with the Oppositions second ground on mutually similar goods as the Oppositions mark is purported to be used for 'data processing equipment, configuration and monitoring software for security', whereas the Defendant is a UK company which provides Translation Management Software (Saas based) and does not provide any hardware at all. The Defendant sells its Translation Management Software to Language Service Providers and to businesses who require computer translation services. The Defendants website details its offerings are merely translation management software based at xtm.cloud.

The Opposition is a German manufacturer of electrical enclosures for use in industrial settings and sell related software and services. This is a completely different market and therefore the Opposition is not in direct competition with the Defendant. The intended purpose of the goods and services and the nature of the goods and services provided by the Opposition are completely different to the Defendant and as such their offering is in a different market.

To conclude, the Defendant and Opposition are not in direct competition and are marketing and selling its offerings in different markets. The proposed mark does not cause confusion to consumers due to the visual differences and also due to the fact that the Defendant does not compete in the same market or offer a similar service as the Opposition.”

11. Differences between the goods and services currently provided by the parties, such as particular characteristics of the goods and services at issue, are irrelevant, except to the extent that those differences are apparent from each party's specification. Since the opponent's earlier mark is not subject to proof of use, it is entitled to protection in relation to all the goods for which it is registered. It is the goods relied upon by the opponent and the goods and services applied for by the applicant that I

will be comparing later in this decision. The assessment I must make between the goods and services is a notional and objective assessment, rather than a subjective one.

12. Furthermore, marketing strategies, including the targeting of specific consumers, are temporary and may change over time. As such, it is not appropriate to take that factor into account in my assessment.⁶ However, I will make an assessment, later in this decision, as to who the average consumer could be for the goods and services at issue.

RELEVANCE OF EU LAW

13. 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)

14. Sections 5(2)(b) is relied on and reads as follows:

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

(a)...

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

⁶ *Devinlec Développement Innovation Leclerc SA v OHIM*, Case C-171/06P at [59].

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

15. Section 5A states:

[...]

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

16. I am guided by the following principles which are gleaned from the decisions of the EU courts in *Sabel BV v Puma AG*, Case C-251/95, *Canon Kabushiki Kaisha v Metro-Goldwyn-Mayer Inc*, Case C-39/97, *Lloyd Schuhfabrik Meyer & Co GmbH v Klijsen Handel B.V.* Case C-342/97, *Marca Mode CV v Adidas AG & Adidas Benelux BV*, Case C-425/98, *Matratzen Concord GmbH v OHIM*, Case C-3/03, *Medion AG v Thomson Multimedia Sales Germany & Austria GmbH*, Case C-120/04, *Shaker di L. Laudato & C. Sas v OHIM*, Case C-334/05P and *Bimbo SA v OHIM*, Case C-591/12P:

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

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

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

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

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

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

(g) a lesser degree of similarity between the goods or services may be offset by a great degree of similarity between the marks, and vice versa;

(h) there is a greater likelihood of confusion where the earlier mark has a highly distinctive character, either per se or because of the use that has been made of it;

(i) mere association, in the strict sense that the later mark brings the earlier mark to mind, is not sufficient;

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

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

Comparison of goods and services

17. When making the comparison, all relevant factors relating to the goods and services 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, ... 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.”⁷

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

“In addition, the goods can be considered as identical when the goods designated by the earlier mark are included in a more general category, designated by trade mark application (Case T-388/00 *Institut für Lernsysteme v OHIM - Educational Services* (ELS) [2002] ECR II-4301, paragraph 53) or where the goods designated by the trade mark application are included in a more general category designated by the earlier mark.”⁸

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

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

⁷ Paragraph 23

⁸ Paragraph 29

“...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.”⁹

21. For the purposes of considering the issue of similarity of the goods and/or services, it is permissible to consider groups of terms collectively where appropriate: *Separode Trade Mark*, BL O-399-10.¹⁰

22. The goods and services to be compared are:

Applicant's goods and services

Class 9

Software; Computer software; Collaboration software platforms [software]; Software for computers; Enterprise software; Multimedia software; Computer software applications; Programming software; Software applications; System software; Computer application software; Application software; Networking software; Computer software programs; Interface software; Computer software applications, downloadable; Business software; Platform software; Server software; Operating software; Computer operating software; Smartphone software.

Class 42

Development of computer hardware and software; Computer software development; Development of computer software; Computer software integration; Computer software consultancy; Software development; Development of software; Computer software installation; Installation of computer software; Testing of computer software; Software design; Design of software; Installation of software; Software installation; Development of computer database software; Computer software maintenance; Maintenance of computer software; Leasing of computer software; Developing computer software; Upgrading of computer software; Software (Updating of computer -); Updating of computer software; Development of computer software application

⁹ Paragraph 82

¹⁰ Paragraph 5

solutions; Computer software programming services; Software as a service [SaaS] featuring software for machine learning.

Opponent's goods

Class 9

Configuration and monitoring software for security areas for information technology; Data-processing equipment and computers; Data processing equipment; Computers; Computer software.

23. Both parties have filed submissions regarding the similarity of the goods and services. Whilst I do not propose to reproduce those here, I have taken them all into consideration in reaching my decision.

Class 9 of the contested application

Computer software

24. The above goods appear in both specifications, therefore the goods are identical.

Software; Collaboration software platforms [software]; Software for computers; Enterprise software; Multimedia software; Computer software applications; Programming software; Software applications; System software; Computer application software; Application software; Networking software; Computer software programs; Interface software; Computer software applications, downloadable; Business software; Platform software; Server software; Operating software; Computer operating software; Smartphone software

25. Broadly speaking, *software* is a collection of instructions, data, or computer programs that enable a computer to perform specific tasks. The above contested goods are all forms of *software*. As such, I find that these goods are included in the broad term *computer software* contained in the opponent's goods, and therefore are considered identical in line with the principle set out in *Meric*.

Class 42 of the contested application

Development of computer software; Computer software development; Software development; Development of software; Software design; Design of software; Development of computer database software; Developing computer software; Development of computer software application solutions; Computer software programming services

26. The above services are concerned with the design, development and programming of *computer software*. Whilst services are not the same as goods, I consider the opponent's *computer software* in Class 9 to be the end result of its design, development and programming. As such, I find that there exists a complementary relationship with the above contested services and the opponent's *computer software*, on the basis that without the above services there would be no software end product. Whilst I acknowledge that the nature, purpose and method of use of the goods and services at issue is different, there may be an element of competition, with the consumer selecting either bespoke goods from the designer or choosing specific apparatus or software already on the market. As such, I do not consider it unreasonable for the consumer to believe that the goods and services derive from the same or related undertakings. Overall, I find there to be a medium degree of similarity between the above services and the opponent's *computer software*.

Development of computer hardware

27. As found previously for *computer software* and its design and development, I find that there exists a complementary relationship between the above services and the opponent's *computers* in Class 9. For the same reasons as outlined above in relation to the applicant's services and the opponent's computer software, I consider there to be a medium degree of similarity between the above services and the opponent's *computers* in Class 9.

Computer software integration

28. Broadly speaking, *computer software integration* is the process of combining different software programs into one system, enabling them to work together and share data. Accordingly, I find this service shares a degree of similarity with the opponent's *computer software* in Class 9 on the basis that in the IT field, manufacturers of software are also likely to render software-related services (as a means of keeping systems updated, etc.). Although the nature of the goods and services is not the same, both the average consumer and the usual producers and providers for the goods and services at issue may coincide. Furthermore, I am of the view that there exists a complementarity between the goods and services. Overall, I consider there to be between a low to medium degree of similarity between the above services and the opponent's *computer software* in Class 9.

Computer software consultancy

29. In general, I interpret consultancy in this field to cover a service usually aimed at businesses to identify the software needs of the organisation, and to analyse the costs and benefits of such software in order to improve the IT efficiency of the business. In my view, the method of use will differ from the opponent's *computer software* in Class 9 as the services will involve the expertise of the service provider rather than interaction with the goods themselves. Further, the main purpose of the services is to find ways to make the IT systems function more efficiently which differs from the purpose of software itself. However, the core nature of these consultancy services is synonymous with the opponent's computer software to the degree that it would be reasonable for consumers to believe that the software for these services and the services themselves are provided by the same undertakings. Therefore, there would be a degree of complementarity. The users and the trade channels are likely to overlap as providers of IT consultancy services could also provide the actual software to assist with the implementation of the recommendations. Overall, I find that these goods and services are similar to between a low and medium degree.

Software as a service [SaaS] featuring software for machine learning; Leasing of computer software

30. In general, the above services are concerned with software that is rented or licensed, etc., rather than purchased outright. Accordingly, rather than buying software and paying for periodic upgrades, etc., the above services tend to be subscription based, and mean that any updates/upgrades are delivered automatically during the subscription period. The opponent's *computer software* present Class 9 may include the same type of software provided through the above services. As such, the goods and services will overlap in trade channels, with the same undertaking providing both the goods and services. There will also be an overlap in user, and the user will also assume that the goods and services originate from the same undertaking, especially as they are important and indispensable to one another (the above services cannot be provided without the software). Consequently, I consider that they are complementary. I also consider that, to some extent, the goods and services may be in competition, with the user electing to either access their software via the internet, or alternatively choosing to purchase the equivalent software as goods. Therefore, taking all of the above into account, the goods and services are similar to a medium degree.

Computer software installation; Installation of computer software; Installation of software; Software installation

31. The nature and purpose of the above Class 42 services and the opponent's *computer software* goods in Class 9 differ. Broadly speaking, the services at issue are offered by a provider to end users, whereas the goods in Class 9 concern software products. That said, it is acknowledged that the above contested services could share the same trade channels and users as the opponent's goods. Whilst I do not consider there is competition between the respective goods and services, there is a degree of complementarity. Accordingly, I find the goods and services at issue to be similar to between a low to medium degree.

Testing of computer software; Computer software maintenance; Maintenance of computer software; Upgrading of computer software; Software (Updating of computer -); Updating of computer software

32. In general, the above services involve the process of assessing the functionality of software, in order to, for example, identify errors or faults, etc., and to ensure that the software is bug/virus free, as well as the process of modifying and updating software after it has been delivered to a customer in order to, for example, extend the lifespan of the software. Accordingly, I am of the view that these services share a degree of similarity with the opponent's *computer software*. This is because manufacturers of software will also likely provide software-related services (as a means of keeping the system updated, for example). Although the nature of the goods and services is not the same, both the average consumer and the usual producers/providers of the goods and services may coincide. Furthermore, I find that there is a complementarity between the goods and services because they are important or indispensable to each other and the average consumer is likely to believe that the businesses providing the software would also be responsible for testing, maintaining and updating it. Overall, I find that these goods and services are similar to between a low to medium degree.

The average consumer and the nature of the purchasing act

33. 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 (see *Lloyd Schuhfabrik Meyer*, Case C-342/97).

34. 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:

“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.”

35. The average consumer of the goods and services at issue is likely to include members of the general public as well as businesses and professional users. The goods and services will be available via both general retailers and more specialist ones, and their online or catalogue equivalents. At the retailers’ physical premises, the goods will be displayed on shelves and in cabinets and the services will be displayed on signs and placards, both being self-selected by the consumer. A similar process will apply when the goods and services are selected online or via catalogues, in that a consumer will select them after seeing an image, on, for example, a webpage or in a catalogue. In my view, the visual component will dominate all methods of sale, although I do not discount an aural component playing a part given that orders may be placed by telephone or that word-of-mouth recommendations and advice may be received from sales assistants. Given the range of goods and services at issue, the price and frequency of purchase will vary depending on their nature and type. In this regard, when selecting the goods and services at issue, the average consumer is likely to pay at least a medium degree of attention.

Comparison of the marks

36. It is clear from *Sabel BV v. Puma AG* that the average consumer normally perceives a trade mark as a whole and does not proceed to analyse its various details. The same case also explains that the visual, aural and conceptual similarities of the trade marks must be assessed by reference to the overall impressions created by them, bearing in mind their distinctive and dominant components. The CJEU stated in *Bimbo SA v OHIM*, that:

“34. [...] 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.”

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

38. The trade marks to be compared are as follows:

Opponent's mark	Applicant's mark
	

39. Both parties have filed submissions regarding the similarity of the marks. Whilst I do not propose to reproduce those here, I have taken them all into consideration in reaching my decision.

Overall impression

40. Both trade marks are figurative; the opponent's mark contains the letter 'X' formed from what appears to be two overlapping chevrons, with flat outer edges. The chevron on the right is coloured red, whereas the chevron on the left is black. Furthermore, there is a slight gap between the chevrons where they overlap. The applicant's mark also contains the letter 'X' and similarly, appears to be formed from two overlapping chevrons, though in this case the outer edges are rounded and the chevron on the left is blue in colour, whereas the chevron on the right is grey. Furthermore, the figurative 'X' is encased within a grey circular border. I find that in both marks, the overall impression of the marks is derived from the stylised letter 'X', with the colours featured playing a lesser role. With regards to the grey circular border present in the applicant's

mark, I find that this will have little impact on the consumer. Therefore, whilst there are differences between the overall presentation of the stylised X's, present in the marks, i.e. colour and border, I find that they have a notably similar overall impression.

Visual comparison

41. Visually the figurative marks coincide insofar as they both contain a device resembling a stylised letter 'X', presented in a similar manner, as shown above. The marks differ in that the 'X' in the opponent's mark is presented in black and red with straight edges, whereas the applicant's mark is presented in blue and grey with the "X" device having rounded edges, and is encased within a grey circular border. I find there to be a medium degree of visual similarity between the respective marks.

Aural comparison

42. The figurative elements contained in the marks will not play a part in the aural comparison. Therefore, it is considered highly likely that the marks will be pronounced in the same way, namely as the letter "X" ('eks'). As such, I find that they are aurally identical.

Conceptual comparison

43. For a conceptual message to be relevant it must be capable of immediate grasp by the average consumer. This is highlighted in numerous judgments of the GC and the CJEU including *Ruiz Picasso v OHIM* [2006] E.C.R.-I-643; [2006] E.T.M.R 29. The assessment must, therefore, be made from the point of view of the average consumer.

44. Conceptually, whilst the marks may be perceived by a proportion of consumers simply as two figurative shape marks, and some consumers may identify the chevron shapes which make up each of the "X" elements, I am of the view that in the round they are likely to be understood as representing the 24th letter of the English alphabet, namely the letter 'X'. The stylisation and colour elements present in the respective marks do not create a conceptual gap on the basis that they have no clear relationship

with the letter 'X' and will not convey any particular meaning. Therefore, the marks are conceptually identical.

Distinctive character of the earlier trade mark

45. The distinctive character of a trade mark can be measured only, first, by reference to the goods or services in respect of which registration is sought and, second, by reference to the way it is perceived by the relevant public. In *Lloyd Schuhfabrik Meyer & Co. GmbH v Klijsen Handel BV*, 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).”

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 or services, to those with high inherent distinctive character, such as invented words which have no allusive qualities. The degree of distinctiveness is an

important factor as it directly relates to whether there is a likelihood of confusion; the more distinctive the earlier mark, the greater the likelihood of confusion.

47. Neither party has made any specific comments on the distinctiveness of the earlier mark. Although the distinctiveness of a mark can be enhanced by virtue of the use that has been made of it, the opponent has not filed any evidence of use. Consequently, I have only the inherent position to consider.

48. The distinctiveness of single letters as trade marks is only an issue when the letter is meaningful, for example, the letter 'E' in respect of electronic goods or services. There is no evidence to suggest that the letter 'X', or the stylisation contained in the earlier mark describes or alludes to the goods for which the mark is registered. Accordingly, I find the mark meaningless in respect of those goods. However, whilst the overall presentation of the mark is noted, I am of the view that there is nothing especially striking or inventive about a single letter of the alphabet. Accordingly, I find the earlier mark to be inherently distinctive to a lower than medium degree.

Likelihood of confusion

49. 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. One such factor 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 earlier trade mark, the average consumer for the goods and services, and the nature of the purchasing process. In doing so, I must be mindful 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 they have retained in their mind.

50. Confusion can be direct or indirect. Direct confusion involves the average consumer mistaking one trade mark for the other, while indirect confusion is where the average consumer realises the trade marks are not the same but puts the similarity

that exists between the trade marks and goods down to the responsible undertakings being the same or related.

51. Earlier in the decision I concluded that the respective marks are visually similar to a medium degree and aurally and conceptually identical. I have found the earlier mark to have a lower than medium degree of inherent distinctive character. I have found the parties' goods and services to range between identical and similar to between a low to medium degree. I have identified the average consumer to be members of the general public as well as business and professional users, who will pay at least a medium degree of attention during the selection of the goods and services at issue. I am of the view that the purchasing process for the goods and services at issue would be predominantly visual in nature, though I have not discounted aural considerations.

52. Bearing in mind all the aforesaid, I find the shared nature of the letter 'X' is the most pertinent factor to consider and that will have the lasting impact on consumers who rarely see marks side by side but instead rely on imperfect recollection. The identical concept of the letter 'X' will overwhelm any stylisation in the respective marks which is likely to either be overlooked or misremembered. Accordingly, in my view, a significant proportion of consumers will mistake one trade mark for the other. Therefore, there is a likelihood of direct confusion.

Conclusion

53. The opposition under Section 5(2)(b) of the Act has succeeded. Subject to any successful appeal, the application will be refused.

Costs

54. The opponent has been successful and is entitled to a contribution towards its costs in line with the scale set out in Tribunal Practice Notice (TPN) 1/2023. For fast track opposition proceedings, costs are capped at £600, excluding the official fee. I award costs to the opponent on the following basis:

Official fee	£100
Preparing the notice of opposition and considering the other side's statement	£250
Preparing written submissions:	£100
Total	£450

55. I therefore order XTM International Ltd to pay Rittal GmbH & Co. KG, the sum of £450. This should be paid within twenty-one days of the expiry of the appeal period or, if there is an unsuccessful appeal, within twenty-one days of the appeal proceedings.

Dated this 13th day of November 2024

**Sam Congreve
For the Registrar**