

**Notification to the applicant/holder of a decision**

Alicante, 01/12/2017

Quirijn Meijnen  
Raadhuisstraat 52C  
NL-1016DG Amsterdam  
PAÍSES BAJOS

*Your reference:* **CR/GMK1012**  
*Opposition number:* **B 002288234**  
*Contested trade mark number:* **011960391**  
*Name of the applicant/holder:* **Alda Events B.V.**

Please see the attached decision which ends the abovementioned opposition proceedings. It was taken on **01/12/2017**.



**Orsola LAMBERTI**

Enclosures (excluding the cover letter): 28 pages.

**Please note that the decisions of the Opposition Division will not be signed by the responsible officials, but will only indicate their full name and carry a printed seal of the Office according to Article 94(2) EUTMR.**

**OPPOSITION No B 2 288 234**

**Aldi GmbH & Co. KG**, Burgstr. 37, 45476 Mülheim/Ruhr, Germany (opponent), represented by **Schmidt, von der Osten & Huber Rechtsanwälte Steuerberater Partnerschaft mbB**, Haumannplatz 28, 45130 Essen, Germany (professional representative)

a g a i n s t

**Alda Events B.V.**, Anthony Fokkerweg 61, 1059 CP Amsterdam, The Netherlands (applicant), represented by **Quirijn Meijnen**, Raadhuisstraat 52C, 1016DG Amsterdam, The Netherlands (professional representative).

On 01/12/2017, the Opposition Division takes the following

**DECISION:**

1. Opposition No B 2 288 234 is partially upheld, namely for the following contested goods:

Class 9: *Magnetic, optical and electronic sound, image and other data carriers in disc, card, tape or other form, including videotapes, CDs, CD-ROMs, CD-Is, CD-videos, Digital Video Discs, DCCs, mini-discs, CD-Rs, CD-RWs, DATs, floppy disks, hard disks, chips and computer programs (software), blank or containing audio, video, data, programs or information; computer software (recorded); electronic and electrotechnical devices, instruments and articles for recording, transmission or reproduction of sound, images, data, programs or information; computer software; computer programs for accessing computer networks and global communications networks; data carriers in the form of cards, in particular sim cards, identity cards, credit and charge cards, as well as combinations thereof, including for (mobile) telecommunications; sunglasses; electronic and digital publications, on data carriers or otherwise; the aforesaid goods solely in the context of music-and dance events, and the organisation thereof, included in this class.*

Class 16: *Paper, cardboard and goods made from these materials, not included in other classes; printed matter, including books, newspapers, magazines, brochures and other periodicals; diaries, calendars, photographs, posters, flyers, leaflets, stickers, notepads, note books, pencils, pens, pen trays, pen cases and other such school and office requisites, not included in other classes; instructional and teaching material (except apparatus); books, newspapers and magazines and other printed matter; the aforesaid goods solely in the context of music and dance events.*

2. European Union trade mark application No 11 960 391 is rejected for all the above goods. It may proceed for the remaining services.
3. Each party bears its own costs.

### Preliminary Remark

As from 01/10/2017, Regulation (EC) No 207/2009 and Regulation (EC) No 2868/95 have been repealed and replaced by Regulation (EU) 2017/1001 (codification), Delegated Regulation (EU) 2017/1430 and Implementing Regulation (EU) 2017/1431, subject to certain transitional provisions. All the references in this decision to the EUTMR, EUTMDR and EUTMIR shall be understood as references to the Regulations currently in force, except where expressly indicated otherwise.

### **REASONS**

The opponent filed an opposition against all the goods and services of European Union trade mark application No 11 960 391 for the figurative mark



. The opposition is based on:

- 1) International registration designating the European Union No 870 876 for the word mark 'ALDI'
- 2) European Union trade mark registration No 2 071 728 for the word mark 'ALDI';
- 3) European Union trade mark registration No 6 870 943 for the word mark 'ALDI'.
- 4) European Union trade mark registration No 3 360 914 for the word mark 'ALDI'.

The opponent invoked for marks 1), 2) and 3) Article 8(1)(b) EUTMR.

### **ADMISSIBILITY**

According to Rule 15(2)(c) EUTMIR (in the version in force at the time of filing of the opposition), the notice of opposition must contain the grounds on which the opposition is based, namely a statement to the effect that the respective requirements under Article 8(1), (3), (4), (4a) and (5) EUTMR are fulfilled.

In particular, the grounds are to be considered properly indicated if one of the relevant boxes in the notice of opposition form is checked or if they are indicated in any of its annexes or supporting documents. The grounds are also considered to be properly indicated if the earlier mark is identified and it is possible to unequivocally identify the grounds and the opposition as based on Article 8(1) EUTMR.

According to Rule 17(2) EUTMIR (in the version in force at the time of filing of the opposition), if the notice of opposition does not contain grounds for opposition in accordance with Rule 15(2)(c) EUTMIR (in the version in force at the time of filing of the opposition), and if the deficiency has not been remedied before the expiry of the opposition period, the Office will reject the opposition as inadmissible.

On 11/12/2013, the opponent filed notice of opposition against the contested application. However, the opponent failed to indicate the grounds of the opposition in relation to European Union trade mark registration No 3 360 914. Therefore, the opposition is not admissible insofar as based on said earlier mark.

## PROOF OF USE

In accordance with Article 42(2) and (3) EUTMR (in the version in force at the time of filing of the opposition, now Article 47(2) and (3) EUTMR), if the applicant so requests, the opponent must furnish proof that, during the five-year period preceding the date of publication of the contested trade mark, the earlier trade mark has been put to genuine use in the territories in which it is protected in connection with the goods or services for which it is registered and which the opponent cites as justification for its opposition, or that there are proper reasons for non-use. The earlier mark is subject to the use obligation if, at that date, it has been registered for at least five years.

The same provision states that, in the absence of such proof, the opposition will be rejected.

The applicant requested that the opponent submit proof of use of:

- 1) International registration designating the European Union No 870 876 for the word mark 'ALDI'
- 2) European Union trade mark registration No 2 071 728 for the word mark 'ALDI';

The contested application was published on 25/09/2013. The opponent was therefore required to prove that the trade marks on which the opposition is based were put to genuine use in the European Union from 25/09/2008 to 24/09/2013 inclusive.

The request was submitted in due time and is admissible as the earlier trade marks were registered more than five years prior to the relevant date mentioned above. Furthermore, the evidence must show use of the trade marks for the goods and services on which the opposition is based, namely the following:

International registration designating the European Union No 870 876, earlier mark (1):

Class 35: *Advertising; business management; business administration; office functions; retailing in all product areas; online retailing in all product areas; operating supermarkets, retail outlets and discount retail outlets; advertising in the Internet, for others; providing information on the Internet, namely information about consumer products, consumer advice information and customer service information; arranging of commercial transactions for third parties, also on the Internet; arranging of contracts regarding the purchase and sale of goods, as well as the providing of services for others, also via the Internet.*

Class 38: *Telecommunications.*

Class 40: *Treatment of materials; photographic laboratory services; making of photographic copies, also on the basis of digital data, development of films, duplicating of photographs; photograph processing services, in particular enlargement and retouching of digital photographs.*

Class 41: *Education; providing of training; entertainment; sporting and cultural activities; providing of entertainment in the form of recorded music, recorded images and films.*

European Union trade mark registration No 2 071 728, earlier mark (2):

Class 3: *Bleaching preparations and other substances for laundry use; cleaning, polishing, scouring and abrasive preparations; soaps; perfumery, essential oils, cosmetics, hair lotions; dentifrices.*

Class 4: *Industrial oils and greases; lubricants; dust absorbing, wetting and binding compositions; fuels (including motor spirit) and illuminants; candles, wax candles, nightlights (candles) and wicks.*

Class 7: *Household vacuum cleaners.*

Class 9: *Electric and electronic apparatus for recording, transmitting, inputting, outputting, storage and reproduction of data, images and sound; telecommunications apparatus, transmitting and receiving apparatus; parts of the aforesaid goods; batteries and accumulators; battery and accumulator charging equipment.*

Class 16: *Paper, cardboard and goods of these materials, included in class 16, in particular wrapping and packing paper, conical paper bags, paper bags, filter paper, advertising paper, letter and writing paper, table napkins of paper, paper towels, household rolls, toilet paper, linen of paper, namely handkerchiefs, mouth and face cloths, hand towels, table linen; printed matter; bookbinding material; photographs; stationery; adhesives for stationery or household purposes; artists' materials; paint brushes; typewriters and office requisites (except furniture); instructional and teaching material (except apparatus); plastic materials for packaging (included in class 16); playing cards; printers' type; printing blocks; carrier bags, carrier pouches, sachets and banners for shop windows of plastic foil or paper, being also for advertising purposes.*

Class 24: *Textiles and textile goods, included in class 24, in particular fabrics, bath linen, bed linen, table linen; curtains.*

Class 25: *Education; providing of training; entertainment; sporting and cultural activities; providing of entertainment in the form of recorded music, recorded images and films.*

Class 29: *Clothing, footwear, headgear.*

Class 30: *Coffee, tea, cocoa, sugar, rice, tapioca, sago, artificial coffee; flour and preparations made from cereals, bread, pastry and confectionery, ices; honey, treacle; yeast, baking-powder, salt, mustard; vinegar; sauces; spices; ice.*

Class 31: *Agricultural, horticultural and forestry products as well as grains (as far as contained in class 31); live animals; fresh fruits and vegetables; seeds, natural plants and flowers; foodstuffs for animals, malt.*

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

Class 33: *Alcoholic beverages (except beers).*

Class 34: *Tobacco; smokers' articles; matches.*

Class 36: *Financial affairs, in particular financial consultancy and purchasing consultancy for other companies.*

According to Rule 22(3) EUTMIR (in the version in force at the moment of filing the request for proof of use), the evidence of use must consist of indications concerning the place, time, extent and nature of use of the opposing trade marks for the goods or services in respect of which it is registered and on which the opposition is based.

On 17/08/2016, in accordance with Rule 22(2) EUTMIR (in the version in force at the moment of filing the request for proof of use), the Office gave the opponent until 22/10/2016 to submit evidence of use of the earlier trade marks. Said time limit was extended to 22/12/2016. On 11, 20 and 21/12/2016, within the time limit, the opponent submitted evidence of use.

As the opponent requested to keep certain commercial data contained in the evidence confidential vis-à-vis third parties, the Opposition Division will describe the evidence only in the most general terms without divulging any such data.

The evidence to be taken into account is the following:

- Item 1 of the sending of 11/11/2016: affidavit of the managing director of the opponent company, given on 08/09/2016. The affidavit indicates that the mark 'ALDI' has been used in Germany for the services in Class 35 in the relevant period and refers to the evidence attached. It is also said that the ALDI SOUTH group provides services for third parties under 'ALDI' trade mark (arranging of contracts between customers and other companies) under the



sign

- Item 2 of the sending of 11/11/2016: a remarkable quantity of



advertising brochures displaying the sign referring to the relevant period (from October 2008 to the year 2013). The brochures are in German and contain references to different products (e.g. clothing, foodstuffs, household articles, stationery, books etc.) and services (e.g. telecommunication). For instance:

**CD-ROM Kompaktwissen Schule**  
 Multimediales Lexikon mit mehreren hundert Artikeln zum Nachlesen und Lernen. 10 Titel für die wichtigsten Schulfächer, z.B.:

- Biologie, 5.-10. Klasse
- Chemie, 5.-10. Klasse
- Literatur, 7.-13. Klasse

Je 1 CD-ROM mit Begleitbuch in DVD-Box.

Bitte die Systemvoraussetzungen beachten.

**je**  
**5,99\***



In Zusammenarbeit mit dem bekannten Nachhilfe-Institut *Schülerhilfe!*

**DVD-Film**  
 Beste Unterhaltung für die ganze Familie, z.B.:

- Indiana Jones 1 – Jäger des verlorenen Schatzes
- Brücke nach Terabithia Flutsch und weg
- Die Kinder des Monsieur Mathieu
- Save the last Dance 2

**je**  
**7,59\***



**CASA DECO®**  
**Geschenkpapier „Frühling“**  
 Feste Qualität, farbenfroh und attraktiv.  
 Maße ca.: 2 m x 70 cm

**je Rolle**  
**-,65\***  
(m<sup>2</sup>-Preis -46)



**CASA DECO®**  
**Geschenkhänder-Set, 3-teilig**  
 Länge je Rolle ca. 3 m.  
 Teils mit Drahtkante.

**je 3er-Set**  
**1,79\***

Für hübsche Geschenke...



**CASA DECO**

**...und schöne Grüße!**

**6er-Packung.**

**Rex® 6 Gel-Stifte**

- Metallic • Glitter oder
- Neon

je 6er-Set **-,99\***

**4 Rollen, je 10 m x 15 mm.**

**tesafilm**

- stark klebend
- reißfest
- kopierneutral
- alterungsbeständig

4 Rollen **-,99\***

**Rex OFFICE**

**Perfekte Ordnungshüter – für jedes Büro!**

**REX® OFFICE Ordnungshelfer**

Aus stabiler Pappe.

- 6 Magazin-Boxen, Maße je ca.: 7,2 x 30,3 x 73 cm (B x H x T)
- 1 CD-Box, Maße ca.: 27,5 x 30,2 x 17,5 cm (B x H x T)
- 1 Schubladen-Box, Maße ca.: 24,5 x 24 x 33,4 cm (B x H x T)
- oder
- 2 Utensilien-Boxen mit Deckel, Maße je ca.: 24,5 x 16,3 x 34 cm (B x H x T)

je **1,99\***

**Viele tolle Motive!**



**2009/2010  
Auto-Pocket-Atlas-Set  
oder  
Motorrad-Karten-Set**

Für Deutschland und die Alpenländer.

- 2-teiliges Auto-Pocket-Atlas-Set  
GPS geeignete Kartografie, mit umfangreichem Ortsregister, viele Freizeitinformationen...
- oder
- 12-teiliges Motorrad-Karten-Set  
inkl. Info-Booklet mit Offroadstrecken, Tourenvorschlägen, Biker-Treffs...

je Set  
**3,99\***



**Zubehör**



**Verbindungsmöglichkeiten:**

- Nokia 2-mm-Ladeanschluss
- Bluetooth Spezifikation 2.1 mit EDR
- Aufladen des Mobiltelefons über USB mit dem Computer möglich
- 3,5-mm-Klinkenbuchse mit Zusatzfunktionen

**Anwendungen:**

- Rechner • Organizer-Funktionen
- Weltzeituhr, Stoppuhr, Countdown-Funktion
- Internetsuche • Opera Mini-Browser
- Ovi Store, Windows Live Messenger (über Ovi Store)
- Unterstützung für den Nokia Messaging Dienst
- Flickr • Facebook (über Ovi Store)

**E-Mail und Instant Messaging:**

- E-Mail-Client: Unterstützung für den Nokia Messaging Dienst
- gemeinsamer SMS/MMS-Editor
- Instant Messaging (über Ovi Chat-Funktionen)

**ALDI TALK**



**Bleiben Sie in Verbindung!**

**Wer günstig spricht – spricht ALDI!**

**Für Notebooks:**  
Entscheiden Sie sich für eine der ALDI TALK Internet-Flatrate-Optionen!

**Für Handys und Smartphones:**  
Das mobile Internet im Taschenformat. Entdecken Sie die Vorteile der ALDI TALK App – jetzt auch für iPhone und iPad!

**Weltweit bestens verbunden!**  
Einfach günstig international in Verbindung.

In über 90 Ländern aktiv telefonieren und in mehr als 125 Ländern mobil erreichbar!  
Informationen zu den ALDI TALK Auslandstarifen – und natürlich den Basistarifen – finden Sie unter

- Item 3 of the sending of 11/11/2016: 9 undated printouts of the websites <https://www.aldi-sued.de>, [www2.aldiblumenservice.de](http://www2.aldiblumenservice.de), [www.alditalk.de/sued/](http://www.alditalk.de/sued/), [sued.aldi-reisen.de](http://sued.aldi-reisen.de), [sued.aldireisen.de](http://sued.aldireisen.de), [sued.aldifotos.de](http://sued.aldifotos.de), on which reference to 'ALDI' services (e.g. telecommunications) appears.
- Item 4 of the sending of 11/11/2016: extract from Wikipedia, dated 13/09/2016, concerning 'ALDI' described as leading global discount supermarket. The extract contains the story of the chain and information on the distribution of its seats worldwide and the brand policy. It is also mentioned that 'Aldi has a mobile virtual network operator in Germany, Belgium, and the Netherlands, called Aldi Talk'. The evidence indicates also that 'ALDI' it is a leading global discount supermarket chain with almost 10,000 stores in 18 countries and an estimated turnover of more than €50 billion and that Aldi is active in the retail industry.



programmes and master programmes, that currently 295 students are studying the dual study programmes at 16 partner universities. These statements are supported by documents attached as Item B1 (see below). Furthermore, the affidavit indicates that for decades ALDI SÜD Dienstleistungs-GmbH & Co. oHG and regional companies of the ALDI SÜD Group have educated young talent at all levels, from Store Manager to Managing Director. These statements are supported by documents attached as Items B2 and B3 (see below). The affidavit also includes a table covering the years from 2013 to 2016, hence partially outside of the relevant period, with printing costs in euros and numbers of issues of recruitment materials circulated with different titles.

- Item B1: extracts from two undated brochures called 'The dual Bachelor study program at ALDI SÜD' and 'The dual Master study program at ALDI SÜD. Your entry to the management career' respectively. Both brochures are in German together with partial English translations thereof and provide information about the study programmes offered. The brochures also feature



use of the sign

The documentation also includes an undated informative text in German and includes no source indication together with an English translation thereof and which indicates the characteristics of the programme. Extracts in German together with English translations thereof from the website with information on the same subject are provided too, together with an article dated 22/02/2013 in German from the website [www.lebensmittelzeitung.net](http://www.lebensmittelzeitung.net), together with an English translation thereof relating to the master programme which indicates, inter alia, that the programme was developed in close cooperation with Aldi Süd and that all students are Aldi Süd employees. Finally, the annex contains an extract in German from the website [www.reutlingen-university.de](http://www.reutlingen-university.de), with a partial English translation thereof from the 19/04/2016 referring to the opening of a lecture hall called 'Lecture Hall Aldi South'.

- Items B2 and B3: extracts in German from a document with the heading 'ALDI SÜD AKADEMIE' with an English translation of its title, 'Seminar and qualification program for group leader and managing directors' and a translation of the indication that the document originates from 'Bous, Human Resources, September 2013'. The items also include extracts in German from another document with the heading 'ALDI SÜD AKADEMIE' with an English translation of its title, 'Education and qualification program for trainees, young executives, surrogates and prospective commercial specialists' and a translation of the indication that the document originates from 'Bous, Human Resources, May 2014'.
- Items B4-B10: undated extracts from a brochure or catalogue in German with an English translation of the headings of the respective extracts, namely 'Junior Branch Manager (m/f) at ALDI SOUTH', 'Branch Manager (m/f) at ALDI SOUTH' and 'Deputy Branch Manager (m/f) at ALDI SOUTH'. Extracts from two undated brochures in German together with partial English translations thereof with information about career opportunities at ALDI SÜD.

Extracts from an undated brochure in German together with partial English translations thereof with the title, 'Education at ALDI SOUTH. For a diverse start into work life' and providing information as to why one should start an apprenticeship at ALDI SÜD and the advantages of a career at ALDI SÜD. Extracts from a brochure in German dated 29/07/2014, together with partial English translations thereof with the title 'Training and dual study at the IT at ALDI SÜD. More connection for your beginning career'. All brochures or



catalogues feature the sign

- An affidavit of the Buying Director of the opponent company given on



20/12/2016 and stating that the sign was used in relation to entertainment services. According to the affidavit, the webpages attached gathered several millions views/users and have been active at least since 2014.

- 2 undated printouts of the webpage [www.aldi-sued.de](http://www.aldi-sued.de), containing 'entertainment' tabs, featuring games. 2 more printouts dated 14/12/2016 from the 'games' section of said website.
- 2 printouts from 14/12/2016 of the company's Youtube portal, showing several videos whose title contains the mark 'ALDI'.
- 11 printouts from 14/12/2016 the company's Facebook page, displaying the



sign

- 7 printouts from 14/12/2016 of the website [www.aldilino.de](http://www.aldilino.de) that contains entertainment for children.

In addition, it shall be noted that on the 01/07/2016 the opponent submitted its further facts, evidence and arguments in support of the opposition, which included evidence to substantiate its claim that the earlier marks enjoy a high degree of distinctiveness because it is well-known to consumers in the European Union. This evidence must also be taken into account as potential proof of use of the earlier marks in relation to the services concerned. In this respect, the opponent submitted the following evidence:

- A Wikipedia extract about the company 'ALDI' (see Item 4 of the sending of 11/11/2016 above).
- A copy of two studies provided by AC Nielsen in 1997 and 2003 called '*The Discounter as Judged by the Consumer*' on consumers' awareness in connection with the earlier marks and referring to years previous to the relevant period (from the 70s to 2003).
- A copy of an article in German dated 17/09/2004 and called '*Aldi avanciert zur Topmarke*' (translated by the opponent as 'Aldi moves up to become top trademark'). According to the opponent, the article is taken from the German newspaper 'Lebensmittelzeitung' ('food news').
- A copy of an article in German called '*Die Deutschen lieben Porsche und Aldi*' together with an English translation thereof. It refers to the results of a study concerning, inter alia, the reputation of 'ALDI' as perceived by German consumers. According to the opponent, the article is from the German newspaper 'Handelsblatt' on 15/11/2004.
- Excerpts from a judgment of the Appeal Court in Hamm/Germany of 01/04/2003 (file ref. No.: 4 U 157/02), together with a partial English translation containing statements about the well-known character of 'Aldi' supermarkets in Germany.
- A copy of an article with reference to [www.tagesschau.de](http://www.tagesschau.de) as a source dated the 15/11/2004. It indicates that the results of the '*Excellence Barometer 2004*' study shows that, in consumers' opinion, Germany's most successful company is the discount chain Aldi.
- A copy of the announcement of the results of the 2005 study of '*Reader's Digest European Trusted Brands*' in Germany, where 'ALDI' was voted the most trusted brand in the field of trade companies.
- A copy of the results of '*ShopperTrends Europe 2004*' from AC Nielsen, mentioning 'ALDI' among the three strongest marks of retail companies in Europe.
- A copy of the results of 'EXBA', 2003, translated by the opponent as '*Study "Benchmark" for the excellence in the German economy*', ranking 'ALDI' as number one.
- A copy of an article in German dated 08/04/2014 from the website [www.markenartikel-magazin.de](http://www.markenartikel-magazin.de), together with an English translation thereof. It indicates that Interbrand has published the study '*Best Retail Brands*', where Aldi remained the strongest German retail brand.
- A copy of an article in English dated 27/05/2015 from the website [www.campaignlive.co.uk](http://www.campaignlive.co.uk). It indicates that Aldi has taken over Tesco in BrandZ's brand ranking '*Top 100 Most Valuable Global Retail Brands*'.
- A copy of BrandZ's brand ranking '*Top 100 Most Valuable Global Brands 2015*' listing Aldi as number 90 and indicating that the brand pertains to the category of retail.

- Decision in Opposition proceedings B 1 631 681 of 25/09/2012 where no assessment on the Proof of use, nor on the enhanced distinctiveness of the earlier marks was carried out. Moreover, the decision regarded different marks.

### **Assessment of the evidence – factors**

The Court of Justice has held that there is 'genuine use' of a mark where it is used in accordance with its essential function, which is to guarantee the identity of the origin of the goods or services for which it is registered, in order to create or preserve an outlet for those goods or services. Genuine use does not include token use for the sole purpose of preserving the rights conferred by the mark. Furthermore, the condition of genuine use of the mark requires that the mark, as protected in the relevant territory, be used publicly and outwardly (11/03/2003, C-40/01, Minimax, EU:C:2003:145, and 12/03/2003, T-174/01, Silk Cocoon, EU:T:2003:68).

According to Rule 22(3) EUTMIR, the evidence of use shall consist of indications concerning the place, time, extent and nature of use of the opposing trade mark for the goods and services in respect of which it is registered and on which the opposition is based. These requirements are cumulative (05/10/2010, T-92/09, STRATEGI, EU:T:2010:424, § 43) and the opponent must thus prove each of these requirements. However, the sufficiency of the evidence as to the place, time, extent and nature of use has to be determined by considering the evidence submitted in its entirety.

The documents show that the place of use is Germany. This can be inferred from the language of the majority of the documents provided (German). Therefore, the evidence relates to the relevant territory.

Most of the evidence is dated within the relevant period; however, a part of the documentation is dated outside of said period. Evidence referring to use made outside the relevant timeframe is disregarded unless it contains conclusive indirect proof that the marks must have been put to genuine use during the relevant period of time as well. Events subsequent to the relevant time period may make it possible to confirm or better assess the extent to which the earlier marks were used during the relevant time period and the real intentions of the EUTM proprietor at that time (27/01/2004, C-259/02, Laboratoire de la mer, EU:C:2004:50). In the present case, the evidence referring to use outside the relevant period confirms use of the opponent's marks within the relevant period. This is because a relevant portion of the documentation is close in time with respect to the evidence in the relevant period. Moreover, when read in conjunction with the evidence from the relevant period, the evidence dated outside said period is helpful in the assessment of the extent of use during the relevant time period.

In the context of Article 10(3) EUTMDR (former Rule 22(3) EUTMIR, in force before 01/10/2017), the expression 'nature of use' includes evidence of use of the sign in accordance with its function, of use of the mark as registered, or of a variation thereof according to Article 18(1), second subparagraph, point (a) EUTMR, and of its use for the goods and services for which it is registered.

According to Article 18(1), second subparagraph, point (a), EUTMR, the following will also constitute use within the meaning of paragraph 1: use of the European Union trade mark in a form differing in elements that do not alter the distinctive character of the mark in the form in which it was registered, regardless of whether or not the trade mark in the form as used is also registered in the name of the proprietor. When

examining the use of an earlier registration for the purposes of Article 47(2) and (3) EUTMR, Article 18 may be applied by analogy to assess whether or not the use of the signs constitutes genuine use of the earlier marks as far as its nature is concerned.

In the present case, although the copies of advertisement brochures display the sign



, the word 'ALDI' appears in standard letters and the additional, much smaller word 'SÜD' and figurative elements are not considered to substantially change the distinctive character of the word marks 'ALDI' as registered. Indeed, this word is clearly legible and occupies an independent position; furthermore, the additional element 'SÜD', meaning 'south', is descriptive of the geographical origin of the services or of the opponent, or of the place where the relevant services are provided. Moreover, 'ALDI' also appears as a word in the remaining material submitted by the opponent.

In view of the above, the Opposition Division considers that the evidence does show use of the sign as registered within the meaning of Article 18(1), second subparagraph, point (a), EUTMR.

It is observed that a part of the evidence provided does not show the use made by the opponent, but rather by companies of the same group. According to Article 18(2) EUTMR, use of the EUTM with the consent of the proprietor is deemed to constitute use by the proprietor.

The fact that the opponent submitted evidence of use of its marks by a third party implicitly shows that it consented to this use (08/07/2004, T-203/02, Vitafruit, EU:T:2004:225).

Consequently, it can be presumed that the evidence filed by the opponent is an implicit indication that use has been made with its consent. To this extent, and in accordance with Article 18(2) EUTMR, the Opposition Division considers that the use made by those other companies was made with the opponent's consent and thus is equivalent to use made by the opponent. Indeed, use by companies economically related to the trade mark proprietor, such as members of the same group of companies (affiliates, subsidiaries, etc.) is similarly to be considered as authorised use (judgment of 30/01/2015, T-278/13, now, EU:T:2015:57, § 38).

As far as the four affidavits are concerned, Article 10(4) EUTMDR (former Rule 22(4) EUTMIR, in force before 01/10/2017) expressly mentions written statements referred to in Article 97(1)(f) EUTMR as admissible means of proof of use. Article 97(1)(f) EUTMR lists means of giving evidence, amongst which are sworn or affirmed written statements or other statements that have a similar effect according to the law of the State in which they have been drawn up. As far as the probative value of this kind of evidence is concerned, statements drawn up by the interested parties themselves or their employees are generally given less weight than independent evidence. This is because the perception of the party involved in the dispute may be more or less affected by its personal interests in the matter.

However, this does not mean that such statements do not have any probative value at all. The final outcome depends on the overall assessment of the evidence in the

particular case. This is because, in general, further evidence is necessary to establish use, since such statements have to be considered as having less probative value than physical evidence (labels, packaging, etc.) or evidence originating from independent sources.

Bearing in mind the foregoing, it is necessary to assess the remaining evidence to see whether or not the contents of the declaration are supported by the other items of evidence.

### **Services in Class 35 of International registration designating the European Union No 870 876**

As regards the extent of use, all the relevant facts and circumstances must be taken into account, including the nature of the relevant goods or services and the characteristics of the market concerned, the territorial extent of use, its commercial volume, duration and frequency.

The assessment of genuine use entails a degree of interdependence between the factors taken into account. Thus, the fact that commercial volume achieved under the mark is not high may be offset by the fact that use of the mark has been extensive or very regular, and vice versa. Likewise, the territorial scope of the use is only one of several factors to be taken into account, so that a limited territorial scope of use can be counteracted by a more significant volume or duration of use. The evidence submitted by the opponent in order to prove genuine use of the earlier marks mainly relates to Germany. Given that the territorial scope of the use is only one of several factors to be assessed in the determination of whether the use is genuine or not, the use in the abovementioned country is considered sufficient to demonstrate the use in the relevant territory, namely the European Union.

The opponent expressly mentioned that the evidence to prove the genuine use of the mark in relation to Class 35 were the ones provided on 11/11/2016. The copies of advertisement materials, in particular brochures (e.g. item 2 of the sending of 11/11/2016), the numerous extracts from internet websites (e.g. item 3 of the sending of 11/11/2016) and the excerpts from Wikipedia pages (e.g. item 3 of the sending of 11/11/2016) provided in relation to said services, by themselves do not provide sufficient information on actual use for the services claimed. Without further information about the distribution of the brochures or the number of visits to the mentioned websites, and even if they do show *inter alia* the nature of use of the mark, this evidence is inconclusive as to the extent of use. Therefore, it has to be considered in conjunction with the evidence provided in relation to other Classes and to substantiate the claim of the well-known character of the earlier mark, the latter containing information on the recognition of the mark in Germany in relation to retail services and that do demonstrate a certain presence on the German market of the mark.

Taking into account the evidence in its entirety, including the evidence coming from the opponent (e.g. the sales figures of item 1 of the sending of 20/11/2016), although the evidence submitted by the opponent is not particularly exhaustive, it does reach the minimum level necessary to establish genuine use of the earlier trade mark during the relevant period in the relevant territory. Therefore, the Opposition Division considers that the opponent has provided sufficient indications concerning the extent of the use of the earlier mark in relation to a series of retail services. Indeed, most of the evidence refers to the mark in relation to these services (e.g. the Wikipedia extract of item 4 of the sending of 11/11/2016 and most of the articles provided to substantiate the claim of enhanced distinctiveness of the mark). Moreover, in item 2



of the sending of 20/11/2016, the mark appears on the packaging of stationery products not as the main mark of said goods but in smaller dimensions, as the mark of the retailer of the products at issue.

Therefore, the evidence filed by the opponent does not show genuine use of the trade mark for all the services covered by the earlier trade mark in Class 35.

In the present case, the Opposition Division considers that the evidence does prove use only for *retail services of electronic and digital publications, paper, cardboard and goods made from these materials, printed matter, stationery, clothing, footwear, headgear, footwear accessories, foodstuffs, food and beverage cooking, heating, cooling and treatment equipment, alcoholic and non-alcoholic beverages, electric and electronic goods, lighting, cleaning articles and equipment, cleaning preparations, hygienic preparations and articles, fragrances for household purposes, parasols, luggage, bags and other carriers, artists' materials, gardening articles and equipment, horticulture equipment, horticulture products, furniture and furnishings, flowers, decorative articles, candles, protective and safety equipment, information technology and audio-visual equipment and their accessories, coverings for furniture, linen, sporting articles and equipment, beauty products, toiletries, medical preparations and articles, hygienic and beauty implements, cosmetic and toilet utensils, floor and ground coverings, cookware and containers, vehicle parts and accessories, foodstuffs and articles for animals, optical goods, personal heating and drying implements, bags and articles for packaging, wrapping and storage, heating and air treatment equipment, instruments for accumulating and storing electricity, adhesives for stationery or household purposes, machines for garden and household use, accessories for machines for household and garden use, tools, time instruments, measuring instruments, optical devices, small items of metal hardware* in Class 35.

The genuine use was not, indeed, demonstrated in relation to the other services of Class 35 (essentially promotional and business support services), since the only references to said services were contained in two of the affidavits provided and said declarations were not supported by further documentation.

#### **Services in Classes 38, 40, 41 ad 42 of international registration designating the European Union No 870 876**

None of the evidence filed by the opponent concerns the services in Classes 40 or 42, covered by the earlier international registration designating the European Union No 870 876. Since the opponent did not furnish any evidence concerning the use of the earlier trade mark for services in any of these classes and did not argue that there were proper reasons for non-use either, the opposition must clearly be rejected insofar as it is based on this earlier mark in Classes 40 and 42.

The services in Class 38 are referred to only in some of the brochures provided (e.g. in Item 2 of the sending of 11/11/2016), a few undated screenshots (e.g. item 3 of the sending of 11/11/2016) and the Wikipedia.org page marked as item 4 of the sending of 11/12/2016. For instance:

**Zubehör**

**ALDI TALK**

Bleiben Sie in Verbindung!

**Wer günstig spricht - spricht ALDI!**

**Verbindungsmöglichkeiten:**

- Nokia 2-mm-Ladeanschluss
- Bluetooth Spezifikation 2.1 mit EDR
- Aufladen des Mobiltelefons über USB mit dem Computer möglich
- 3,5-mm-Klinkenbuchse mit Zusatzfunktionen

**Anwendungen:**

- Taschenrechner • Organizer-Funktionen
- Weltzeituhr, Stoppuhr, Countdown-Funktion
- Internetsuche • Opera Mini-Browser
- Ovi Store, Windows Live Messenger (früher Ovi Store)
- Unterstützung für den Nokia Messaging Dienst
- Flickr • Facebook (über Ovi Store)

**E-Mail und Instant Messaging:**

- E-Mail-Client: Unterstützung für den Nokia Messaging Dienst
- gemeinsamer SMS/MMS-Editor
- Instant Messaging (über Ovi Chat-Funktionen)

**Für Notebooks:**

Entscheiden Sie sich für eine der ALDI TALK Internet-Flatrate-Optionen!

**Für Handys und Smartphones:**

Das mobile Internet im Taschenformat. Entdecken Sie die Vorteile der ALDI TALK App - jetzt auch für iPhone und iPad!

**Weltweit bestens verbunden!**  
Einfach günstig international in Verbindung.

In über 90 Ländern aktiv telefonieren und in mehr als 125 Ländern mobil erreichbar! Informationen zu den ALDI TALK Auslandstarifen - und natürlich den Basistarifen - finden Sie unter

However, there is no information about the amounts actually sold during the period or about the circulation of the opponent's catalogues and said information cannot be inferred from any other document provided (as it was possible for retail services). The evidence provided comes from the opponent or has a circumstantial nature. Such indirect evidence can play a decisive role in the overall assessment of the evidence submitted, but only if an overall assessment of all the evidence is possible. In the present case, although the evidence submitted refers to the relevant territory and does show the use of the mark as registered and by the opponent, without the support of further evidence to be read in conjunction, said documentation does not give sufficient information on the extent of use of the earlier mark in the market for any of the services in Class 38.

Concerning the services in Class 41, the affidavit under item B0 provides certain indications as to the extent of use of the earlier mark, as it refers to educational services provided since 2012 in cooperation with several universities, training and education provided by the opponent for decades, printing costs for and the numbers of issues circulated of different recruitment materials for the years 2013-2016 (therefore, partly outside but very close to the relevant period). In addition, it also refers to recruitment documents, such as job advertisements and advertisements concerning education. Nonetheless, as explained above, this information is provided by the opponent, so its probative value depends on the strength of the further material submitted.

In view of this, it is necessary to assess the additional evidence to see whether or not the statements made in the affidavit are sufficiently supported by the other evidence.

The documents submitted in Item B1 give some information about Aldi study programmes given at ESB Business School and exclusively offered to Aldi employees since 2012, in addition to evidence regarding a lecture hall called 'Lecture

Hall Aldi South' having been inaugurated at a university in Germany in 2016. However, these documents do not provide any information concerning the number of students attending these study programmes during the relevant time period, the costs for taking said programmes or any fees actually paid for the services provided. Furthermore, apart from being outside the relevant time period, the fact that a lecture hall at a German university is called 'Lecture Hall Aldi South' does not constitute use of the earlier mark in relation to the provision of educational services, or any other of the services concerned in Class 41.

Items B2 and B3 display documents that come from the opponent's Human Resources department concerning seminars, education and qualification programmes for employees. The condition of genuine use of a mark requires that the mark be used publicly and outwardly with a view to create or preserve an outlet for the relevant goods or services in the market. It follows that internal, on the job training or education within a company does not constitute genuine use of a mark for training or educational services.

As regards to the documents submitted in Items B4-B10, most of them concern employment offers and therefore bear no relevance to the issue of proving that the earlier mark has been used to provide services in Class 41. In addition, the first brochure is undated and the second is dated July 2014 and is thus outside the relevant time period. Furthermore, they do not give sufficient information as to the nature of the services concerned, or any information concerning the commercial volume of any services provided, if at all.

Finally, the printing costs and circulation figures indicated in the affidavit, apart from being described as concerning recruitment materials, are not supported by any factual evidence.

According to well-established case-law, genuine use of a trade mark cannot be proved by means of probabilities or suppositions, but must be demonstrated by solid and objective evidence of effective and sufficient use of the trade mark on the market concerned (12/12/2002, T-39/01, HIWATT, EU:T:2002:316, § 47; 06/10/2004, T-356/02, VITAKRAFT, EU:T:2004:292, § 28).

The opponent did not submit any invoices for any services provided or any documents to prove the enrolment of any of the 295 students to the study programmes concerned, as alleged in the affidavit, or evidence to prove any costs or circulation, frequency and duration of any advertising of the services concerned publicly and outwardly.

Therefore, although the evidence submitted refers to the relevant territory, and, at least to some extent, concerns the relevant time period, the affidavit and the additional material submitted cannot be considered sufficient to establish the extent of use of the earlier mark in the market for any of the services Class 41.

Finally, as regards to the evidence submitted to substantiate the claim of enhanced distinctiveness through use, it only relates to the well-known character of the earlier mark in relation to retail services (Class 35) and to the opponent as a retail company. Therefore, this evidence does not assist to establish that the earlier mark under examination has been used for any of the services concerned in Classes 38, 40, 41 or 42.

In view of all the above and an overall assessment of the evidence submitted, in the absence of further supporting material, the opponent cannot be deemed to have

proven, to the required legal standard, the extent of the use of the international registration designating the European Union No 870 876 for any services in Class 41 and no evidence was submitted concerning the services in Classes 38, 40 or 42.

**Goods in Classes 3, 4, 7, 9, 16, 24, 25, 29, 30, 31, 32, 33, 34 and services in class 36 of European Union trade mark registration No 2 071 728**

As the evidence provided exclusively regards retail services, the Opposition Division cannot consider that the genuine use of the abovementioned goods and services has not been proven, since none of the evidence consists or regards the manufacture of goods. Moreover, the services covered by European Union trade mark registration No 2 071 728 do not regard the retail of goods (e.g. financial services).

**Conclusion**

The methods and means of proving genuine use of a mark are unlimited. The above finding that genuine use has not been proven in the present case is due, not to an excessively high standard of proof, but to the fact that the opponent chose to restrict the evidence submitted (15/09/2011, T-427/09, Centrotherm, EU:T:2011:480, § 46).

The Opposition Division concludes that the evidence furnished by the opponent is insufficient to prove that the earlier trade mark was genuinely used in the relevant territory during the relevant period of time for some of the Classes of goods and services covered by the earlier marks.

Therefore, the opposition must be rejected pursuant to Article 47(2) EUTMR and Article 10(2) EUTMDR (former Rule 22(2) EUTMIR, in force before 01/10/2017) insofar is based on:

- international registration designating the European Union No 870 876 is insufficient as a whole to establish use of the mark for some of the services in Class 35 and the services in Classes 38, 40, 41 and 42,
- European Union trade mark registration No 2 071 728 for all Classes.

As mentioned above, the Opposition Division considers that the evidence proves use of international registration designating the European Union No 870 876 for *retail services of electronic and digital publications, paper, cardboard and goods made from these materials, printed matter, stationery, clothing, footwear, headgear, footwear accessories, foodstuffs, food and beverage cooking, heating, cooling and treatment equipment, alcoholic and non-alcoholic beverages, electric and electronic goods, lighting, cleaning articles and equipment, cleaning preparations, hygienic preparations and articles, fragrances for household purposes, parasols, luggage, bags and other carriers, artists' materials, gardening articles and equipment, horticulture equipment, horticulture products, furniture and furnishings, flowers, decorative articles, candles, protective and safety equipment, information technology and audio-visual equipment and their accessories, coverings for furniture, linen, sporting articles and equipment, beauty products, toiletries, medical preparations and articles, hygienic and beauty implements, cosmetic and toilet utensils, floor and ground coverings, cookware and containers, vehicle parts and accessories, foodstuffs and articles for animals, optical goods, personal heating and drying implements, bags and articles for packaging, wrapping and storage, heating and air treatment equipment, instruments for accumulating and storing electricity, adhesives for stationery or household purposes, machines for garden and household use, accessories for machines for household and garden use, tools, time instruments, measuring instruments, optical devices, small items of metal hardware* in Class 35.

**LIKELIHOOD OF CONFUSION — ARTICLE 8(1)(b) EUTMR**

A likelihood of confusion exists if there is a risk that the public might believe that the goods or services in question, under the assumption that they bear the marks in question, come from the same undertaking or, as the case may be, from economically linked undertakings. Whether a likelihood of confusion exists depends on the appreciation in a global assessment of several factors, which are interdependent. These factors include the similarity of the signs, the similarity of the goods and services, the distinctiveness of the earlier mark, the distinctive and dominant elements of the conflicting signs, and the relevant public.

**a) The goods and services**

The goods and services on which the opposition is based are the following:

**1) International registration designating the European Union No 870 876**

*Class 35: Retail services of electronic and digital publications, paper, cardboard and goods made from these materials, printed matter, stationery, clothing, footwear, headgear, footwear accessories, foodstuffs, food and beverage cooking, heating, cooling and treatment equipment, alcoholic and non-alcoholic beverages, electric and electronic goods, lighting, cleaning articles and equipment, cleaning preparations, hygienic preparations and articles, fragrances for household purposes, parasols, luggage, bags and other carriers, printed matter, disposable paper products, artists' materials, gardening articles and equipment, horticulture equipment, horticulture products, furniture and furnishings, flowers, decorative articles, candles, protective and safety equipment, information technology and audio-visual equipment and their accessories, coverings for furniture, linen, sporting articles and equipment, beauty products, toiletries, medical preparations and articles, hygienic and beauty implements, cosmetic and toilet utensils, floor and ground coverings, cookware and containers, vehicle parts and accessories, foodstuffs and articles for animals, optical goods, personal heating and drying implements, bags and articles for packaging, wrapping and storage, heating and air treatment equipment, instruments for accumulating and storing electricity, adhesives for stationery or household purposes, stationery, machines for garden and household use, accessories for machines for household and garden use, tools, time instruments, measuring instruments, optical devices, small items of metal hardware.*

**2) European Union trade mark registration No 6 870 943**

*Class 7: Machines and machine tools; motors and engines (except for land vehicles); machine coupling and transmission components (except for land vehicles); agricultural implements other than hand-operated; incubators for eggs; other than packaging machines for foodstuffs and other goods and accessories therefor.*

*Class 9: Scientific, nautical, surveying, photographic, cinematographic, optical, weighing, measuring, signalling, checking (supervision), life-saving and teaching apparatus and instruments; apparatus and instruments for conducting, switching, transforming, accumulating, regulating or controlling electricity; apparatus for recording, transmission or reproduction of sound or images; magnetic data carriers, recording discs; automatic vending machines and mechanisms for coin-operated*

*apparatus; cash registers, calculating machines, data processing equipment and computers; fire-extinguishing apparatus.*

*Class 28: Games and playthings; gymnastic and sporting articles not included in other classes; decorations for Christmas trees.*

The contested goods and services are the following:

*Class 9: Magnetic, optical and electronic sound, image and other data carriers in disc, card, tape or other form, including videotapes, CDs, CD-ROMs, CD-Is, CD-videos, Digital Video Discs, DCCs, mini-discs, CD-Rs, CD-RWs, DATs, floppy disks, hard disks, chips and computer programs (software), blank or containing audio, video, data, programs or information; computer software (recorded); electronic and electrotechnical devices, instruments and articles for recording, transmission or reproduction of sound, images, data, programs or information; computer software; computer programs for accessing computer networks and global communications networks; data carriers in the form of cards, in particular sim cards, identity cards, credit and charge cards, as well as combinations thereof, including for (mobile) telecommunications; sunglasses; electronic and digital publications, on data carriers or otherwise; the aforesaid goods solely in the context of music-and dance events, and the organisation thereof, included in this class.*

*Class 16: Paper, cardboard and goods made from these materials, not included in other classes; printed matter, including books, newspapers, magazines, brochures and other periodicals; diaries, calendars, photographs, posters, flyers, leaflets, stickers, notepads, note books, pencils, pens, pen trays, pen cases and other such school and office requisites, not included in other classes; instructional and teaching material (except apparatus); books, newspapers and magazines and other printed matter; the aforesaid goods solely in the context of music and dance events.*

*Class 35: Advertising; business management; business administration; office functions; business mediation in the purchase and sale and import and export of apparatus and instruments for conducting, switching, transforming, accumulating, regulating or controlling electricity, apparatus for recording, transmission or reproduction of sound or images, magnetic, optical and electronic carriers of sound, images and other data, in the form of discs, cards, tapes or in another form, including phonograph records, video tapes, CDs, CD-ROMs, CD-Is, CD videos, Digital Video Discs, DCCs, CD-Rs, DATs, computer floppy disks, hard disks, chips, computers, computer programs (software), electronic publications (downloadable or on carriers), digital image and/or sound files downloadable via the internet, data carriers (in card form), including for identification, credit, saving and payment purposes, including club cards, membership cards, discount, advantage, payment and saving cards for use by club members, customer cards and discount cards with a magnetic strip, clothing, footwear, headgear; organisation of events for commercial purposes; advertising for the purposes of promoting events; compilation and management of online databases and searchable online databases; information and consultancy relating to the aforesaid services; all the aforesaid services whether or not provided via electronic channels, including the internet; the aforesaid services solely in the context of music and dance events, and the organisation thereof, included in this class.*

*Class 41: Education and entertainment; composition, production, arranging and performing of concerts, tours, music and dance performances and other entertainment; production, compilation and direction of films and radio and television programmes, whether or not with the help of interactive techniques and methods; presentation of music and amusement programmes, also via radio and television;*

*organising trade shows and exhibitions for cultural and educational purposes; publication, lending and dissemination of newsletter, books, newspapers, magazines, guides, programme listings and other publications; providing educational and cultural (entertainment) information via websites; performing arts, including providing musical and dance performances; providing online video and/or audio recordings in the field of entertainment; production of audio and/or video recordings (audiovisual production); production and compiling of music; mediation between artists (services of an impresario); recording of sound on carriers; arranging of club evenings; booking of artists for concerts, tours, theatre productions, sports competitions and other entertainment; information and consultancy relating to the aforesaid services; all the aforesaid services whether or not provided via electronic channels, including the internet; the aforesaid services solely in the context of music and dance events, and the organisation thereof, included in this class.*

The relevant factors relating to the comparison of the goods or services include, inter alia, the nature and purpose of the goods or services, the distribution channels, the sales outlets, the producers, the method of use and whether they are in competition with each other or complementary to each other.

An interpretation of the wording of the list of goods is required to determine the scope of protection of these goods.

The term 'including', used in the applicant's list of goods in Class 9, indicates that the specific goods are only examples of items included in the category and that protection is not restricted to them. In other words, it introduces a non-exhaustive list of examples (09/04/2003, T-224/01, Nu-Tride, EU:T:2003:107).

### **Contested goods in Class 9**

The contested *sunglasses* are included in the broad category of the opponent's *optical apparatus and instruments*. Therefore, they are identical.

The contested *magnetic, optical and electronic sound, image and other data carriers in disc, card, tape or other form, including videotapes, CDs, CD-ROMs, CD-Is, CD-videos, Digital Video Discs, DCCs, mini-discs, CD-Rs, CD-RWs, DATs, floppy disks, hard disks, chips; data carriers in the form of cards, in particular sim cards, identity cards, credit and charge cards, as well as combinations thereof, including for (mobile) telecommunications; the aforesaid goods solely in the context of music-and dance events, and the organisation thereof, included in this class* are devices whose application is to carry images, sounds and other data using different technologies. They are at least similar to the opponent's *magnetic data carriers, recording discs*, since they include or overlap with said goods or because they have a similar nature and purpose (i.e. carrying contents), target the same public, can be found in the same distribution channels (typically electronics stores) and are produced by the same undertakings.

The contested *electronic and electrotechnical devices, instruments and articles for recording, transmission or reproduction of sound, images, data, programs or information; the aforesaid goods solely in the context of music-and dance events, and the organisation thereof, included in this class* are at least similar to the opponent's *apparatus for recording, transmission or reproduction of sound or images*, since they include or overlap with said goods or because they have a similar nature, target the same public, can be found in the same distribution channels (typically electronics stores) and are produced by the same undertakings.

The contested *computer programs (software), blank or containing audio, video, data, programs or information; computer software (recorded); computer software; computer programs for accessing computer networks and global communications networks; the aforesaid goods solely in the context of music-and dance events, and the organisation thereof, included in this class* are parts of computer systems that consist of data and/or computer instructions. These goods are similar to the opponent's *computers*, as they can coincide in producer, end users and distribution channels. Furthermore they are complementary.

Retail services concerning the sale of particular goods are similar to a low degree to those particular goods. Although the nature, purpose and method of use of these goods and services are not the same, they have some similarities, as they are complementary and the services are generally offered in the same places where the goods are offered for sale. Furthermore, they target the same public.

Therefore, the contested *electronic and digital publications, on data carriers or otherwise; the aforesaid goods solely in the context of music-and dance events, and the organisation thereof, included in this class* are similar to a low degree to the opponent's *retail services of electronic and digital publications*.

### **Contested goods in Class 16**

Retail services concerning the sale of particular goods are similar to a low degree to those particular goods. Although the nature, purpose and method of use of these goods and services are not the same, they have some similarities, as they are complementary and the services are generally offered in the same places where the goods are offered for sale. Furthermore, they target the same public.

Therefore, the contested *paper, cardboard and goods made from these materials, not included in other classes; printed matter, including books, newspapers, magazines, brochures and other periodicals; diaries, calendars, photographs, posters, flyers, leaflets, stickers, notepads, note books, pencils, pens, pen trays, pen cases and other such school and office requisites, not included in other classes; instructional and teaching material (except apparatus); books, newspapers and magazines and other printed matter; the aforesaid goods solely in the context of music and dance events* are similar to a low degree to the opponent's *retail services of electronic and digital publications, paper, cardboard and goods made from these materials, printed matter, stationery*.

### **Contested services in Class 35**

The contested services in Class 35 essentially consist of promotional and business support services, as well as information services related to said services. These services are dissimilar from the opponent's goods and services in Classes 35 for the earlier mark (1) and 7, 9 and 28 for earlier mark (2). Indeed the opponent's goods and services, for earlier mark (1), are retail services and, for earlier mark (2), are machines and vehicles to be used in the agricultural sector, scientific, measurement, optical and electronic items, as well as playthings and gymnastic articles. These goods and services differ in their nature, purpose, targeted consumers, distribution channels and producers/providers. Furthermore, they are not complementary in competition with each other.

In particular, the contested promotional services consist of providing others with assistance in the sale of their goods and services by promoting their launch and/or sale, or of reinforcing a client's position in the market and acquiring competitive



advantage through publicity. They are fundamentally different in nature and purpose from the manufacture of goods and their selling. The contested services originate from specialised agencies which are not involved in the manufacture of goods or in their direct retailing. In particular, the fact that the opponent's goods covered by earlier mark (2) do appear in advertisements is insufficient for finding similarity.

The abovementioned business support services are rendered by specialised business management consultants or agencies. The mere fact that the manufacturer of the opponent's goods covered by earlier mark (2) may require assistance in business management is not a relevant factor for finding similarity, in view of the vast differences in the natures, purposes, usual origins and distribution channels of the goods and services at issue. Moreover, the mentioned specialised agencies/service providers are not typically involved in the actual selling of goods like the opponent's services in Class 35 covered by earlier mark (1). The contested services are directed at commercial or industrial undertakings that may operate in the retail sector, but that does not lead to a finding of similarity. The natures and purposes of these goods and services differ. In addition, the distribution channels are different, as are the relevant consumer circles. There is no complementarity or interchangeability between these goods and services either.

#### **Contested services in Class 41**

The contested services in Class 41 consist of entertainment, educational, production and publishing services. They are dissimilar to the opponent's goods and services as defined above. In fact, the natures and purposes of these goods and services differ, the distribution channels are different, as are the relevant consumer circles. Moreover, there is no complementarity or interchangeability between these goods and services.

#### **b) Relevant public — degree of attention**

The average consumer of the category of products concerned is deemed to be reasonably well informed and reasonably observant and circumspect. It should also be borne in mind that the average consumer's degree of attention is likely to vary according to the category of goods or services in question.

In the present case, the goods and services found to be identical or similar are directed at the public at large. The degree of attention is average.

#### **c) The signs**

ALDI



Earlier trade marks

Contested sign

The relevant territory is the European Union.

The global appreciation of the visual, aural or conceptual similarity of the marks in question must be based on the overall impression given by the marks, bearing in mind, in particular, their distinctive and dominant components (11/11/1997, C-251/95, Sabèl, EU:C:1997:528, § 23).

The unitary character of the European Union trade mark means that an earlier European Union trade mark can be relied on in opposition proceedings against any application for registration of a European Union trade mark that would adversely affect the protection of the first mark, even if only in relation to the perception of consumers in part of the European Union (18/09/2008, C-514/06 P, Armafoam, EU:C:2008:511, § 57). Therefore, a likelihood of confusion for only part of the relevant public of the European Union is sufficient to reject the contested application.

The verbal elements of the contested sign, 'EVENTS' will be understood in some territories, for example by the English-speaking part of the public. The Opposition Division will proceed with the evaluation of the decision on this basis, that is, in relation to the abovementioned part of public.

The earlier marks are the word marks 'ALDI', which have no meaning for the relevant public and are, therefore, distinctive.

Due to their verbal nature, the marks have no elements that could be considered clearly more dominant (visually eye-catching) than other elements.

The contested sign is a figurative mark that includes the meaningless, thus distinctive, word 'ALDA' in slightly stylised, bold upper case letters. Given its dimensions and central position, this is the dominant, therefore most relevant, element of the mark.

The mark also includes the word 'EVENTS' in smaller upper case white characters that has no distinctive character, since it indicates the context in which the relevant goods are sold, namely organized occasions like social gatherings, competitions or shows. Due to its meaning and dimensions, this element has less relevance than the other dominant and distinctive elements of the mark.

The abovementioned elements of the mark are depicted on a dark grey background, which will be seen as a mere carrier of the verbal elements of the mark. Consequently, said element has no distinctive character and limited significance in the present comparison.

In any case, when signs consist of both verbal and figurative components, in principle, the verbal component of the sign usually has a stronger impact on the consumer than the figurative component. This is because the public does not tend to analyse signs and will more easily refer to the signs in question by their verbal element than by describing their figurative elements (14/07/2005, T-312/03, Selenium-Ace, EU:T:2005:289, § 37). Consequently, the figurative element mentioned above and the stylisation of the contested sign have limited impact in the present assessment.

Consumers generally tend to focus on the beginning of a sign when they encounter a trade mark. This is because the public reads from left to right, which makes the part placed at the left of the sign (the initial part) the one that first catches the attention of the reader. Therefore, the differences in the final letters of the earlier mark and of the dominant element of the contested sign have less significance than the commonalities in their initial parts.

**Visually**, the signs coincide in the letters 'ALD\*' of the only element of the earlier marks and of the dominant and distinctive element of the contested sign. The marks differ in the final letters of said elements, namely the 'I' of the earlier marks and the 'A' of the contested sign. However, said difference is placed where consumers do not tend to focus their attention for the reasons seen above. In view of the foregoing and given that the marks differ in other elements of limited significance (e.g. the non-distinctive and non-dominant word 'EVENTS' and the non-distinctive dark grey background), the marks are visually similar to an average degree.

**Aurally**, the pronunciation of the signs coincides in the sound of the letters 'ALD\*' of the only element of the earlier marks and of the dominant element of the contested sign. They differ in their final letters, which are placed where consumers do not tend to focus their attention. Considering its non-distinctive character and substantially smaller dimensions, the element 'EVENTS' will most probably not be pronounced by the relevant public. Therefore, the signs are aurally highly similar.

**Conceptually**, the public in the relevant territory will perceive the meaning of the element of the contested sign 'EVENTS' as explained above, nonetheless, this is not sufficient to validly establish any conceptual dissimilarity, as this element is non-distinctive and cannot indicate the commercial origin. The attention of the relevant public will be drawn to the additional, meaningless, distinctive verbal elements of the marks. Since a conceptual comparison is not possible, the conceptual aspect does not influence the assessment of the similarity of the signs.

As the signs have been found similar in at least one aspect of the comparison, the examination of likelihood of confusion will proceed.

#### **d) Distinctiveness of the earlier mark**

The distinctiveness of the earlier mark is one of the factors to be taken into account in the global assessment of likelihood of confusion.

According to the opponent, the earlier mark has been extensively used and enjoys an enhanced scope of protection. However, for reasons of procedural economy, the evidence filed by the opponent to prove this claim does not have to be assessed in the present case (see below in 'Global assessment').

Consequently, the assessment of the distinctiveness of the earlier mark will rest on its distinctiveness per se. In the present case, the earlier trade mark as a whole has no meaning for any of the goods in question from the perspective of the public in the relevant territory. Therefore, the distinctiveness of the earlier mark must be seen as normal.

#### **e) Global assessment, other arguments and conclusion**

The goods and services covered by the trade marks in dispute are partly identical, partly similar to various degrees and partly dissimilar. They target the public at large, whose degree of attention is considered average. Furthermore, the earlier mark enjoys a normal degree of distinctiveness.

The signs are visually similar to an average degree and aurally highly similar because they coincide in the string of letters 'ALD\*', which constitutes three out of

four letters of the only element of the earlier marks and of the dominant and distinctive element of the contested sign.

The differences between the signs are confined to aspects that either may easily go unnoticed or have a limited impact on the overall impression of the sign concerned, namely the letter 'l' at the end of the earlier mark and the final letter 'A' of the contested sign (placed where consumers do not tend to focus their attention), the non-distinctive and ancillary element 'EVENTS' of the contested signs and the figurative elements of the latter, which are either secondary (i.e. the stylisation of the word element) or non-distinctive (i.e. the dark grey background).

Account must be taken of the fact that average consumers rarely have the chance to make a direct comparison between different marks, but must trust in their imperfect recollection of them (22/06/1999, C-342/97, Lloyd Schuhfabrik, EU:C:1999:323, § 26).

Evaluating likelihood of confusion implies some interdependence between the relevant factors and, in particular, a similarity between the marks and between the goods or services. Therefore, a lesser degree of similarity between goods and services may be offset by a greater degree of similarity between the marks and vice versa (29/09/1998, C-39/97, Canon, EU:C:1998:442, § 17). In the present case, the commonalities between the marks are sufficient to outweigh the low level of similarity among some of the goods and services.

Likelihood of confusion covers situations where the consumer directly confuses the trade marks themselves, or where the consumer makes a connection between the conflicting signs and assumes that the goods/services covered are from the same or economically linked undertakings. Indeed, it is highly conceivable that the relevant consumer will perceive the contested mark as a sub-brand, a variation of the earlier mark, configured in a different way according to the type of goods or services that it designates (23/10/2002, T-104/01, Fifties, EU:T:2002:262, § 49).

Considering all the above, the Opposition Division finds that there is a likelihood of confusion on the part of the English-speaking part of the public and therefore the opposition is partly well founded on the basis of the opponent's International registration designating the European Union No 870 876 and European Union trade mark registration No 2 071 728.

It follows from the above that the contested trade mark must be rejected for the goods found to be identical or similar to those of the earlier trade mark.

The rest of the contested services are dissimilar. As similarity of goods and services is a necessary condition for the application of Article 8(1) EUTMR, the opposition based on this Article and directed at these services cannot be successful.

Since the opposition is partially successful on the basis of the inherent distinctiveness of the earlier marks, there is no need to assess the enhanced degree of distinctiveness of the opposing marks due to their reputation as claimed by the opponent and in relation to identical and similar goods and services. The result would be the same even if the earlier marks enjoyed an enhanced degree of distinctiveness.

Likewise, there is no need to assess the claimed enhanced degree of distinctiveness of the opposing marks in relation to dissimilar services, as the similarity of goods and

services is a *sine qua non* for there to be likelihood of confusion. The result would be the same even if the earlier marks enjoyed an enhanced degree of distinctiveness.

## **COSTS**

According to Article 109(1) EUTMR, the losing party in opposition proceedings must bear the fees and costs incurred by the other party. According to Article 109(3) EUTMR, where each party succeeds on some heads and fails on others, or if reasons of equity so dictate, the Opposition Division will decide a different apportionment of costs.

Since the opposition is successful for only some of the contested goods, both parties have succeeded on some heads and failed on others. Consequently, each party has to bear its own costs.



### **The Opposition Division**

Andrea VALISA

Orsola LAMBERTI

Birgit Holst  
FILTENBORG

According to Article 67 EUTMR, any party adversely affected by this decision has a right to appeal against this decision. According to Article 68 EUTMR, notice of appeal must be filed in writing at the Office within two months of the date of notification of this decision. It must be filed in the language of the proceedings in which the decision subject to appeal was taken. Furthermore, a written statement of the grounds for appeal must be filed within four months of the same date. The notice of appeal will be deemed to have been filed only when the appeal fee of EUR 720 has been paid.