DECISION
of the Fifth Board of Appeal
of 29 June 2026

In case R 2098/2025-5

Alfasan Nederland B.V.
Kuipersweg 9
3449 JA Woerden
Netherlands Applicant / Appellant

represented by De Merkplaats B.V., Herengracht 227, 1016 BG Amsterdam, Netherlands

v

metaX Institut für Diätetik GmbH
Am Strassbach 5
61169 Friedberg
Germany Opponent / Defendant

represented by Maiwald GmbH, Elisenhof, Elisenstr. 3, 80335 München, Germany

APPEAL relating to Opposition Proceedings No B 3 208 317 (European Union trade mark application No 18 917 466)

THE FIFTH BOARD OF APPEAL

composed of V. Melgar (Chairperson), A. Pohlmann (Rapporteur) and Ph. von Kapff (Member)

Registrar: K. Zajfert

gives the following

Decision

Summary of the facts

1 By an application filed on 24 August 2023, Alfasan Nederland B.V. (‘the applicant’) sought to register the word mark

METAXX

as a European Union trade mark (the ‘EUTM’) for goods and services in Classes 5 and 35, which were last limited on 18 February 2025 as follows:

Class 5: *Veterinary medicines for cattle, pigs, dogs, cats, horses and guinea pigs for the treatment of pain and inflammations.*

2 The application was published on 15 September 2023.

3 On 11 December 2023, metaX Institut für Diätetik GmbH (‘the opponent’) filed an opposition against the registration of the published trade mark application for all the goods and services applied for. The opposition was based on the following grounds and earlier rights:

a) EUTM registration No 17 634 916 

(hereinafter ‘the earlier mark’), filed on 22 December 2017 and registered on 13 June 2018 for goods and services in Classes 5, 41, 42 and 44, inter alia, the following:

Class 5: *Amino acids and amino acid mixtures for medical purposes; dietetic substances, including food, foodstuffs, dietary supplements, substances and beverages adapted for medical use; albuminous preparations for medical purposes; tonics and reconstituents for medical purposes; vitamin preparations; dietary supplements based on carbohydrates and/or vitamins and/or minerals and/or trace elements; starch for dietetic purposes; flavours and flavourings for medical purposes; glucose for medical purposes; foods for special medical purposes.*

Class 41: *Lectures in diet schools, providing of further training for doctors, lectures for self-help groups, courses and seminars relating to health and nutrition; planning, arranging and moderation of meetings, congresses and seminars; editing, creation, design and publication of print templates, books, handbooks (manuals), newspapers, periodicals, prospectuses and documentation, posters and photographs*.

Class 42: *Research services; development (for others); scientific research relating to rare diseases*.

Class 44: *Medical nutrition consultancy for consumers relating to medical nutrition matters of all kinds; medical care, healthcare, all in relation to rare diseases*.

In relation to this earlier right, Article 8(1)(b) EUTMR was invoked.

b) German company name '**MetaX Institut für Diätetik GmbH**' (hereinafter 'the earlier company name'), which was registered on 10 May 1999 in the Company Register B of the Local Court of Friedberg in relation to the following activities:

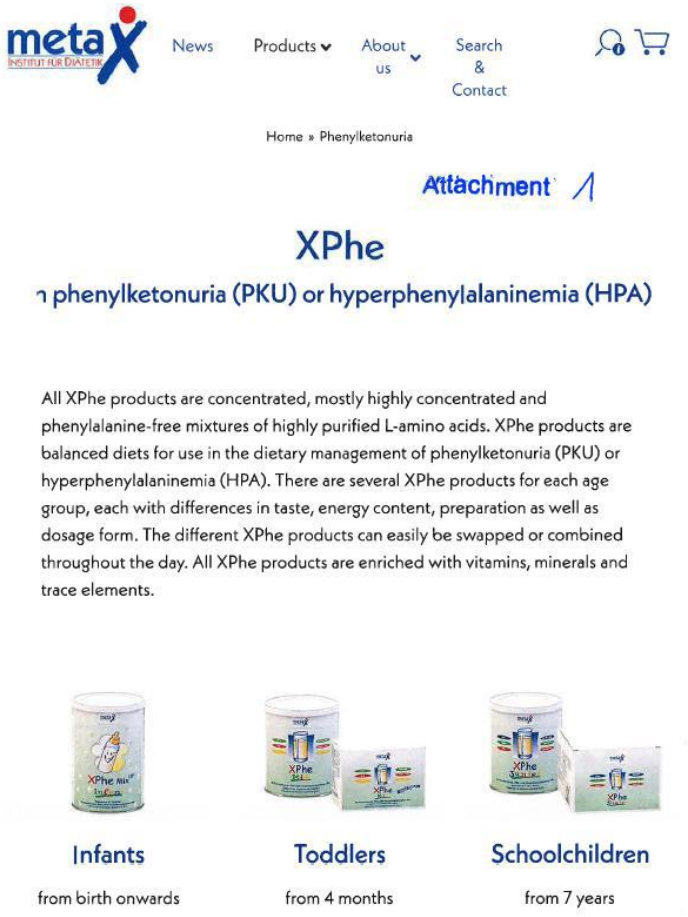
The development, production (contract manufacturer and copackers) and the distribution of dietetic foodstuffs, the distribution of diagnostics and the training of members of the medical professionals and their patients.

In relation to this earlier right, Article 8(4) EUTMR was invoked.

4 On 21 May 2024, the applicant filed a request for proof of use of the earlier EUTM No 17 634 916 pursuant to Article 47(2) EUTMR.

5 On 4 October 2024, within the extension of the deadline, the following evidence was submitted to establish the genuine use of the earlier mark for the goods invoked in the opposition.

Attachment 1: two pages of internet screenshots setting out a range of products of the opponent, as reproduced below:



The above products – under the product brand 'XPhe' but which feature nevertheless the earlier mark, inter alia, on the front of the product packaging/containers – are stated to be *concentrated, mostly highly concentrated and phenylalanine-free mixtures of highly purified L-amino acids. XPhe products are balanced diets for use in the dietary management of phenylketonuria (PKU) or hyperphenylalaninemia (HPA).*

Attachment 2: printouts from the opponent's website showing goods bearing the earlier mark.

Attachment 3: a table of sales achieved in Germany for the years 2018-2023 (inclusive), as reproduced below. While it features different product types, the largest sales relate to the goods category 'foods for special medical purposes; **amino acids and amino acid mixtures for medical purposes**; dietetic substances, including food, foodstuffs, dietary supplements, substances and beverages adapted for medical use' for which total sales in relation thereto increased from EUR 9.7 million in 2018 to EUR 14.49 million in 2023.

Opposition against EU trade mark METAXX No. 018783558 based on EU trade mark No. 017634916 (Maiwald sign: M11957EMOP/SUH)

Sales achieved in Germany in €

goods	on the market since	2018	2019	2020	2021	2022	2023
Foods for special medical purposes; amino acids and amino acid mixtures for medical purposes; dietetic substances, including food, foodstuffs, dietary supplements, substances and beverages adapted for medical use;	1999	9,7 Mio	10,7 Mio	11,7 Mio	12,2 Mio	14.2 Mio	14,49 Mio
Albuminous preparations for medical purposes	2014	95 T	103 T	114 T	168 T	193 T	314 T
Tonics and reconstituents for medical purposes;	2004	456 T	487 T	490 T	559 T	576 T	616 T
Vitamin preparations	1999	120 T	124 T	130 T	134 T	132 T	133 T
Dietary supplements based on carbohydrates and/or vitamins and/or minerals and/or trace elements;	1999	120 T	124 T	130 T	134 T	132 T	133 T
starch for dietetic or pharmaceutical purposes	2000	444 T	516 T	550 T	589 T	609 T	702 T
Flavours and flavourings for medical purposes;	1999	57 T	60 T	62 T	73 T	56 T	60 T
Glucose for medical purposes	1999	294 T	294 T	262 T	302 T	589 T	261 T

Attachment 4: a substantial number of invoices, most of which are dated within the relevant period and spanning each of the years 2018-2023 (inclusive). Although partially redacted for data protection purposes, they relate to customers in various addresses around Germany including addresses in Berlin, Hamburg and Essen. Various products are identified in the invoice description field but at least some of them refer to sales of the opponent's 'XPhe' product (the product container of which also bears the earlier mark as set out in Attachment 1 above), concerning substantial sales figures therefor. For example, the invoice dated 15/03/2019 to an address in Buchen (in Baden-Württemberg), concerns gross sales of EUR 10 318.00 of one of the opponent's XPhe branded products, while the invoice dated 22/05/2020 to an address in Bad Oeynhausen (in North Rhine-Westphalia), concerns gross sales of EUR 5 160.00 of one of the opponent's XPhe branded products.

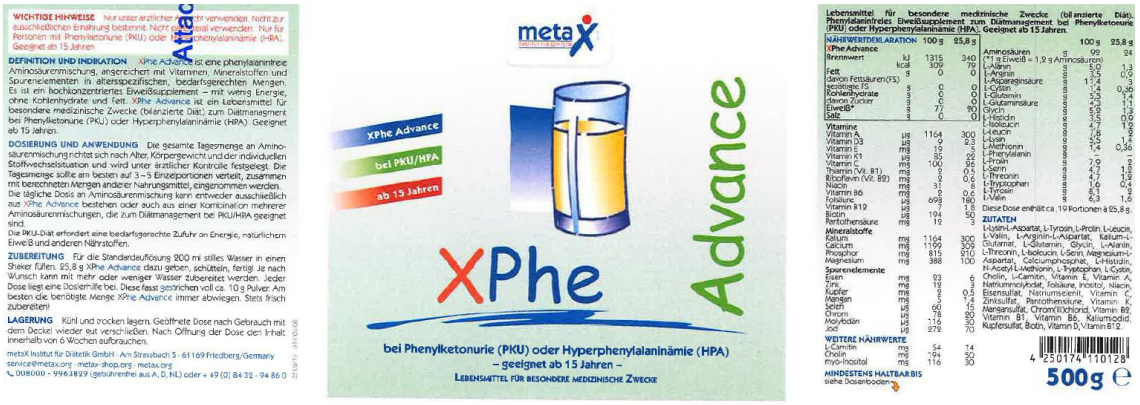
Attachment 5: sample invoices of sales to other customers inside the EU (e.g. the Czech Republic, Denmark, Italy, the Netherlands, Poland, Romania, Slovenia, Slovakia) and to the United Kingdom.

Attachment 6: a table of the percentage turnover of foreign markets of the opponent (i.e. outside Germany) – for example, 21.4 % of the opponent's turnover occurs in Denmark, albeit the year/period therefor is not provided.

Attachment 7: 56 pages of sample recipes (in German) as part of the opponent's medical nutrition consultancy and, in particular, using some of the opponent's branded products such as MaltoCal or EnergeaP, each bearing the earlier mark at various places throughout but not expressly featuring the opponent's Xphe product (the packaging/container of which bears the earlier mark as set out in **Attachment 1**).

Attachment 8: a product information sheet (in English) relating to the opponent's Xphe Kid, Junior, and Advance products, on the top and at the bottom of which appears the earlier mark. The bottom also bears the dates 23/10/2004 and 14/02/2005, which can reasonably be assumed to be the issue/publication date thereof.

Attachment 9: circa 12 pages of sample product labels bearing the earlier mark. For example, the first page – reproduced below – concerns the opponent's XPhe Advance product, clearly bearing the earlier mark, the label being in German. The label appears to bear a date mark (written vertically on the right-hand side of the left-hand part of the label but it is not legible, at least as regards the year in question). At least some of the other attached labels are dated within the relevant period (e.g. the label for the opponent's EnergeaP Kid product, which bears the date 23 June 2019):



6 In its observations, which accompany the evidence of genuine use, the opponent sets out the total number of invoices issued in the years 2018 to 2023 (inclusive) as follows:

The overall number of invoices issued in the last years can be stated as follows:

2023	38707
2022	39553
2021	41969
2020	37884
2019	34571
2018	32405

7 Therein, the opponent also sets out the number of its clients, including the number of private customers in Germany, the number of pharmacy customers in Germany, the number of German wholesale customers, and the number of German clinic customers, as follows:

The current number of the opponent's customers is:

Private customers Germany	20509
Private customers EU	1093
Private customers low protein	5378
‚Pharmacies Germany	13422
Pharmacies EU	916
Nutritionists	1207
Wholesaler incl. Pharmaceuticals Germany	132
Wholesaler incl. Pharmaceuticals EUR	27
Clinics Germany	2647
Clinics EU	175

8 In the observations filed by the opponent during the substantiation period, the opponent sets out its annual turnover in Germany for the business years 2019-2022 (inclusive), including the percentage of which relates to Germany, as follows:

Business year	Annual turnover	Germany	Germany	worldwide
2022	14.016.834 €	8.517.765 €	61%	39%
2021	12.150.811 €	7.616.548 €	63%	37%
2020	11.661.841 €	7.239.751 €	62%	38%
2019	10.683.534 €	6.719.176 €	63%	37%

9 On 13 January 2025, the applicant requested to limit the list of goods and services in Classes 5 and 35 initially applied for.

10 On 20 January 2025, the Office rejected this limitation.

11 On 28 January 2025, the applicant again requested to limit the list of goods and services.

12 On 11 February 2025, the Office rejected this limitation.

13 On 12 February 2025, the applicant submitted observations in which it requested the examiner to dismiss the opposition and register the application for the goods referred to in paragraph 1 above.

14 On 18 February 2025, the Office confirmed the limitation of the goods.

15 On 16 May 2025, the opponent informed the Office that it would maintain the opposition despite the limitation.

16 By decision of 22 September 2025 (‘the contested decision’), the Opposition Division totally upheld the opposition and rejected the trade mark applied for in its entirety on the grounds that there was a likelihood of confusion with the earlier EUTM. It gave, in particular, the following grounds for its decision.

– After several limitations of the goods and services of the contested mark, the remaining goods are the following:

Class 5: *Veterinary medicines for cattle, pigs, dogs, cats, horses and guinea pigs for the treatment of pain and inflammations.*

Proof of use

– The relevant period is from 24 August 2018 to 23 August 2023 inclusive.

– For the sake of procedural economy, the Opposition Division shall consider whether the opponent has demonstrated genuine use of the earlier mark in relation to the

protected goods *amino acids and amino acid mixtures for medical purposes* in Class 5 only.

- The opponent has duly demonstrated genuine use.

- The indications as to **time** and **place** (the assessment focusing on Germany) are clearly met. Proof of place is clear from, inter alia, the evidence in German, and the addresses in Germany. With respect to the indication of time, the majority of the sample invoices at Attachment 4 are dated within the relevant period and span each of the years in question (2018-2023 inclusive).

- **Extent of use**: the evidence includes information as to the total turnover by the opponent for the years spanning the relevant period, being circa EUR 14.5 million in 2023, including information as to total turnover in Germany for the years 2019-2022 (inclusive). In addition to providing details as to the number of private customers in Germany, the number of German pharmacy customers, the number of German wholesale customers, and the number of German clinic customers, the opponent provided details as to the total number of invoices issued for the years 2018-2023 (inclusive), which run to tens of thousands. Moreover, the evidence includes a significant number of sample sales invoices for Germany during the relevant period, which feature significant levels of sales of its XPhe product, which clearly and prominently displays the earlier mark (e.g. Attachment 1). The opponent has made, at least, a serious effort to commercially exploit its products bearing the earlier mark in Germany during the relevant period.

- **Nature of use**: the evidence shows that the earlier mark has been used in accordance with its function and as registered for the goods for which it is registered, including for the protected goods *amino acids and amino acid mixtures for medical purposes* in Class 5. This is clear from, inter alia, the website screenshots at Attachment 1, which clearly indicate prominent use of the earlier mark on the opponent's packaging/container for its XPhe range of products, which is corroborated by the product information sheet and sample product labels (Attachments 8 and 9).

- The full legal name of the opponent is 'Metax Institut Für Diätetik GmbH'. While the earlier mark appears on many of the items of evidence (e.g. the website screenshots, the recipes, or the product information sheet), wherein it could be regarded as being use thereof as a company name and/or as an indicator of trade origin, the evidence (e.g. the images at Attachment 1) indicates that the earlier mark has been used as an indicator of trade origin. In that regard, the applicant has not disputed either that the opponent has duly shown genuine use of the earlier mark or that such use includes use as a trade mark. Accordingly, irrespective of the fact that the earlier mark reflects the name of the company and that at least some of the evidence may be regarded as being a reference to that company name, it has been sufficiently used in order to indicate the trade origin of the opponent's goods, such as to satisfy the requirement as to nature of use thereof.

- Taking into account the evidence in its entirety, although the evidence submitted by the opponent is not particularly exhaustive, it does reach at least the minimum level necessary to establish genuine use of the earlier mark during the relevant period in Germany.

– Taking into account that Germany is the most populous Member State of the European Union, it is considered that use of the earlier mark in Germany duly amounts to genuine use in the EU territory.

– The evidence shows genuine use of the earlier mark at least for the following goods: *amino acids and amino acid mixtures for medical purposes* in Class 5. This is supported by the evidence submitted such as Attachment 1, wherein it is set out that the opponent's XPhe products (bearing the earlier mark) are concentrated mixtures of highly purified amino acids used for dietary purposes. Therefore, the Opposition Division will only consider the abovementioned goods in its further examination of the opposition.

Likelihood of confusion

– The contested goods are similar to the opponent's *amino acids and amino acid mixtures for medical purposes* as they have the same purpose. They usually coincide in producer, relevant public and distribution channels.

– The goods target the public at large and business customers with specific professional knowledge. The level of attention is likely to be above average having regard to the nature of the goods in question and to the possible consequences of such goods for human/animal health and/or well-being.

– The relevant territory is the European Union.

– Taking into account that the non-coinciding verbal elements of the earlier mark are meaningful in German, for the sake of procedural economy, the Opposition Division will focus on the significant part of the German-speaking part of the relevant public in the EU, such as in Germany and Austria, for which the main verbal element of the earlier mark is perceived as the meaningless verbal element 'metax'.

– The earlier mark will be perceived as comprising the meaningless verbal element 'metax', notwithstanding the stylisation and larger size of the letter 'x', having due regard in particular to the fact that all of the letters of this verbal element are in the same colour so that the relevant public will perceive it thus. This verbal element is distinctive to a normal degree for the goods in question. The red dot over the letter 'x' will be regarded as being a mere geometric shape and so will not play a material role in the overall perception of this mark.

– The German phrase 'Institut für Diätetik' means 'Institute for Dietetics' and as it merely refers to the nature or purpose of the producer/manufacturer of the goods in question it is non-distinctive – taking into consideration that 'dietetics' is the scientific study of food intake and preparation (information extracted from *Collins Dictionary* on 16/09/2025 at https://www.collinsdictionary.com/dictionary/english/dietetics).

– To the extent that the indication 'GmbH' – written vertically – is even noticed, it merely refers to the legal form of the opponent's corporate entity and so lacks distinctiveness. The thin horizontal lines either side of the phrase 'Institut für Diätetik' will be regarded as being mere decoration and so will not play a material role in the trade mark appreciation.

- The verbal element ‘metax’ is the dominant element of the earlier mark as it is the most visually outstanding part.

- The contested sign is the word ‘METAXX’, which lacks meaning and is distinctive for the relevant goods.

- **Visually** and **aurally**, the signs coincide in the letter string ‘metax’ (and sounds), differing in the additional letter ‘X’ of the contested sign (which does not cause any aural difference) and in the non-coinciding verbal and figurative/elements of the earlier mark, each of which is either non-distinctive or has less impact. Due to the small size, inferior position and lack of distinctiveness, the non-coinciding verbal elements are unlikely to be spoken by the consumer in normal usage.

- Also taking into account that the coincidence concerns the dominant element of the earlier mark, and that the coincidence comes at the beginning/top of the earlier mark and at the beginning of the contested sign, the signs are visually similar to an average degree and aurally identical.

- **Conceptually**, the signs are not similar due to the meaning conveyed by the non-coinciding verbal elements of the earlier mark. However, as these elements lack distinctiveness, the significance of this finding is very low.

- For reasons of procedural economy, the evidence submitted by the opponent to prove enhanced distinctiveness through use does not have to be assessed. The inherent distinctiveness of the earlier mark is normal.

- The goods are similar, the earlier mark as a whole is inherently distinctive to a normal degree, and the degree of attention upon purchase is likely to be above average. The signs are visually similar to an average degree, aurally identical, and conceptually not similar, although the significance of that fact is very low.

- The similarities due to the near-coinciding verbal element ‘metax’/‘METAXX’ – concerning the dominant element of the earlier mark and the sole element of the contested sign – are not counteracted by the differences, pertaining to the additional letter ‘X’ at the end of the contested sign (which, however, produces no aural difference from the verbal element ‘metax’) and to the non-coinciding verbal and figurative/stylised elements of the earlier mark, each of which is non-distinctive and/or has less impact.

- There is a likelihood of confusion on the part of the analysed public (a significant part of the German-speaking part of the relevant public in the EU, such as in Germany and Austria, for which the main verbal element of the earlier mark is perceived as the meaningless verbal element ‘metax’).

- There is no need to examine the other ground of the opposition, namely Article 8(4) EUTMR.

17 On 18 November 2025, the applicant filed an appeal against the contested decision, requesting that the decision be entirely set aside.

18 On 20 January 2026, the statement of grounds of the appeal was received.

19 In its response received on 5 March 2026, the opponent requested that the appeal be dismissed.

Submissions and arguments of the parties

20 The arguments raised in the statement of grounds may be summarised as follows.

Relevant contested goods / Limitation

ee) The purpose of the limitation of 13 January 2025 was to convey that the goods applied for can only be prescribed by a veterinarian and are not available to the general public. However, the rejection of this limitation made the goods for which the contested mark is intended much broader. The rejection of the initial limitation has prohibited the applicant from indicating the actual nature of the goods.

ff) For the purposes of these proceedings, the Board is requested to assess the goods as originally limited in Class 5, namely as *veterinary preparations for cattle, pigs, dogs, cats, horses and guinea pigs for treatment of pain and inflammation, only available with a veterinarian's prescription*, or in any equivalent wording clearly indicating that those goods may be obtained only through a veterinarian.

Proof of use

gg) The evidence solely indicates the use of the opponent's goods for humans only. It is also clear from the opponent's company profile that it only creates and produces goods for human use. The earlier mark's scope of protection should have been limited to *amino acids and amino acid mixtures for medical purposes, for humans*.

hh) The statement that use in Germany fulfils the use requirement for the EU is not in line with the General Court jurisprudence where use in one Member State was generally accompanied by other relevant factors explaining why the earlier marks were not used in other Member States. In the present case, there are no other relevant factors indicating why a generic product is not marketed and sold in other Member States. Therefore, the evidence of use should not be deemed valid for the whole EU. As a result, the earlier mark should not be taken into account during these proceedings.

Likelihood of confusion

ii) The signs are visually similar to a very low degree. The contested sign has six letters and the earlier mark has 20 letters – only five letters are the same in both signs. Both signs produce a very different overall impression due to the graphic depiction of the earlier mark and the additional words 'INSTITUT FÜR DIÄTETIK' – the earlier mark will be perceived by the public as 'META-X'.

jj) The key elements for determining the overall phonetic impression of a trade mark are the syllables and their particular sequence and stress. The contested sign consists of two syllables and is pronounced MEE-TAKS. The earlier mark consists of at least nine syllables. Only the first two syllables of the marks compared are similar.

However, due to its placement, the general public will pronounce the earlier mark as MEE-TAA-EKS. The signs are aurally similar to a very low degree.

kk) Neither sign has a concept. A conceptual comparison is not possible. The signs are conceptually not similar.

ll) The goods should be compared as follows:

Class 5: *Amino acids and amino acid mixtures for medical purposes, for humans*.	Class 5: *Veterinary preparations for cattle, pigs, dogs, cats, horses and guinea pigs for treatment of pain and inflammation, only available with a veterinarian's prescription*.
Earlier mark	Contested sign

mm) Even without taking into account that the opponent's goods are for humans and that the contested goods are only available with a veterinarian's prescription, the goods are not similar.

nn) The Opposition Division found that the goods are similar without any supporting arguments.

oo) As regards their nature, the earlier goods are intended for humans and the contested goods are intended for animals.

pp) The intended purpose of the earlier goods is to keep humans with health issues healthy. The intended purpose of the contested goods is the treatment of sick animals. It is entirely unclear where the purposes of these goods coincide.

qq) The goods are not in competition. The applicant's goods cannot substitute or replace the opponent's goods. Additionally, these goods are not sold in the same locations, nor are they displayed together at any venue.

rr) The goods are not complementary at all. Since they are meant for separate groups – humans and animals – they cannot be used together or permitted to complement one another in any way.

ss) Human and veterinary medicine are never distributed through the same channels. There are no places in the EU where you can find medicine for animals and for humans side by side in a catalogue or warehouse. Even when companies have human and veterinary branches, these are always handled separately.

tt) The relevant public for these products is generally distinct; only a small, highly informed group overlaps – humans with health conditions who also have sick animals needing medicine. This group is unlikely to confuse the products due to their high level of attention.

uu) Most pharmaceutical companies specialise in either human or veterinary medicine. Only a few large firms handle both, but always in distinct divisions – this separation should not influence the assessment of product similarity. The primary distinction is between human and animal medicine.

vv) The goods are dissimilar. Therefore, no likelihood of confusion can exist.

ww) Should it be concluded that the goods are somehow similar to a very low degree, the likelihood of confusion can only be assessed by taking into account the relevant public. The opponent's goods are sold and used by humans with health issues, a group that is on very high alert when it comes to buying and consuming goods that are connected to their health issues. The other group are specialised veterinarians and owners of sick animals that also have a very high level of attention when it comes to administering medicine to a sick animal.

xx) Even in the very unlikely event that the goods at issue are present in the exact same place, the relevant public will never confuse or associate them.

21 The arguments raised in response to the appeal may be summarised as follows.

Proof of use

– Evidence of use must be assessed in terms of an EU mark, not in EU Member State's boundaries. The opponent does not have to justify why use has 'only' been made in a certain Member State.

– Evidence was also submitted in relation to Member States other than Germany. Attachment 5 shows invoices in English sent to consumers not in Germany. Attachment 6 states the percentage of the foreign turnover made and lists several EU Member States.

– Various material in English has also been submitted, clearly addressing consumers outside Germany where German material was distributed. Facts and data referring to customers outside Germany were given in the respective submission dated 23 September 2024 on pages 4 and 5.

– The opposition was also based on the opponent's company name. No evidence of use is required for this ground of opposition.

Likelihood of confusion

– The contested decision follows case-law that considers dietary supplements or pharmaceuticals to be identical or at least highly similar, regardless of whether they are for human use or for veterinary use. Reference is made to the following decisions of the Opposition Division on this subject (12/05/2025, B 3 202 186 (*medical preparations* identical to *pharmaceuticals and veterinary preparations*); 15/04/2025, B 3 167 311 (*vitamin preparations; dietetic foods and preparations for medical or veterinary purposes; dietary supplements for humans and animals* identical to *dietary supplements for humans*); 21/03/2024, B 3 172 366 ('Nutritional supplements, whether medicated or not, may be used together with medicines for veterinary use in the treatment or prevention of illnesses. They therefore frequently serve the same purpose, namely the restoration or preservation of health, target the same relevant public and are sold through the same distribution channels'); 17/12/2025, B 3 236 821 (*veterinary preparations* identical to *pharmaceutical and medicinal preparations and substances*).

- Pharmaceuticals are used to treat a disease and nutritional supplements, more correctly special foods for medical purposes, are designed to provide special nutritional products for individuals with specific medical conditions. While the actual marketing differentiates between such products for human use and such products for animal use, consumers will still assume that the actual illness or medical condition may be the same and the contents of the products may also be the same, just adapted for consumption by humans or animals so that, for example, the dosage form may differ. However, this does not render the products different (i.e. entirely dissimilar from a trade mark law perspective).

- The relevant public does not only include doctors but also private end consumers.

- Regarding the comparison of the signs, the dominant element of the earlier mark is 'metaX', while the other elements are descriptive and much smaller so that they are insufficient to differentiate the signs. This makes the signs visually and phonetically similar.

- The other elements of the earlier mark are insufficient to clearly differentiate the signs. The consumers will focus on the elements 'metaX' and 'METAXX', as the other elements are of smaller size, inferior position and lack distinctiveness.

- Consumers will pronounce the elements 'metaX' and 'METAXX' identically and consider them visually strikingly similar.

- The earlier mark emphasises the letter X in 'metaX' by using an upper-case X at the end compared to the lower-case letters before this, and the contested mark stresses the last letter by doubling it to 'METAXX'. While this will not influence the pronunciation of the signs, consumers will see that the last letter is stressed and assume that the two marks belong to the same undertaking.

- The signs' differences are insufficient to exclude a likelihood of confusion.

Reasons

22 The appeal complies with Articles 66, 67 and Article 68(1) EUTMR. It is admissible.

23 It is also well founded.

Scope of the appeal

24 The applicant appealed the contested decision in its entirety, as the opposition was fully upheld and the EUTM application was rejected in its entirety.

25 Therefore, the Board will revise the contested decision in full.

Proof of use

26 For reasons of procedural economy, the Opposition Division examined the evidence of use only in relation to *amino acids and amino acid mixtures for medical purposes* in

Class 5, and concluded that genuine use, within the meaning of Article 47(2) and (3) EUTMR, was proved by the opponent for those goods.

27 Consequently, the Board will first proceed with the examination of the appeal assuming that use has been proved for the abovementioned goods.

Article 8(1)(b) EUTMR (likelihood of confusion)

28 Pursuant to Article 8(1)(b) EUTMR, a European Union trade mark application shall be rejected upon opposition where there is an earlier trade mark as referred to in Article 8(2) EUTMR and if, because of the identity with, or similarity to, the earlier sign and the identity or similarity between the goods or services covered by the trade marks there exists a likelihood of confusion on the part of the public in the territory in which the earlier mark is protected. A likelihood of confusion includes a likelihood of association with the earlier mark.

29 According to settled case-law, the risk that the public might believe that the goods or services in question come from the same undertaking or, as the case may be, from economically linked undertakings, constitutes a likelihood of confusion (11/11/1997, C-251/95, Sabèl, EU:C:1997:528, § 16-18; 29/09/1998, C-39/97, Canon, EU:C:1998:442, § 17). For the purposes of applying Article 8(1)(b) EUTMR, a likelihood of confusion presupposes both that the marks at issue are identical or similar and that the goods or services they cover are identical or similar. Those conditions are cumulative (22/01/2009, T-316/07, easyHotel / EASYHOTEL, EU:T:2009:14, § 42 and the case-law cited).

30 A likelihood of confusion must be assessed globally, based on how the relevant public would perceive the marks and the goods and services in question and taking into account all factors relevant to the circumstances of the case (11/11/1997, C-251/95, Sabèl, EU:C:1997:528, § 22; 29/09/1998, C-39/97, Canon, EU:C:1998:442, § 16; 22/06/1999, C-342/97, Lloyd Schuhfabrik, EU:C:1999:323, § 18).

Comparison of the goods

31 According to settled case-law, when comparing the goods or services covered by the marks at issue, all the relevant factors relating to those goods and services should be taken into account. Those factors include, inter alia, their nature, intended purpose, method of use and whether they are in competition or complementary (29/09/1998, C-39/97, Canon, EU:C:1998:442, § 23). Other factors may also be taken into account, such as the distribution channels of the goods or services concerned or the fact that those goods or services are often sold in the same specialist sales outlets, which may facilitate the perception by the relevant consumer of the close connections between them and strengthen the impression that the same undertaking is responsible for the production of those goods or provision of those services (02/06/2021, T-177/20, HISPANO SUIZA / HISPANO SUIZA, EU:T:2021:312, § 44).

32 This list of criteria is not exhaustive. It is supplemented by the addition of other criteria, including the usual origin of the goods concerned and their distribution channels. Furthermore, it has been held that the fact that the goods at issue are promoted by the same specialised magazines is also a factor likely to facilitate the perception by the

relevant consumer of the close connections between them and strengthen the impression that the same undertaking is responsible for the production of those goods (02/06/2021, T-177/20, HISPANO SUIZA / HISPANO SUIZA, EU:T:2021:312, § 45).

33 It cannot be ruled out that one single relevant criterion may be capable of being the sole basis for the existence of a similarity between the goods or services, although the application of other criteria would indicate that there is no such similarity (02/06/2021, T-177/20, HISPANO SUIZA / HISPANO SUIZA, EU:T:2021:312, § 48).

34 It is apparent from case-law that, firstly, each criterion developed by case-law, irrespective of whether it is one of the original or the additional criteria, is only one criterion among others; secondly, the criteria are autonomous and independent; and thirdly, the similarity between the goods or services at issue may be based on only one of those criteria. Furthermore, although the Office is required to take into account all the relevant factors relating to the goods and services concerned, it may disregard factors that are irrelevant to the relationship between them (02/06/2021, T-177/20, HISPANO SUIZA / HISPANO SUIZA, EU:T:2021:312, § 53, 61).

35 The list of goods and services must be interpreted on the basis of the literal meaning the terms have under Article 33(2) and (5) EUTMR (19/06/2012, C-307/10, IP Translator, EU:C:2012:361, § 48, 64).

36 According to Article 33(7) EUTMR, goods or services are not regarded as being similar to or dissimilar from each other on the ground that they appear in the same or different classes under the Nice Classification.

37 The reference point is whether the relevant public will perceive the goods or services concerned as having a coinciding commercial origin (04/11/2003, T-85/02, Castillo, EU:T:2003:288, § 32, 38) and whether consumers consider it normal that the goods or services are marketed under the same trade mark, which normally implies that a large number of producers or providers are the same (11/07/2007, T-150/04, Tosca Blu, EU:T:2007:214, § 37; 23/01/2014, T-221/12, Sun fresh, EU:T:2014:25, § 89-90).

38 In assessing whether the consumer generally expects there to be a link between the goods or services, it is appropriate to take into account the economic reality on the market as it currently exists, namely the existence of a certain market practice (16/01/2018, T-273/16, METAPORN / META4 et al., EU:T:2018:2, § 41-42; 02/06/2021, T-177/20, Hispano Suiza / Hispano Suiza, EU:T:2021:312, § 51-55).

39 The Opposition Division held that the contested *veterinary medicines for cattle, pigs, dogs, cats, horses and guinea pigs for the treatment of pain and inflammations* in Class 5 were similar to the opponent's *amino acids and amino acid mixtures for medical purposes* in the same class, as they had the same purpose and they usually coincided in producer, relevant public and distribution channels.

40 The above assessment is limited to a conclusory statement without any concrete application of the relevant criteria for comparing the goods. It remains unclear how the criteria relevant to the comparison of goods – namely their nature, purpose, complementarity or substitutability/competition, usual origin, method of use, distribution channels and relevant public – were applied in the present case.

41 In the following assessment, the Board will focus its analysis on the relevant criteria for the comparison of the goods established by case-law (e.g. the nature and purpose, the producers, the relevant public, the distribution channels, their complementary character or relationship of competition), considering the arguments, facts and evidence provided by the parties and well-known facts.

42 The opponent's goods are *amino acids and amino acid mixtures for medical purposes* in Class 5. *Amino acids* are fundamental elements of proteins. Amino acids and proteins are vital for repairing and building body's tissue (14/08/2025, R 0330/2025-4, Smartbrane / SMARTMEMBRANE, § 37). It is a well-known fact that those substances are vital for maintaining and building muscle mass. High protein powder, food and beverages have become very popular and are available in most supermarkets. Amino acids and proteins for medical purposes serve a nutritional, metabolic, or general health-supporting function for patients who suffer from lack of amino acids. However, the contested *veterinary medicines for pain and inflammation* have a clear and narrow therapeutic purpose: treating pain and inflammatory conditions in animals. Consequently, the purpose of the conflicting goods is different.

43 As regards the producer/usual origin, amino acids and medical nutritional products are often produced by specialised chemical, biochemical, or nutraceutical manufacturers. However, *veterinary medicines for pain and inflammation* are typically produced by pharmaceutical companies, many of them specialising in veterinary healthcare. Although some large undertakings may operate in both sectors, this fact alone is insufficient to establish that the relevant public would generally expect these goods to originate from the same undertaking (23/01/2014, T-221/12, SUN FRESH / SUNNY FRESH, EU:T:2014:25, § 91).

44 Furthermore, although certain professional groups (e.g. healthcare professionals) may conceptually overlap, the core composition of the relevant target groups differs. The contested goods target veterinary professionals and animal owners to treat pain and inflammations. However, the opponent's goods target patients and healthcare professionals concerned with an unbalanced medical nutrition.

45 As regards distribution channels, *veterinary medicines for pain and inflammations* are primarily supplied through veterinarians or veterinary pharmacies. *Amino acid preparations for medical purposes* are distributed through pharmacies or specialised medical nutrition channels.

46 Finally, there are no indications that amino acid (mixtures) on the one hand and medicines treating pain and inflammation on the other hand had a relationship of competition or complementarity. One product is not essential or important for the other, and the public does not need to make a choice whether to buy amino acids (to balance nutrition) or pharmaceuticals treating pain and inflammation.

47 The Board notes that the case-law according to which food, dietary or vitamin supplements may be regarded as similar, at least to a low degree, to pharmaceutical preparations cannot be applied by analogy in the present case (see, inter alia, 28/05/2020, T-724/18 & T-184/19, AUREA BIOLABS (fig.) / Aurea et al., EU:T:2020:227, § 75; 16/12/2020, T-883/19, Helix elixir / Helixor et al., EU:T:2020:617, § 40-43; 28/06/2023, T-495/22, Omegor / OMACOR (fig.) et al., EU:T:2023:359, § 52-53). That line of case-law concerns products intended for human use, which, notwithstanding differences in

their regulatory classification or degree of therapeutic specificity, share a comparable health-related function and are liable to address the same category of patients. Unlike the opponent's *amino acids and amino acid mixtures for medical purposes*, which lack a defined therapeutic use, the contested goods are veterinary medicines specifically indicated for treating pain and inflammation in animals. In accordance with settled case-law, for the comparison of medical products it is their specific intended purpose, rather than a general reference to improving or protecting health, that is decisive (07/06/2023, T-543/22, BIOPLAN / BIOPLAK, EU:T:2023:320, § 27, 06/11/2024, T-1146/23, Cardioflow / CARDIOFORM, EU:T:2024:789, § 24-25). Accordingly, the mere fact that both lists of goods fall within Class 5 or broadly relate to health is insufficient to establish similarity.

48 To sum up, the nature and purpose of the goods at issue are different. The goods are neither complementary nor in competition. The goods target different groups of consumers. The Board therefore concludes that the opponent's *amino acids and amino acid mixtures for medical purposes* in Class 5 are overall dissimilar to the contested *veterinary medicines for cattle, pigs, dogs, cats, horses and guinea pigs for the treatment of pain and inflammations* in the same class.

49 Consequently, contrary to the findings of the Opposition Division, one of the essential conditions under Article 8(1)(b) EUTMR is missing as far as the opponent's *amino acids and amino acid mixtures for medical purposes* in Class 5 are concerned.

Remittal under Article 71(1) EUTMR

50 For reasons of procedural economy, the Opposition Division examined proof of use only for the opponent's *amino acids and amino acid mixtures for medical purposes* in Class 5. However, given that the contested goods are dissimilar to those goods, that examination cannot sustain the contested decision. The Opposition Division should therefore have carried out a full examination of proof of genuine use in respect of the remaining goods relied upon, which is necessary for the subsequent assessment under Article 8(1)(b) EUTMR.

51 While a department of the Office may, for reasons of procedural economy, limit its assessment to certain goods or arguments, such an approach is permissible only where the underlying reasoning remains legally correct and complete. In the present case, the Opposition Division's reliance on procedural economy led to a comparison of goods that was not supported by a proper application of the relevant legal criteria and therefore constituted an error of assessment. By contrast, the Board's reliance on procedural economy in the context of the present appeal is justified by the finding that the goods are dissimilar, which renders the examination of the remaining arguments unnecessary and cannot affect the outcome of the proceedings.

52 In accordance with Article 71(1), second sentence, EUTMR, the Board of Appeal may either exercise any power within the competence of the department which was responsible for the decision appealed or remit the case to that department for further prosecution. In exercising the broad discretion conferred on it by the above provision, the Board of Appeal may decide to remit the case to the Opposition Division for further consideration and, in particular, for that division to examine the incomplete or incorrect aspects of its annulled decision in order globally to assess, in the light of all the relevant

factors, the likelihood of confusion in the present case (04/05/2022, T-4/21, ASI ADVANCED SUPERABRASIVES (fig.) / ADI (fig.) et al., EU:T:2022:274, § 69).

53 Pursuant to Article 71(2) EUTMR, the department whose decision was appealed is bound by the *ratio decidendi* of the Board of Appeal, provided that the facts are the same. This binding effect applies in particular to the Board's finding that the goods compared above are dissimilar within the meaning of Article 8(1)(b) EUTMR.

54 In light of the above, the appeal is upheld and the contested decision is annulled insofar as it was based on an erroneous comparison of the contested goods in Class 5 with the opponent's *amino acids and amino acid mixtures for medical purposes*.

55 Given the parties' legitimate interest that the case be examined by both instances of the Office, the case is remitted to the Opposition Division in accordance with Article 71(1), second sentence, EUTMR, for the purpose of examining proof of genuine use in respect of the opponent's remaining goods not yet assessed, and for completing the examination under Article 8(1)(b) and/or Article 8(4) EUTMR.

Costs

56 Pursuant to Article 109(3) EUTMR, where each party succeeds on some heads and fails on others, the Boards of Appeal shall decide a different apportionment of costs. As the opposition must be further examined by the Opposition Division on its merits under Article 8(1)(b) EUTMR, it is appropriate to order that each party bears its own costs in the appeal proceedings.

Order

On those grounds,

THE BOARD

hereby:

1. **Annuls the contested decision.**
2. **Remits the case to the Opposition Division for further examination.**
3. **Orders the parties to bear their own costs of the appeal proceedings.**

Signed	Signed	Signed
V. Melgar	A. Pohlmann	Ph. von Kapff

Registrar:

Signed

p.o. L. Benítez