

**DECISION
of the Fifth Board of Appeal
of 27 August 2026**

In case R 1210/2025-5

Goliath IP Stichting

Vijzelpad 80
8051 KR Hattem, Gelderland
Netherlands

Cancellation applicant / Appellant

represented by Holla legal & tax, Stationsplein 101, 5211 BM, 's-Hertogenbosch,
Netherlands

v

Wahu GmbH

Frischeck 56
94065 Waldkirchen
Germany

EUTM proprietor / Defendant

represented by Bardehle Pagenberg Partnerschaft Mbb Patentanwälte, Rechtsanwälte,
Prinzregentenplatz 7, 81675 München, Germany

APPEAL relating to Cancellation Proceedings No C 50 174 (European Union trade mark
registration No 18 246 076)

THE FIFTH BOARD OF APPEAL

composed of V. Melgar (Chairperson), R. Ocquet (Rapporteur) and A. Pohlmann (Member)

Registrar: K. Zajfert

gives the following

Decision

Summary of the facts

- 1 By an application filed on 27 May 2020, vivaimpuls GmbH, the predecessor in title of Wahu GmbH ('the EUTM proprietor') sought to register the word mark

WAHU

as a European Union trade mark ('EUTM') for the following goods:

Class 28: *Sports equipment.*

- 2 The application was published on 4 June 2020, and the mark was registered on 14 December 2020.
- 3 On 8 June 2021, Goliath Far East Ltd, the predecessor in title of Goliath IP Stichting ('the cancellation applicant'), filed a request for a declaration of invalidity ('the invalidity request') of the registered mark ('the contested EUTM') for the above goods ('the contested goods. The grounds for the invalidity request were those laid down in Article 60(1)(a) EUTMR in conjunction with Article 8(1)(b) EUTMR and it was based on earlier international trade mark registration ('IR') No 935 118 designating the European Union for the figurative mark



('the earlier mark') filed and registered on 27 July 2007 and duly renewed for various goods in Classes 25 and 28.

- 4 The earlier mark was partially revoked by a final decision of the Cancellation Division (11/05/2023, C 51 714), after it remained registered for the following goods:

Class 28: *Outdoor toys, games, playthings; balls, footballs, beach balls, frisbees; sporting goods in this class, namely balls.*

- 5 On 8 June 2021, the cancellation applicant submitted the following evidence:
 - Website extracts (Annex A) dated 1 June 2021 for the online offer of:
 - 'Wahu Wingblade', 'Wahu Triblade', 'Wahu Ball' and 'Wahu Ryzr' on www.amazon.it;
 - 'Wahu Balance Board', 'Wahu Ryzr', 'Wahu Triblade' and 'Wahu Wingblade Pro' on www.amazon.de;
 - 'Wahu Backyard' products ('Hop Skip & Splash', 'Splash & Snake', 'Bash & Splash'), 'Wahu Ball Red /Blue', Wahu Ball Black/Yellow and 'Wahu Phlat Ball Wooosh' on www.bol.com/nl/;

- ‘Wahu Mini Footy’, ‘Wahu Phlatball – Wooosh’ and ‘Wahu Ball’ on www.ebay.es/;
- ‘Wahu Super Slide’, ‘Wahu Ryzr’ and ‘Wahu Ryzr + Phlat Ball + Super Wubble Bubble Ball – Toy Package’ on www.ebay.es/;
- ‘Wahu Phlat Ball Wooosh’ on www.internet-toys.com .

6 On 20 October 2021, the EUTM proprietor requested proof of use of the earlier mark.

7 On 26 January 2024, the cancellation applicant submitted the following proof of use:

- Annex 1: Affidavit of H.O. responsible for legal affairs of the Goliath group;
- Annex 2: Wikipedia extract on Vivid Imaginations, a company in the cancellation applicant’s group;
- Annex 3: Press release dated 26 February 2018 ‘Goliath acquires Britz Marketing Australia’;
- Annexes 4A to 4E: 2019 catalogue extract in German, and four 2020 catalogue extracts in German, French, Dutch and Polish; The catalogues depict goods bearing the sign :

- Wahu Triblade, Wingblade and Wingblade Pro (Airbladez):



- Wahu Ryzr:



- Wahu Phlat Ball:



- Wahu Ball: Content section ‘OUTDOOR : ‘Wahu Soccer Ball’



- Annexes 5A to 5C: Invoices dated 16 March 2020, 27 March 2020 and 13 May 2020 issued to Goliath BV for the printing of ‘Brochure Goliath Duitsland’, ‘Brochure Goliath NL’ and ‘Brochure Goliath Frankrijk’;
 - Annex 6: Invoices dated from 19 July 2019 to 30 April 2020 issued by Goliath B.V. in the Netherlands, or by Vivid Imaginations Limited in the United Kingdom, to customers in Germany, the Netherlands, the United Kingdom, Poland, Ireland and France;
 - Annex 7: Table on quantities and amounts of ‘Wahu’ goods (‘CDU Phlatbladez Triblade’, ‘CDU Wahu Wingblade’, ‘CDU Wahu Wingblade Pro’, ‘Ryzr’, ‘Wahu Wingblade’ and ‘Wahu Wingblade Pro’) sold from July 2019 to April 2020;
 - Annexes 8A and 8B: www.amazon.nl extracts dated 3 September 2022 on the offer of ‘Wahu Wingblade’ and WAHU Ryzr with customer reviews from 21 June 2020 to 12 November 2020;
 - Annex 9: YouTube screenshots dated 20 March 2020 of the video ‘Wahu Ryzr Disc Assortment – Smyths Toys’.
- 8 By decision of 29 May 2025 (‘the contested decision’), the Cancellation Division rejected the invalidity request, reasoning essentially as follows:

Proof of use

- The invalidity request was filed on 8 June 2021. The cancellation applicant was required to prove that the earlier mark was genuinely used in the European Union from 8 June 2016 until 7 June 2021 inclusive for the earlier goods (*‘the first relevant period’*).
- Since the earlier mark was registered more than five years prior to the filing date of filing of the contested EUTM on 27 May 2020, use of the earlier mark has to be shown also for the period from 27 May 2015 to 26 May 2020 inclusive (*‘the second relevant period’*).
- The United Kingdom withdrew from the EU subject to a transition period until 31 December 2020. Evidence relating to the United Kingdom and to a period prior to 1 January 2021 is taken into account.
- The cancellation applicant has demonstrated that Vivid Imaginations became part of the Goliath Group in 2018. Use by companies economically related to the mark proprietor is authorised use.

Extent

- The proof of use relates to France, Germany, Ireland, the Netherlands, Poland and the United Kingdom. A substantial part of the materials, including the product catalogues (Annexes 4A, 4B, 4C, 4D and 4E) and the invoices (Annex 6), bear dates in the relevant periods or contain information concerning the relevant periods and prove the continuity and frequency of use of the mark during those periods.
- The documents provide sufficient information on the commercial volume of use of the earlier mark for some goods. The following goods can be identified in the invoices:
 - Wahu Triblade, Wingblade and Wingblade Pro (Airbladez): described as ‘CDU Phlatbladez Triblade’ and ‘CDU Airbladez Triblade’ with code number 8711 808 311 626, ‘CDU Phlatbladez Wingblade’ and ‘CDU Airbladez Wingblade’ with code number 8711 808 311 657, and ‘CDU Phlatbladez Wingblade Pro’ and ‘CDU Airbladez Wingblade Pro’ with code number 8711 808 311 701.
 - Wahu Ryzr: described as ‘CDU Wahu Ryzr’ and ‘Wahu Ryzr’, with code number 8711 808 311 879.
 - Wahu Phlatball: described as ‘Phlatball Jr asst.’ number 8711 808 316 362, ‘Wahu Phlatball V4 Color Asst’ with code number 8711 808 316 133, ‘Wahu Phlatball Wooosh’ with code number 8711 808 318 144, ‘CDU Wahu PhlatbMini W2’ with code number 8711 808 317 857, ‘Wahu Phlatb SwirlCl Asst’ with code number 8711 808 317 802.
- The article code numbers can be matched to the ‘WAHU’ toys in the catalogues. By way of example:
 - ‘CDU Airbladez Wingblade’ and ‘CDU Phlatbladez Wingblade’ with code number 8 711 808 311 657 in the invoices correspond to the following products with the same number in the catalogues:



(Annex 4A)



(Annex 4B)



(Annex 4C)

- ‘Phlatball Jr asst.’ with code number 8711 808 316 362 in the invoices corresponds to the following products with the same number in the catalogues:



(Annex 4B)



(Annex 4C)

- There was sufficient use of the earlier mark in relation to some *toys, games and playthings* in Class 28, but not *sporting goods* such as balls or sports frisbees.
- Although the ‘Wahu Ball’, the ‘Wahu Mini Footy’ or the ‘Wahu Balance Board’ could potentially be considered as sporting articles, the extent of use by way of external trade activities for these goods has not been shown during each of the relevant periods.
- The ‘Wahu Mini Footy’ and the ‘Wahu Balance Board’ are not featured in any evidence relating to the **second relevant period** but appear only in website extracts (Annex A) dated at the very end of the **first relevant period**. There is no evidence to allow conclusions to be drawn on the use of the earlier mark for these goods in the **second relevant period**.
- The ‘Wahu Ball’, is featured in the website extracts (Annex A) relating to the **first relevant period**, and in two 2020 product catalogues (Annex 4) with the indication that it is ‘new’. The catalogue extracts are relevant to **both relevant periods**.

- In contrast to the ‘Wahu Triblade’, ‘Wingblade’, ‘Wingblade Pro (Airbladez)’, ‘Wahu Ryzr’ and ‘Wahu Phlatball’, the ‘Wahu Ball’ does not appear in any invoice (Annex 6) and are not listed in the sales table (Annex 7) for the period July 2019-April 2020.
- Without concrete indications of sufficient commercial activity relating to these goods, it cannot be concluded that they were marketed and sold to a degree that reaches the minimum level necessary to establish genuine use during the relevant periods in the relevant territory.
- The goods for which there is sufficient evidence on the extent of use, (‘Wahu Triblade’, ‘Wahu Wingblade’ and ‘Wahu Wingblade Pro’, ‘Wahu Ryzr’ and ‘Wahu Phlatball’), are not sporting goods.
- The assessment of the remaining factors continues in relation to use of the earlier mark for Class 28: **toys, games and playthings** for which the extent of use has been proven.

Place

- The place of use in the European Union can be inferred from the invoices (Annex 6) rendered to customers in EU Member States (Germany, the Netherlands, the United Kingdom, Poland, Ireland and France). The catalogues (Annexes 4A, 4B, 4C, 4D and 4E) and invoices (Annexes 5A, 5B and 5C) contain indications of the Member States where the catalogues were distributed or the location of the cancellation applicant’s divisions.

Time

- A substantial part of the documents including the invoices and the product catalogues, fall within both relevant periods.

Nature

- ‘Wahu’ is used in the textual references to the products (e.g., in invoices, the product catalogues, and other documents), and the figurative sign  is depicted on the product packaging in the catalogues.
- The use of the mark in colour as opposed to the black and white version of the mark as registered is an ordinary graphical means of bringing the mark’s elements to the attention of the public and does not materially impact the mark’s distinctiveness, given that its principal components (its distinctive verbal element depicted in a particular typeface against an oval background) and the contrast of the colours remain unchanged.
- It is customary in documents such as invoices or product descriptions to use the verbal element of a mark in plain text rather than reproducing figurative signs.

- The evidence shows that the earlier mark was used on product packaging to guarantee the identity of the origin of the goods for which it is registered.
- The indications (e.g. ‘Wingblade’, ‘Ryzr’, ‘Phlatball’) depicted on the product packaging and in product descriptions along with the element ‘Wahu’, appear as elements independent from the word ‘Wahu’. Trade marks are often used together with other marks, for example, to indicate a house mark and a sub-brand. The sign  is used on product packaging to designate a product line while the additional indications (‘Wingblade’, ‘Ryzr’, ‘Phlatball’) are the names of a specific product or a sub-line. This constitutes use of the mark in the same form as registered, in parallel with, but independently from, other marks (simultaneous use of independent marks). The evidence demonstrates use of the earlier mark as registered or in a form that is an acceptable variation of the mark as registered.

Use in relation to the registered goods and services

The evidence proves use of the earlier mark for toy balls, frisbees and flying discs (‘Wahu Triblade’, ‘Wahu Wingblade’ and ‘Wahu Wingblade Pro’, ‘Wahu Ryzr’, and ‘Wahu Phlatball’ in different variations, such as ‘Mini’, ‘JR’, ‘Flash’, ‘Woosh’).

- Their main purpose is to entertain. They are *toys*.
- The earlier mark is registered for the broad category of ***outdoor toys, games, playthings*** in Class 28. As there are several examples of goods belonging to this category and as the cancellation applicant is not required to prove use for all the conceivable variations of the category of goods for which the earlier mark is registered, the evidence shows genuine use for ***outdoor toys, games, playthings***. Accepting use only for specific goods in this category would be too restrictive. The cancellation applicant has a legitimate interest to expand in the future the range of its goods to outdoor toys, games and playthings with other similar applications, the purpose of which is to entertain.
- *Balls* in Class 28 cover goods with different purposes. On one hand, it covers *toy balls* the main function of which is to entertain, and on the other hand, it also includes *sport balls* which are intended for sporting activities (e.g. volleyball, football, etc.). These two subcategories of goods, while they can all be classified under the broader category of balls, are distinct and do not overlap. Consequently, based on the purpose and intended use of the goods used, the evidence shows genuine use of the mark only for ***toy balls*** which form an objective subcategory of the broader category of *balls*.
- The earlier mark is registered for *frisbees* which refer to a light plastic disc or a similar object thrown with a spinning motion for recreation or in competition. This category also covers goods with different purposes – *toy frisbees* and *frisbees for sports*. The evidence shows genuine use of the mark for ***toy frisbees*** which form an objective subcategory of the broader category of *frisbees*.
- There is insufficient evidence of use for the remaining earlier goods.

- The cancellation applicant refers to the final decision in revocation proceedings (11 May 2023 C 51 714) directed at the same earlier mark. The Office is not bound by its previous decisions since each case must be dealt with separately and regarding its particularities. In these revocation proceedings, the Cancellation Division based its conclusions on, *inter alia*, 2021 catalogues and invoices and found that the evidence submitted referred to the use of the earlier mark for various balls such as zoom balls, hoover balls, punching balls, and footballs, thus covering a broad spectrum of balls. The Cancellation Division found genuine use to have been proven for the whole broad category of *balls*, as well as for *sporting goods in this class, namely balls* in these revocation proceedings. The evidence in this case justifies a different conclusion.
- The earlier goods that are taken into account in the assessment of the invalidity request are:

Class 28: ***Outdoor toys, games, playthings; toy balls, toy frisbees.***

Article 60(1)(a) EUTMR in conjunction with Article 8(1)(b) EUTMR

- The case-law demonstrates diversity in approach in the comparison of the goods.
- In the ‘Knut’ case (16/09/2013, T-250/10, Knut – der Eisbär, EU:T:2013:448) the Court found a distant similarity between the goods at issue.
- The Court reached a different conclusion in the ‘Betwin’ case (04/06/2013, T-514/11, Betwin, EU:T:2013:291) and in the ‘Alex’ case (02/07/2015, T-657/13, Alex / Alex et al., EU:T:2015:449).
- In ‘Betwin’, the Court examined goods comparable in wording and nature to those at issue here (e.g. *playthings, games, flying disks, playing balls*), and found them not similar to *gymnastic and sporting articles*. It acknowledged that although some ‘fluid transition’ between the goods could exist in certain cases, this was not sufficient to establish similarity. It emphasised that the intended purposes of the goods remained fundamentally different; toys and playthings are primarily intended for entertainment, whereas sporting goods aim to promote physical training and exercise. The Court also found significant differences in producers and distribution channels (04/06/2013, T-514/11, Betwin, EU:T:2013:291, § 36-39).
- In ‘Alex’, the Court noted the lack of consistent practice on the matter, but did not take a stance against dissimilarity. Rather, it confirmed that similarity assessments had to be based on specific evidence concerning the goods at issue in each case.
- ‘Billa’ did not contain a detailed comparison of *toys* and *sports articles* as this matter was not disputed by the parties, but the Court found *games* and *sports articles* to be dissimilar (04/12/2019, T-524/18, Billa / Billabong et al., EU:T:2019:838, § 40, 44-45, 51).
- The contested *sports equipment* and the earlier *toys, games, playthings; toy balls, toy frisbees* are dissimilar. The contested *sports equipment*, which includes goods such as *sports balls*, is intended for engaging in physical exercise or sporting activities

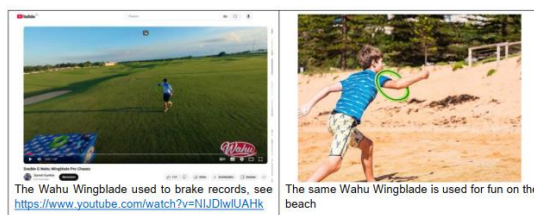
(e.g. volleyball, football, etc.), often requiring specific performance standards or durability: The function of the earlier goods is to entertain. The goods have different intended purposes and are not interchangeable or in competition with each other. They are usually not produced by the same undertakings, and even when available in the same retail outlets, they are typically offered in separate departments or sections (e.g. toy aisle vs. sports gear section).

- One of the necessary conditions of Article 8(1)(b) EUTMR is not fulfilled, and the application must be rejected.
 - This finding would still be valid even if the earlier mark were to be considered as enjoying a high degree of distinctiveness. Given that the dissimilarity of the goods cannot be overcome by the highly distinctive character of the earlier mark, the evidence submitted does not alter the above findings.
- 9 On 7 July 2025, the cancellation applicant appealed the contested decision, requesting that the decision be entirely set aside.
- 10 On 26 September 2025, the statement of grounds of the appeal was received, and included the following evidence:
- Annexes 11 and 12 BoA: Registration details of the contested EUTM and the earlier mark;
 - Annex 13 BoA: Invoices from 14 April 2021 to 3 May 2021;
 - Annex 14 BoA: Extract from www.amazon.com on the ‘Wahu Phlatball’, ‘Wahu Ball’, ‘Wahu Triblade’, and ‘Wahu Wingblade’ in the category ‘Sports Toys & Outdoor’;
 - Annex 15 BoA: Evidence that  and  are professional Disc Golf players and several videos on YouTube and Facebook in which both players test the ‘Wahu Wingblade’ to see how far they can throw it, including public comments on the videos indicating that they regard the ‘Wahu Wingblade’ as a *sports item*;
 - Annex 16 BoA: Screenshot of the professional disc golf website www.discgolfunited.com showing that the ‘Wahu Wingblade’ is sold through specialist Disc Golf retailers;
 - Annex 17 BoA: Screenshot of the EUTM proprietor’s website www.wahuboard.nl marketing goods under the contested mark as *toys*.
- 11 Within the extended time limit on 23 February 2026, the EUTM proprietor filed its response.

Submissions and arguments of the parties

- 12 The cancellation applicant’s arguments raised in the statement of grounds may be summarised as follows:

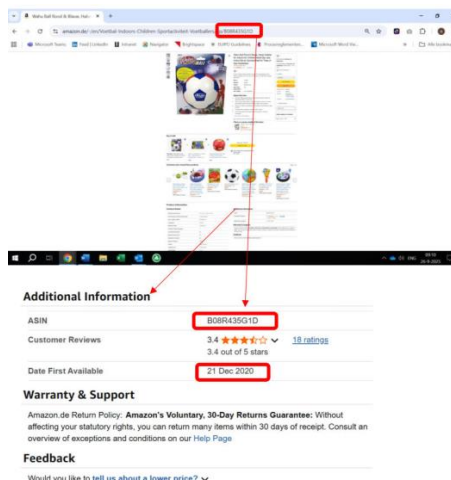
- The reasoning that *toy balls* from *sports balls* and *toy frisbees* are dissimilar to *sport frisbees* is artificial. It means that two different suppliers could market a ‘Wahu Ball’ and a ‘Wahu Phlatball’ under the identical sign ‘WAHU,’ without likelihood of confusion
- On the FC Barcelona online store, consumers may purchase a football of standard size, a *sport ball*, displayed alongside a ‘mini ball’ which, by the logic of the Cancellation Division, can only be considered a *toy ball*. If FC Barcelona’s mark rights extended only to *sports balls* or *sports equipment*, then – under the Cancellation Division’s reasoning – another trader could lawfully market FC Barcelona-branded ‘mini balls’ as *toys*. This is contrary to both common sense and the perception of the relevant public, who would assume that both products originate from the same undertaking or an economically linked entity.
- Nerf water guns are marketed as *toys*, yet they involve competition and even organised play, resembling sport. Trampolines for young children are classified as *toys*, whereas full-size trampolines are *sporting equipment*, with various mid-size models falling somewhere in between. The same applies to skateboards: a basic plastic version for a five-year-old may qualify as a *toy*, while high-quality skateboards are indisputably *sporting goods*, leaving a wide range of intermediate models in a grey area.
- The same goes for the ‘Wahu Wingblade’: it is a frisbee for fun on the beach, but it can also be used for serious challenges, like trying to break a world record:



- In finding that genuine use was not shown for the ‘Wahu Mini Footy’ and ‘Wahu Balance Board’ and the ‘Wahu Ball’ in both relevant periods, the Cancellation Division applied an incorrect, or at the very least an unduly strict standard.
- The Cancellation Division found that, because no sales occurred in both relevant periods, the earlier mark was not put to genuine use for the ‘Wahu Ball’, the ‘Wahu Mini Footy’ and the ‘Wahu Balance Board’. However, the mere fact that no sales were made of these products during both relevant periods does not, by itself, demonstrate that genuine use has not been established.
- The cancellation applicant demonstrated an intention to gain market share for the ‘Wahu Ball’. The Cancellation Division acknowledged that the ‘Wahu Ball’ was ‘new’ in the relevant product catalogue, thereby confirming that it was a newly launched product. As such, it is unsurprising that no substantial sales had yet materialised within the relevant periods. Preparatory steps to introduce the ‘Wahu Ball’ on the market to secure future sales, are sufficient to establish genuine use.
- It is relevant that the ‘Wahu Ball’ was already displayed in two catalogues dated 2020 in the Netherlands and Poland, in which a large number of items designated by

the earlier mark were offered, namely, the 'Wahu Triblade', the 'Wahu Wingblade', the 'Wahu Wingblade Pro', the 'Wahu Ryzr' and the 'Wahu Phlatball' and that those items were available in numerous online web shops in the European Union during both relevant periods.

- The 'Wahu Ball' has been offered for sale since 21 December 2020 and is still available on www.amazon.de:



- This was acknowledged by the Cancellation Division:

'As for the 'Wahu Ball', this product is featured in the same website extracts (Annex III) relevant only for the first relevant period, and in addition, in two of the product catalogues dated in 2020 (Annex 4) where it is indicated that this product offering is 'new'. The catalogue extracts can be relevant for both relevant periods given that the second period covers at least part of 2020.'

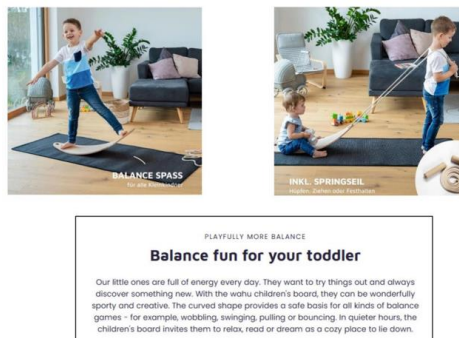
- The presence of the 'Wahu Ball' in different 2020 product catalogues, as well as its availability through leading online sales platforms such as Amazon and bol.com, is decisive to establish genuine use (08/07/2010, T-30/09, Peerstorm, EU:T:2010:298, § 42-43). Genuine use is not intended to demonstrate the commercial success of the mark and that it is relevant that the 'Wahu Ball' was already presented together with other products in various catalogues and offered through different web shops.
- That the cancellation applicant sought to obtain market share with the 'Wahu Ball' in the catalogues is evidenced by the subsequent sales of the 'Wahu Ball' (Annex 13 BoA).

The Cancellation Division's distinction between toy balls/frisbees and sport balls/frisbees is arbitrary and inconsistent with established case law on the similarity of goods under Article 8(1)(b) EUTMR.

- The Cancellation Division's distinction between *toy balls/frisbees* and *sport balls/frisbees* is arbitrary and inconsistent with established case-law. Consumers searching for a *ball* or a *frisbee* do not ordinarily distinguish between *sports* and *toys* in these categories, nor are they necessarily aware that a frisbee can also be used in organised competitive sport. From the consumer's perspective, both are simply items

of play or recreation. The rigid sub-categorisation adopted by the Cancellation Division is artificial and unsupported by market reality.

- This arbitrariness is further underscored by the Cancellation Division’s own findings. The Cancellation Division appears to treat the ‘Wahu Ball’ as a *sporting article* while classifying the ‘Wahu Phlatball’ as a *toy*. Such inconsistent treatment of functionally similar products demonstrates the unsoundness of the distinction drawn. In practice, sports equipment retailers routinely offer both official footballs and smaller or lighter balls intended for leisure use; likewise, frisbees of different weights and dimensions are sold side by side, some intended for competition and others for casual play. Conversely, toy shops also sell regulation-size footballs and other items which, under the Cancellation Division’s reasoning, should properly be classified as sporting goods.
- The FC Barcelona online shop illustrates this point: it offers both an ‘official’ football and a ‘mini ball’ under the same mark. To the relevant public, both products will be considered *toys* as well as *sporting goods* and both clearly emanate from the same source, and no consumer would assume otherwise. Yet, under the logic of the Cancellation Division, these two products would fall into different subcategories, with the result that another trader could market FC Barcelona ‘mini balls’ without infringing FC Barcelona’s mark rights.
- ‘Wahu Phlatball’, ‘Wahu Ball’, ‘Wahu Triblade’, and ‘Wahu Wingblade’ are sold on Amazon’s ‘Sports Toys & Outdoor’ category ([Annex 14 BoA](#)). In that same category, the EUTM proprietor’s goods – including its balance board – are also offered. Thus, a consumer searching for *balls* or *frisbees* on Amazon is presented with both the cancellation applicant’s and the EUTM proprietor’s products within a single marketplace context, without any rigid demarcation between *toys* and *sporting equipment*.
- The cancellation applicant’s products are used not only in leisure play but also in professional sporting contexts. Publicly accessible videos within the European Union show professional Disc Golf players [REDACTED] and [REDACTED] using the ‘Wahu Wingblade’ ([Annex 15 BoA](#)). The ‘Wahu Wingblade’ is also sold through specialist Disc Golf retailers ([Annex 16 BoA](#)), further evidencing its acceptance and marketing as a sporting good.
- The EUTM proprietor itself markets its goods under the contested EUTM as *toys*. In its promotional material, the balance board is explicitly presented with terms such as ‘playfully’ and ‘games’, directly appealing to children ([Annex 17 BoA](#)):



- The accompanying imagery reinforces this positioning: the balance board is depicted as used by children, among other *toys*, and even advertised as customisable by painting, features wholly characteristic of a toy rather than a piece of technical *sports equipment*:



- These examples demonstrate that the economic reality of the market does not support a neat division between ‘toy’ and ‘sport’ categories, especially not in relation to *balls* and *frisbees*. In practice, the cancellation applicant’s goods are distributed and perceived across both spheres, and the EUTM proprietor’s goods are likewise promoted as *toys*. Consumers encountering these products are exposed to them in both *sports* and *toys* contexts and are likely to perceive them as emanating from the same or economically linked undertakings.

The Cancellation Division misapplied case-law on the similarity of toys and sporting goods in Class 28, leading to an erroneous interpretation of Article 8(1)(b) EUTMR

- The Cancellation Division incorrectly held that the following case-law is relevant to the present case and furthermore suggested that they are mutually contradictory: 16/09/2013, T-250/10, Knut – der Eisbär, EU:T:2013:448 ; 04/06/2013, T-514/11, Betwin, EU:T:2013:291, § 36-39; 02/07/2015, T-657/13, Alex / Alex et al., EU:T:2015:449; 04/12/2019, T-524/18, Billa / Billabong et al., EU:T:2019:838, § 40, 44-45, 51.
- The reliance on the afore mentioned case-law without regard to the factual and legal context in which those rulings were delivered is misplaced. The Cancellation Division failed to analyse which specific goods were at issue in the respective cases, and to assess whether those circumstances were comparable to the present matter. Such an examination was required to apply the case-law correctly.
- In the ‘Knut’ and ‘Betwin’ judgments, it was recognised that a fluid transition exists between *gymnastic and sporting articles* on the one hand, and *toys, games and playthings* on the other. However, fluid transition was insufficient to conclude that there is always relevant similarity between the two categories of goods (04/06/2013, T-514/11, Betwin, EU:T:2013:291, § 36).
- Although such relevant similarity does not exist in all cases, it may be present depending on the specific goods being compared, namely where the goods can qualify both as toys and as sporting articles, as in this case.
- The goods compared in each case were as follows:

- In the ‘Knut’ judgment (§ 41), the comparison was between *turn- und sportartikel, soweit sie nicht in anderen Klassen enthalten sind* and *puppen (spielwaren), spiele, spielzeug; plüschtiere*;
 - In the ‘Alex’ judgment (§ 54), the comparison was between *children’s bath toys; children’s educational and developmental activity toys and sporting articles*;
 - In the ‘Billa’ judgment (§ 50) (among others), *games* were compared to *sporting goods*.
- Here, the comparison is between specific goods, namely (toy) *balls* and (toy) *frisbees* on the one hand, and *sports equipment* on the other, between which there is a relevant degree of similarity.
 - In ‘Betwin’ (§ 31, 40, 43), the General Court held that *balls for games, rubber action balls and jumping ropes* were identical or similar to *gymnastic and sporting articles (other than clothing, footwear and mats)*. These goods are analogous to the present situation than those considered in the decisions cited by the Cancellation Division. Accordingly, the Cancellation Division ought to have recognised that the earlier mark covers *balls* and *frisbees*, rather than restricting its analysis to the narrower subcategories of *toy balls* and *toy frisbees*. In addition, it should have concluded that there is relevant similarity between (toy) *balls* and (toy) *frisbees* on the one hand, and *sports equipment* on the other.
 - The reasoning of the Cancellation Division is inconsistent. On page 15 of the contested decision, it acknowledged that the ‘Wahu Ball’, the ‘Wahu Mini Footy’ and the ‘Wahu Balance Board’ could potentially be regarded as *sporting articles*. Yet it simultaneously classifies the ‘Wahu Phlatball’ and the ‘Wahu Ryzr’ exclusively as *toys*. The cancellation applicant fails to see any principled basis for such divergent treatment of highly comparable products. This inconsistency underscores that the Cancellation Division’s distinction between *toy balls* and *toy frisbees*, on the one hand, and *sport balls* and *sport frisbees*, on the other, is arbitrary and legally unsound.
 - While the ‘Betwin’ judgment reached a different conclusion than the ‘Knut’ judgment, the Cancellation Division overlooked several crucial findings in the ‘Betwin’ judgment that are relevant to the present case.
 - Paragraphs 31 and 32 of the ‘Betwin’ judgment confirm that *gymnastic and sporting articles*, on the one hand, and *toys, games, and playthings*, on the other, may be regarded as different goods. However, a closer analysis of the specific goods reveals that among the various types of balls covered by the contested mark, such as *sport balls, netballs, soccer balls, bowling balls, paintballs, volleyballs, punching balls, golf balls, rubber action balls, and playing balls* – only *playing balls* were classified as toys. It follows from the ‘Betwin’ judgment that all the other types of balls fall within the category of *gymnastic and sporting articles*.
 - Consequently, even if the cancellation applicant’s products could not be classified strictly as sport balls, they are at the very least capable of being classified as *balls*

for games. As recognised in the ‘Betwin’ judgment, such goods are to be considered the same as *gymnastic and sporting articles*.

- The ‘Betwin’ judgment makes clear that, although toys and sporting goods may in general be treated as distinct categories, there remains at least a low degree of similarity between them. This is in line with the principle set out in the ‘Equivalenza’ judgment (04/03/2020, C-328/18 P, Black Label by Equivalenza, EU:C:2020:156), according to which the existence of even a low degree of similarity between the goods suffices to require an assessment of the likelihood of confusion under Article 8(1)(b) EUTMR.
- Accordingly, even if the goods at issue were to be regarded as *toy balls* and *toy frisbees*, on the one hand, and *sports equipment*, on the other, the Cancellation Division should have acknowledged that there exists at least a low degree of similarity between them. It should therefore have proceeded to carry out the likelihood of confusion analysis. Its failure to do so constitutes a misapplication of the relevant legal standards and warrants reversal of the earlier mark.
- Applying the ‘Canon’ criteria to the goods at issue leads to the conclusion that they are similar to a relevant degree:
 - Nature of the goods: Both *toy balls/frisbees* and *sports balls/frisbees* are physical play and recreation items made from similar materials (rubber, plastic, synthetic fibres). Their basic characteristics are comparable, and they often overlap in design, size, and functionality.
 - Intended purpose: Both categories serve recreational and sporting purposes, whether in organised sport or in casual play. The distinction drawn by the Cancellation Division ignores the reality that consumers use *balls* and *frisbees* interchangeably for games, leisure, or sport.
 - Method of use: The method of use is essentially identical: throwing, catching, kicking, bouncing. The consumer engages with the goods in the same way, regardless of whether they are categorised as *toys* or *sports articles*.
 - Complementarity: *Toy balls* and *frisbees* and *sports balls* and *frisbees* are complementary in the sense that they fulfil overlapping recreational needs. A consumer may purchase both for the same household or activity. They can be used together or interchangeably in the same environment.
 - Competitive relationship: The goods are at least partially substitutable. A consumer searching for a ball or frisbee may choose between versions sold as toys and those marketed as sports equipment, depending on price, quality, or intended intensity of use. They therefore compete directly in the marketplace.
- Additional relevant factors further support this similarity:
 - Distribution channels: Both *toys* and *sports balls/frisbees* are sold in the same retail outlets (e.g. sports stores, toy stores, supermarkets, department stores, online platforms such as Amazon). They are not confined to entirely separate channels of trade.

- Relevant public: Both categories are directed at the general public, including children, families, and adults. The consumer overlap is complete, as the same individuals may purchase both toy and sporting versions for different contexts.
 - Usual commercial origin: It is commonplace for the same undertakings to market both toys and sporting goods under the same brand (e.g. sports clubs, sportswear companies, toy manufacturers diversifying into sporting articles). Consumers are therefore accustomed to a single commercial origin covering both categories.
- The goods at issue are similar to at least a medium degree.
- 13 The EUTM proprietor's arguments raised in the response to the appeal may be summarised as follows:
- FC Barcelona is a world-famous mark with an enormous reputation. The scope of protection afforded to such a mark extends far beyond the strict similarity of goods. In contrast, there is no claim or evidence that the cancellation applicant's earlier mark enjoys any enhanced distinctiveness or reputation.
 - As to the Nerf water guns, trampolines and skateboards, these generalised observations about supposed grey areas in product categorisation are irrelevant to the issue of whether *toy balls* and *toy frisbees*, on the one hand, and *sports equipment*, on the other, are similar.
 - The cancellation applicant failed to submit any evidence of sales of the 'Wahu Ball' for the second relevant use period (27 May 2015 to 26 May 2020).
 - The invoices in Annex 13 date from January 2021 to July 2021 and therefore fall entirely outside the second relevant period.
 - The invoices submitted must be rejected as inadmissible. The cancellation applicant provides no justification for why these documents could not have been submitted during the proceedings before the Cancellation Division.
 - Insofar as the cancellation applicant relies on the inclusion of the 'Wahu Ball' in 2020 product catalogues, this argument fails for multiple reasons. First, the cancellation applicant has provided no information on the extent of their distribution, neither their print run, nor the territories in which they were circulated, nor the number of recipients. Without such details, it is impossible to assess the commercial significance of this evidence. Accordingly, the catalogues are insufficient to demonstrate the requisite extent of use under Article 10(3) EUTMDR.
 - Second, the inclusion of a product in a catalogue does not constitute genuine use. At most, it represents preparatory activity for a future market launch.
 - The categories of *toys*, on the one hand, and *sports equipment*, on the other, are distinct goods with different intended purposes. From the perspective of consumers, the primary purpose of *toy balls* and *toy frisbees* is entertainment, whereas the primary purpose of *sports balls* and *sports frisbees* is physical exercise and

competitive sporting activity. These are different intended purposes warranting distinct subcategories.

- The ‘Wahu Phlatball’ does not have much to do with a sports ball or any conventional ball. As the evidence shows, it is a transformable object that can be flattened and thrown like a frisbee. This product bears no resemblance to a sports ball such as a football, basketball, or volleyball, etc. The differences in construction, purpose, and manner of use between such *toys* and *sports equipment* underscore that these are distinct product categories, not arbitrary subdivisions.
- The cancellation applicant asserts that *toys* and *sports equipment* are sold through the same distribution channels. However, no evidence has been submitted to support this claim.
- Likewise, the cancellation applicant’s contention that *toy frisbees* and *frisbees* for disc golf or other competitive frisbee sports share the same distribution channels is contested. The cancellation applicant has provided no evidence for this, and it does not reflect commercial reality. Specialised disc golf equipment is typically sold through specialist retailers and dedicated sports outlets, not through general toy shops or toy sections of department stores.
- The cancellation applicant’s reliance on the example of FC Barcelona merchandise is misplaced. First, the FC Barcelona example concerns balls of different sizes, official footballs and smaller ‘mini balls’. Both remain balls in the conventional sense. This is fundamentally different from the ‘Wahu Phlatball’, which is a transformable toy that functions both as a ball and as a throwing disc. The comparison is therefore inapt.
- Second, the FC Barcelona example fails because of the reputation of that mark. It is well established that a mark enjoying a significant reputation benefit from a broader scope of protection extending to goods that may not be similar in the strict sense. Consequently, in the case of a famous mark like FC Barcelona, *toys* marketed under that brand would likely fall within the scope of protection regardless of whether they are strictly similar to *sports equipment*. The distinction between toys and sports equipment would not be determinative.
- In the present case, however, there is no evidence that the cancellation applicant’s earlier mark could enjoy any such enhanced reputation. The assessment must therefore be based on the similarity of the goods as such, without the benefit of extended protection. The Cancellation Division was therefore correct to apply a rigorous analysis of the goods intended purposes and to conclude that *toy balls* and *toy frisbees* constitute distinct subcategories from *sport balls* and *sport frisbees*.
- The cancellation applicant relies on the fact that both its products and those of the EUTM proprietor are sold on Amazon within the category ‘Sports Toys & Outdoor’ (Annex 14). This argument is devoid of merit.
- The categorisation in an online marketplace such as Amazon has no bearing on the legal assessment of similarity of goods under Article 8(1)(b) EUTMR. Amazon’s product categories are designed for commercial convenience and consumer navigation, not for the purposes of trade mark classification. These categories are

notoriously broad and encompass an extremely wide range of disparate products. The mere fact that two products appear within the same Amazon category cannot establish that they are similar in the trade mark law sense, any more than the fact that two products are sold in the same department store would do so.

- The cancellation applicant contends that its ‘Wahu Wingblade’ should be regarded as a sporting good because professional disc golf players have been shown using the product in publicly accessible videos (Annex 15 BoA).
- This argument is misconceived. A closer examination of the evidence submitted by the cancellation applicant itself reveals that the videos in question do not depict these athletes using the ‘Wahu Wingblade’ for the practice of their sport. Rather, the videos show the athletes engaging in informal challenges, world record attempts for entertainment purposes, and similar recreational activities.
- In other words, the cancellation applicant’s own evidence demonstrates precisely what the Cancellation Division found: the ‘Wahu Wingblade’ is used for play and entertainment, not for competitive sport. When professional disc golf players wish to practise or compete in their sport, they use professional disc golf equipment, not the ‘Wahu Wingblade’. The fact that athletes may use a toy product for amusement during their leisure time does not transform that product into sports equipment.
- This evidence therefore confirms, rather than undermines, the Cancellation Division’s classification of the ‘Wahu Wingblade’ as a toy. The Cancellation Division’s finding that ‘it is clear from the nature and the presentation of these goods in the evidence that their main purpose is to entertain’ is fully vindicated by the cancellation applicant’s own submissions.
- The Cancellation Division conducted a thorough and careful analysis of the jurisprudence and correctly identified the ‘Betwin’ judgment as the most pertinent authority for the present case.
- As the Cancellation Division correctly observed, the apparent divergence in outcomes stems from the different factual contexts in which the principles were applied, not from any inconsistency in the legal principles themselves. The Cancellation Division rightly concluded that the ‘Betwin’ judgment provides the most directly applicable guidance for the present case.
- The ‘Betwin’ judgment is of central importance because it involved a detailed comparison between goods comparable to those at issue here. In that case, the General Court was required to assess the similarity between *gymnastic and sporting articles (other than clothing, footwear and mats)* on the one hand, and *toys, games and playthings* on the other. The goods found by the Court to be dissimilar to sporting goods included, inter alia: ‘flying disks; playing balls; games; [...] inflatable toys; board games; swings; kites’ (§ 31). The Court’s reasoning (§ 35-39) is directly applicable to the present case:

‘Even if it cannot be ruled out that, for certain gymnastic and sporting articles, on the one hand, and certain toys, games and playthings, on the other, a link can be drawn in so far as certain sporting articles can be used for games and certain games can also be sporting articles, [...] such an assumption does not call in question the

fact that the intended purpose of those two categories of goods is essentially different. Even if, by their nature, those two categories of goods are meant to entertain the public, they also serve other purposes. [...] gymnastic and sporting articles are intended to train the body through physical exercise, whereas toys, games and playthings are intended first and foremost to entertain their users.’ (§ 36).

- The Court further held *toys, games and playthings* are not similar to *gymnastic and sporting articles (other than clothing, footwear and mats)* (§ 39). This finding directly supports the Cancellation Division’s conclusion that *toy balls* and *toy frisbees* are not similar to *sports equipment*.
- Paragraph 31 of the ‘Betwin’ judgment lists the goods that the cancellation applicant in that case contended were different from sporting goods, including ‘balls for games’, ‘flying disks’ and ‘playing balls’. The Court agreed with this contention and held at paragraph 39 that these goods are not similar to sporting articles.
- Paragraph 40 of the ‘Betwin’ judgment then confirms that the goods found to be similar or identical to sporting articles were ‘the goods in Class 28 covered by the mark applied for, other than the toys, games and playthings mentioned in paragraph 31’. In other words, it was the goods not listed in paragraph 31, goods that were themselves various kinds of sporting articles, that were found similar. The *toys*, including ‘playing balls’ and ‘flying disks’, were found to be dissimilar.
- As regards the other decisions cited by the parties, none of these decisions undermines the Cancellation Division’s analysis. Rather, they confirm the importance of examining the specific goods at issue, which is precisely what the Cancellation Division did.
 - In the ‘Knut’ judgment (16/09/2013, T-250/10, Knut – der Eisbär, EU:T:2013:448), the comparison concerned *plüschtiere* (stuffed animals) and *turn- und sportartikel*, which is a very different factual matrix from the present case involving balls and frisbees.
 - In the ‘Alex’ judgment (02/07/2015, T-657/13, Alex / Alex et al., EU:T:2015:449), the Court explicitly noted the ‘lack of consistent decision-making practice’ on this issue and emphasised the need for case-by-case analysis of specific goods. This supports the Cancellation Division’s approach of focusing on the actual goods at issue rather than applying broad generalisations.
 - The ‘Billa’ judgment (04/12/2019, T-524/18, Billa / Billabong et al., EU:T:2019:838, § 51), did not contain a detailed comparison of toys and sporting articles and expressly found games to be dissimilar to sports articles.
- Thus, the Cancellation Division correctly applied the case-law, identifying the Betwin judgment as the most relevant precedent. That judgment establishes that *playing balls*, *flying disks* and similar toys are not similar to *gymnastic and sporting articles*, notwithstanding any ‘fluid transition’ that may exist at the margins.

- It is settled law that, where one of the cumulative conditions for the application of Article 8(1)(b) EUTMR is not satisfied, a likelihood of confusion analysis is neither required nor appropriate.
- The cancellation applicant correctly acknowledges that ‘Betwin’ classified *playing balls* as *toys*. The cancellation applicant then contends that its own products should be regarded as *balls for games*. This argument defeats itself. The terms *playing balls* and *balls for games* are synonymous, both refer to balls intended for play and entertainment, not for competitive sport.
- The Cancellation Division expressly considered all relevant factors and concluded that and why the goods are dissimilar.

Reasons

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

Evidence filed on appeal

- 15 According to Article 95(2) EUTMR, the Office may disregard facts or evidence which are not submitted in due time by the parties concerned.
- 16 It results from the wording of that provision that, as a general rule and unless otherwise specified, the submission of facts and evidence by the parties remains possible after the expiry of the time limits to which such submission is subject under the provisions of the EUTMR and that the Office is in no way prohibited from taking account of facts and evidence which are submitted or produced late (13/03/2007, C-29/05 P, Arcol, EU:C:2007:162, § 42; 18/07/2013, C-621/11 P, Fishbone, EU:C:2013:484, § 22), that is to say, after the time limit set by the first-instance department and, as the case may be, for the first time before the Board of Appeal. In stating that the latter ‘may’, in such a case, decide to disregard evidence, Article 95(2) EUTMR grants the Office broad discretion to decide, while giving reasons for its decision in that regard, whether or not to take such evidence into account (13/03/2007, C-29/05 P, Arcol, EU:C:2007:162, § 43; 18/07/2013, C-621/11 P, Fishbone, EU:C:2013:484, § 23).
- 17 According to Article 27(4) EUTMDR, which is inspired on the above case-law, the Board may accept facts or evidence submitted for the first time before it where those facts and evidence are, *prima facie*, likely to be relevant for the outcome of the case, and these facts and arguments have not been produced in due time for valid reasons, in particular where they are merely supplementing relevant facts and evidence which had already been submitted in due time, or are filed to contest the findings made or examined by the first instance of its own motion in the decision subject to appeal.
- 18 Annexes 13 to 17 BoA (Annexes 11 and 12 BoA being public documents readily available to the Office) submitted at the appeal stage, are supplementary and complementary to the evidence of genuine use submitted before the Cancellation Division insofar as it they are presented to counter the findings in the contested decision (11/12/2014, T-235/12, Shape of a blade of grass in a bottle, EU:T:2014:1058, § 89).

- 19 The cancellation applicant has produced this evidence with its statements of grounds, and the EUTM proprietor was given the opportunity to comment on this evidence and did in fact do so in its response. The additional evidence is also, *prima facie*, likely to be relevant for the outcome of the case.
- 20 The Board finds that the two cumulative conditions laid down in Article 27(4) EUTMDR for accepting the belated evidence submitted on appeal have been met and, consequently, takes this evidence into account.

Scope of the appeal

- 21 On the issue of the proof of use, the finding of genuine use having been proven for ***outdoor toys, games, playthings***, is not in dispute.
- 22 The Cancellation applicant only challenges the finding of genuine for ***toy balls, toy frisbees*** and argues that genuine use must have been proven for *balls, footballs, beach balls, frisbees; sporting goods in this class, namely balls*.
- 23 It also argues that the conflicting goods are similar under Article 8(1)(b) EUTMR and there is a likelihood of confusion, even in the scenario of genuine use of the earlier mark for only *toy balls, toy frisbees*.

Proof of use

- 24 In accordance with Article 64(2) EUTMR, if the EUTM proprietor so requests, the proprietor of an earlier EUTM who has filed an application for a declaration of invalidity under Article 60(1)(a) EUTMR shall furnish proof that, during the period of five years preceding the date of such application, the earlier mark has been put to genuine use in the European Union in connection with the goods or services in respect of which it is registered and which are relied upon in the invalidity application, or shall prove that there are justifiable reasons for its non-use, provided the earlier mark has at that date been registered for not less than five years. If, at the filing date or the priority date of the contested mark, the earlier mark had been registered for not less than five years, the cancellation applicant shall also furnish proof that the conditions set out in Article 47(2) EUTMR were satisfied at that date. In the absence of proof to this effect, the invalidity application shall be rejected.
- 25 The invalidity request was filed on 8 June 2021.
- 26 The filing date of the contested EUTM is 27 May 2020.
- 27 The aforementioned provisions refer to two different periods, which are as follows:
 - (i) the five-year period preceding the date of declaration of invalidity request that is from 8 June 2016 until 7 June 2021 inclusive (***‘the first relevant period’***); and
 - (ii) the five-year period preceding the filing date of the contested EUTM, that is from 27 May 2015 to 26 May 2020 inclusive (***‘the second relevant period’***).
- 28 There is an overlap between the two relevant periods from 8 June 2016 to 26 May 2020.

- 29 There is ‘genuine use’ of a trade mark where the mark 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 (11/03/2003, C-40/01, Minimax, EU:C:2003:145, § 43; 05/10/2022, T-429/21, Aldiano, EU:T:2022:601, § 18; 02/03/2022, T-140/21, apo-discounter.de, EU:T:2022:110, § 17). Moreover, the condition relating to genuine use of the trade mark requires that the mark, as protected in the relevant territory, is used publicly and outwardly (11/03/2003, C-40/01, Minimax, EU:C:2003:145, § 37; 05/02/2020, T-44/19, TC Touring Club, EU:T:2020:31, § 52).
- 30 When assessing whether use of a trade mark is genuine, regard must be had to all the facts and circumstances relevant to establishing whether the commercial exploitation of the mark is real, particularly whether such use is viewed as warranted in the economic sector concerned to maintain or create a share in the market for the goods or services protected by the mark, the nature of those goods or services, the characteristics of the market and the scale and frequency of use of the mark (19/12/2012, C-149/11, Onel, EU:C:2012:816, § 29; 11/03/2003, C-40/01, Minimax, EU:C:2003:145, § 37; 30/01/2020, T-598/18, Brownie, EU:T:2020:22, § 32).
- 31 According to Article 10(3) EUTMDR, evidence of use of a trade mark must concern the place, time, extent and nature of use of the trade mark.
- 32 It is not necessary that each item of evidence gives information about all these four elements. Thus, items of evidence taken together may establish the necessary facts, even though each of those items of evidence, taken individually, would be insufficient to constitute proof of the accuracy of those facts (16/11/2011, T-308/06, Buffalo Milke, EU:T:2011:675, § 61; 24/05/2012, T-152/11, Mad, EU:T:2012:263, § 33, 34).
- 33 However, 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 (13/06/2019, T-398/18, Dermaepil, EU:T:2019:415, § 56; 12/12/2002, T-39/01, Hiwatt, EU:T:2002:316, § 47).
- 34 Furthermore, pursuant to Article 10(4) EUTMDR, the evidence shall, in principle, be confined to the submission of supporting documents and items such as packages, labels, price lists, catalogues, invoices, photographs, newspapers, advertisements, and statements in writing as referred to in Article 97(1)(f) EUTMR.
- 35 In the assessment of the evidence of genuine use of a mark, each piece of evidence is not to be analysed separately, but together, in order to determine the most likely and coherent significance. Thus, even if the probative value of an item of evidence is limited to the extent that, individually, it does not show with certainty whether, and how, the services concerned were placed on the market, and that item of evidence is therefore not in itself decisive, it may nevertheless be taken into account in the overall assessment as to whether the use of that mark is genuine. That is the case, for example, when that item of evidence is accompanied by other evidence (30/01/2020, T-598/18, Brownie, EU:T:2020:22, § 51).
- 36 The condition relating to genuine use of the trade mark requires that the mark, as protected in the relevant territory, is used publicly and outwardly (11/03/2003, C-40/01,

Minimax, EU:C:2003:145, § 37; 05/02/2020, T-44/19, TC Touring Club, EU:T:2020:31, § 52).

- 37 The *ratio legis* for the requirement that a mark must have been put to genuine use in order to be protected under EU law is that the Office's register cannot be regarded as a strategic and static depository granting an inactive proprietor a legal monopoly for an unlimited period. On the contrary, and in accordance with recital 24 EUTMR, that register must faithfully reflect what companies actually use on the market to distinguish their goods and services in economic life (01/03/2023, T-102/22, Gourmet, EU:T:2023:100, § 33; 12/01/2022, T-160/22, Apiretal, EU:T:2022:2, § 16; 02/02/2016, T-171/13, Motobi B Pesaro, EU:T:2016:54, § 67).
- 38 Moreover, the *ratio legis* of such use requirement is not to assess commercial success or to review the economic strategy of an undertaking, nor is it to restrict trade mark protection to the case where large-scale commercial use has been made of the marks (29/11/2018, C-340/17P, Alcolock EU:C:2018:965, § 90; 26/09/2013, C-609/11 P, Centrotherm, EU:C:2013:1449, § 72, 74; 16/11/2022, T-512/21, Epsilon Technologies, EU:T:2022:710, § 70; 02/02/2016, T-171/13, Motobi B Pesaro, EU:T:2016:54, § 49).
- 39 The finding of genuine use of having been proven for *outdoor toys, games, playthings* in both relevant periods has not been challenged.
- 40 The contested decision found genuine use for *toy balls, toy frisbees* but not for *balls, footballs, beach balls, frisbees; sporting goods in this class, namely balls* reasoning as follows:
 - Although the 'Wahu Ball', the 'Wahu Mini Footy' or the 'Wahu Balance Board' could potentially be considered as sporting articles:
 - (a) The 'Wahu Mini Footy' and the 'Wahu Balance Board' appear only in website extracts (Annex A) dated at the end of the *first relevant period* and do not feature in the evidence for the second relevant period.
 - (b) The 'Wahu Ball' is featured in the same website extracts (Annex A) relevant to the *first relevant period*, and in two 2020 product catalogues (Annex 4) with the indication that this product is 'new'. However, the 'Wahu Ball' does not appear in any invoice (Annex 6) and is not mentioned in the table of 'Wahu' goods sold in the period July 2019-April 2020 (Annex 7).
 - Evidence for the 'Wahu Triblade', the 'Wingblade' and the 'Wingblade Pro (Airbladez)' proves use for subcategory of *toy frisbees*.
 - Use for 'Wahu Phlatball' *toys* constitutes use for the subcategory of *toy balls*;
 - The evidence for the 'Wahu Triblade', 'Wingblade' and 'Wingblade Pro (Airbladez)', 'Wahu Ryzr' and 'Wahu Phlatball' proves genuine use of the earlier mark in the *two relevant periods* for *outdoor toys, games, playthings; toy balls and toy frisbees*.

41 Therefore, while the Cancellation Division acknowledged ‘Wahu Ball’, the ‘Wahu Mini Footy’ or the ‘Wahu Balance Board’ mentioned in the evidence could be *sporting articles*, it found that:

(a) there was insufficient evidence on the extent of use of the ‘Wahu Ball’, the ‘Wahu Mini Footy’ or ‘Wahu Balance Board’ in both the ***first and the second relevant period***;

(b) evidence for Wahu Triblade, Wingblade and Wingblade Pro (Airbladez) proved use for subcategory of *toy frisbees*;

(c) there was evidence only for the Wahu Phlatball which is a *toy ball*, which constitutes use for the coherent and independent subcategory of ***toy balls***.

42 The Board must therefore assess taking into account the additional evidence and arguments on appeal, whether:

(i) there is sufficient evidence on the extent of use in the ***two relevant periods*** for the ‘Wahu Ball’, the ‘Wahu Mini Footy’ and the ‘Wahu Balance Board’;

(ii) ***toy balls*** are an independent and coherent subcategory within *balls, footballs, beach balls*;

(iii) ***toy frisbees*** are an independent and coherent subcategory within *frisbees*.

Extent of use: Wahu ball

43 The evidence for the ‘Wahu ball’ is as follows:

Before the Cancellation Division

- Extract from www.amazon.it (Annex A) dated 1 June 2021 (the ***first relevant period***) on the availability of the Goliath – wahu ball for EUR 14.99 with indication only 10 left and more on the way;
- Extract from www.bol.com/nl/ (Annex A) dated 1 June 2021 (the ***first relevant period***) on the availability of the Wahu Ball Red/BLUE and the Wahu Ball Black/Yellow each for EUR 12.99;
- 2020 Benelux brochure in Dutch printed on 18 March 2020 (Annex 4C), pertinent to ***both relevant periods***, which includes on page 86 in the ‘Outdoor Section’ the new ‘Wahu Soccer ball’ stating that the ‘Wahu neoprene football is ideal for playing outdoors with a good ball and scoring a brilliant overhead kick into the top corner!’.

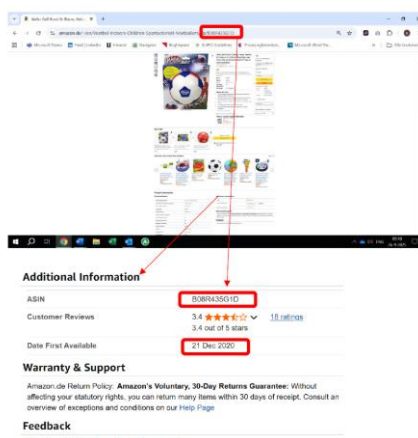


- Polish catalogue 2020 (Annex 4E) printed on 11 February 2020 and pertinent to both of the relevant periods, which includes on page 20 as a new item the new ‘Wahu Soccer Ball’:



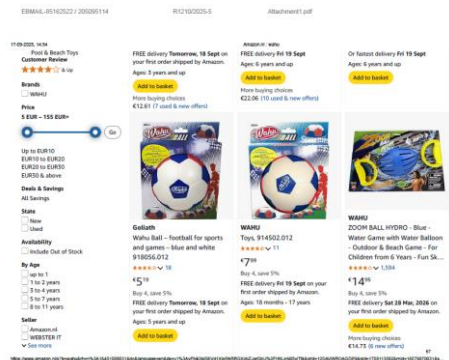
On appeal

- Extract from the www.amazon.de (reproduced in the statement of grounds) on the availability since 21 December 2020 of ‘wahu ball’:



- Varius invoices (Annex 13):
 - Six invoices bearing dates from 29 January 2021 to 3 May 2021 which feature amongst the items invoiced the ‘Wahu Ball Red/Blue’ issued to undertakings in France and Belgium with the product code 918 056.012;
 - One of these invoices dated 14 April 2021 features amongst the items invoiced the ‘Wahu Ball Black/Yellow’ that was sold to a French undertaking;
 - Seven invoices that feature an item with the product code 914 502.012 with the description ‘Wahu Ball assortment’ bearing the date 14 April 2021;

- The www.amazon.nl extract (Annex 14) dated 17 September 2025 submitted on appeal depicts the following ‘Wahu Balls’(‘hooverballs’) that can be matched to invoices.



- 44 The Cancellation Division denied proof of use based on the finding of no evidence of their sales.
- 45 As far as concerns the **first relevant period**, this deficiency has been rectified by the invoices submitted on appeal, which the Board has admitted.
- 46 Moreover, ‘Wahu Ball’ was advertised in the 2020 Benelux and Polish (Annex 4) brochure that are pertinent to **both relevant periods**. The cancellation applicant also provided evidence that this brochure was that printed in this period (Annex 5B invoice dated 27 March 2020 for 200 copies of the Dutch brochure). The images and descriptions of this product in the 2020 brochures corresponds to the invoices covering the **first relevant period** submitted on appeal. The images of the ‘Wahu Ball’ in the www.amazon.nl extract, which depict essentially the same ball as in the 2020 brochures, though dated after the **first relevant period** can be taken into account as they corroborate that sales of the ‘Wahu Balls’ in the invoices for the **second relevant period** relate to the same ball that was promoted as ‘new’ in the 2020 brochures.
- 47 The probative value of these brochures cannot be doubted for the reason that there is no evidence of their distribution, given that the Cancellation Division took into account these same brochures to find genuine use for the ‘Wahu Triblade’, ‘Wingblade’ and ‘Wingblade Pro (Airbladez)’, ‘Wahu Ryzr’ and ‘Wahu Phlatball’
- 48 Taking into account the evidence on appeal, the Board finds that there is evidence for the use for the earlier mark in the **two relevant periods** for the ‘Wahu Ball’, and not only the Phlatball (‘Phlatball Jr asst’, ‘Wahu Phlatball V4 Color Asst’, ‘Wahu Phlatball Wooosh’, ‘CDU Wahu PhlatbMini W2’, ‘Wahu Phlatb SwirlCl Asst’).
- 49 The requirement that the earlier mark must have been put to genuine use if it is to be capable of being used in opposition to a trade mark application is to restrict the number of conflicts between two marks, where there is no good commercial justification deriving from active functioning of the mark on the market. However, the purpose of those provisions is not to assess commercial success or to review the economic strategy of an undertaking, nor are they intended to restrict trade-mark protection to the case where large-scale commercial use has been made of the marks (11/03/2026, T-114/25, Max, EU:T:2026:189, § 19).

- 50 In addition, the turnover and the volume of sales of the goods under the earlier trade mark cannot be assessed in absolute terms but must be looked at in relation to other relevant factors, such as the volume of business, production or marketing capacity or the degree of diversification of the undertaking using the trade mark and the characteristics of the goods or services on the relevant market. As a result, use of the earlier mark need not always be quantitatively significant in order to be deemed genuine (08/07/2004, T-203/02, Vitafruit, EU:T:2004:225, § 42; 08/07/2004, T-334/01, Hipoviton, EU:T:2004:223, § 36).
- 51 As to the extent of use of the earlier mark, it is true that those catalogues provide no information on the quantity of goods actually sold by the cancellation applicant under the earlier mark. However, it is necessary to take into account, the fact that the cancellation applicant acquired the ‘WAHU’ brand on 28 March 2018, which was already then the number one lifestyle brand in Australia for outdoor games and beach toys, as well as a range of sporting goods for both children and adults ([Annex 3](#) press release).
- 52 The ‘Wahu Ball’ was added to this range of goods in the European Union in 2022, as corroborated by the brochures, which, as said, the Cancellation Division took into account in finding that use for ‘Wahu Triblade’, ‘Wingblade’ and ‘Wingblade Pro (Airbladez)’, ‘Wahu Ryzr’ and ‘Wahu Phlatball’ constituted genuine use **outdoor toys, games, playthings; toy balls and toy frisbees**. The ‘Wahu Ball’ was an addition to the range of goods for outdoor activities.
- 53 Moreover, significant sales of the ‘Wahu Ball’ occurred in the **first relevant period** ([Annex 13 BoA](#): for example, invoice S120 25725 dated 29 January 2021 including the supply of 840 items to an undertaking in France; invoice S120 28998 dated 5 March 2021 including the supply of 1500 items of the ‘Wahu Ball Red/Blue’ delivered to an undertaking in Belgium; invoice S120 26680 dated 9 February 2021 for the supply to another undertaking in France of 624 ‘Wahu Ball Red/Blue’; shortly after in the launch of this product in the **second relevant period** and continued thereafter, as evidenced by the continued availability of this product on www.amazon.de.
- 54 Accordingly, the Board considers that there is sufficient evidence on the extent of use of the ‘Wahu Ball’.
- 55 As far as concerns the ‘Wahu Ball’, the factors of time, place, and the requirements of the nature of use (use as a trade mark for the registered goods and use of the mark as registered), which the cancellation did not assess, must be considered.

Time

- 56 It follows from the above assessment that there is evidence for the ‘Wahu Ball’ for **both relevant periods**.

Place

- 57 The territories covered are the Benelux, Poland and France.
- 58 Therefore, there is use in the European Union.

Nature of use: Use as a trade mark and use of the mark in the form registered

- 59 The same considerations apply to the trade mark use for the ‘Wahu Ball’, which is the same as the sign used for the goods for which the Cancellation Division found use.
- 60 The Board endorses and refers to the contested decision.

Nature of use: On whether use for the ‘Wahu Ball’ together with ‘Wahu phlat Ball’ constitutes use for the independent subcategory of toy balls

- 61 If a trade mark has been registered for a category of goods which is sufficiently broad for it to be possible to identify within it a number of subcategories capable of being viewed independently, proof that the mark has been put to genuine use in relation to part of those goods affords protection only for the subcategory to which the goods for which the trade mark has actually been used belong (14/07/2005, T-126/03, Aladin, EU:T:2005:288, § 45; 17/10/2006, T-483/04, Galzin, EU:T:2006:323, § 27; 16/06/2010, T-487/08, Kremezin, EU:T:2010:237, § 56). However, if the goods or services for which the mark is protected have been defined in such a way that it is not possible to make any significant sub-divisions within the category concerned, then the proof of use necessarily covers the entire category (18/10/2016, T-367/14, Fruitfuls, EU:T:2016:615, § 28; 06/03/2014, T-71/13, Annapurna, EU:T:2014:105, § 53).
- 62 Although the principle of partial use operates to ensure that trade marks which have not been used for a given category of goods or services are not rendered unavailable, it must not, however, result in the proprietor of the trade mark being stripped of all protection for goods or services which, although not strictly identical to those in respect of which it has succeeded in proving genuine use, are not in essence different from them and belong to a single group which cannot be divided other than in an arbitrary manner. In that regard, it is in practice impossible for the proprietor of a trade mark to prove that the mark has been used for all conceivable variations of the goods or services concerned by the registration. Consequently, the concept of ‘part of the goods or services’ cannot be taken to mean all the commercial variations of similar goods or services but merely goods or services which are sufficiently distinct to constitute coherent categories or subcategories (18/10/2016, T-367/14, Fruitfuls, EU:T:2016:615, § 40; 14/07/2005, T-126/03, Aladin, EU:T:2005:288, § 46).
- 63 Such an independent subcategory of goods must be coherent and homogeneous and be the result of a division which is significant and not arbitrary. Consequently, the Court of Justice dismissed the appeal brought against the judgment of the General Court which had refused to recognise the existence of an independent subcategory of goods in Class 25, consisting of ‘weather-protective outdoor clothing’, on the ground that all clothing has the same purpose or intended use, because it is intended to cover the human body, to conceal, adorn and protect it against the elements (16/07/2020, C-714/18 P, tigha, EU:C:2020:573, § 29-54).
- 64 The Court noted in that regard that, since consumers are searching primarily for a product or service which meets their specific needs, criterion of **the purpose or intended use** is of fundamental importance in the definition of a subcategory of goods or services (13/02/2007, T-256/04, Respicur, EU:T:2007:46, § 29; 13/10/2021, T-12/2020, Frutaria, EU:T:2021:702, § 79; 30/01/2015, T-278/13, now, EU:T:2015:57, § 27; 15/10/2020, T-49/20, Robox, EU:T:2020:492, § 34).

- 65 If the goods concerned have several purposes and intended uses – as is often the case – determining whether there exists a separate subcategory of goods by considering in isolation each of the purposes that those goods may have will not be possible. Indeed, such an approach would not enable independent subcategories to be identified coherently and would have the effect of limiting excessively the rights of the proprietor of the earlier mark, *inter alia*, in that that person's legitimate interest in expanding his or her range of goods or services for which his or her trade mark is registered would not sufficiently be taken into consideration (15/10/2020, T-49/20, Robox, EU:T:2020:492, § 35; 13/09/2018, T-94/17, tigha, EU:T:2018:539, § 51).
- 66 Insofar as the Cancellation Division acknowledged that the 'Wahu Ball', could be a *sporting article*, which is correct, and the evidence refers to a soccer ball, there is genuine use for a **ball**.
- 67 A 'soccer ball' is a sports ball, even if it is marketed to amateurs or young children, its primary purpose is to play soccer, which is a sport, whether played on the beach or the backyard and irrespectively who plays with the ball, whether a child, an adult, or an amateur sports enthusiast. It is, therefore, not correct to limit it to a *toy ball*.
- 68 Indeed, beach soccer (beach football), which is soccer played on sand with a lighter ball and smaller teams, is a recognised beach sport, played by people of many ages and not necessarily sports enthusiasts or professionals.
- 69 Moreover, an activity can be both recreational and played for fun, while still being a sport; for example, friends playing a casual game of soccer are engaging in the sport of soccer recreationally, whether played on the beach or any yard.
- 70 *Sporting articles* are items or equipment designed for sports, fitness, or active leisure. They, too, can be used in both competitive and recreational sports settings.
- 71 The evidence discloses that the 'Wahu Phlat Ball' is a recreational item that transforms between a flying disc and a ball. When pressed down, it becomes a flat disc that can be throw like a *frisbee*. While it is in the air, a built-in mechanism pops it back into a ball, making it easier for someone else to catch. Its primary uses include playing catch, outdoor games with friends or family. Improving hand-eye coordination in a fun, informal way. The beach is just one possible location. In practice, they are commonly used anywhere there's enough room to throw and catch safely.
- 72 Therefore, evidence for a 'Wahu phlat Ball' constitutes use of the earlier mark for (outdoor) **balls**. The Cancellation Division erred in establishing the subcategory of *toy balls*, which excludes any sporting purpose and the fact that this ball can be used in recreational sports settings.
- 73 It would result in the EUTM proprietor being stripped of all protection for *balls*, although not strictly identical to those in respect of which it has succeeded in proving genuine use, are not in essence different from them and belong to a single group which cannot be divided other than in an arbitrary manner. As a matter of fact, many *sporting articles* are also sold in simplified form as *toys* 16/09/2013, T-250/10, Knut, EU:T:2013:448, § 46-47).

- 74 There is indeed a blurred line between sporting articles and toys, games, etc. For example, table tennis equipment such as balls, bats and table tennis tables, which are in principle intended to use in sports, can also be used in games and entertainment. The purpose or intended use of table tennis equipment for use in sports, on the one hand, and for use in games, on the other, is similar or even identical. In both cases, the game is the same and ultimately the goal is to win the game or competition (29/11/2018, R 1321/2018-5, Catapult / Catapult, § 28).
- 75 Accordingly, evidence of use for the ‘Wahu Ball’ and the ‘Wahu phlat Ball’ constitutes use for the goods registered of **balls, footballs, beach balls; sporting goods in this class, namely balls** which are in themselves sufficiently narrowly identified to preclude any independent subcategories.

On whether use for ‘Wahu Triblade’, ‘Wingblade’ and ‘Wingblade Pro (Airbladez)’, ‘Wahu Ryzr’ constitutes use for the independent subcategory of toy frisbees

- 76 A *frisbee* is a generic term for any flying disc used in recreational play or sports which spins when thrown into the air and is used in a catching game, the object of which is for one player to toss the frisbee, or disk, into the air and try to keep it from his opponent's grasp. It requires skills such as speed, endurance, hand-eye coordination, agility and balance, throwing accuracy and tactical decision-making, all skills that are pertinent in the sport of frisbee throwing. Even though there are subtle differences between a *frisbee* used casually for recreation versus a flying disc used in organised sports, both are designed to fly through the air.
- 77 Consequently, for the same reasons, evidence for *Wahu Triblade, Wingblade and Wingblade Pro (Airbladez), Wahu Ryzr* amounts to genuine use for the registered goods *frisbees*.

Conclusion on proof of use

- 78 The likelihood of confusion assessment must therefore proceed on the basis of the genuine use of the earlier mark having been proven for the following goods:

Class 28: **Outdoor toys, games, playthings; balls, footballs, beach balls, frisbees; sporting goods in this class, namely balls.**

Article 8(1)(b) EUTMR

- 79 Article 8(1)(b) EUTMR provides that, upon opposition by the proprietor of an earlier trade mark, the trade mark applied for must not be registered if because of its identity with, or similarity to, an earlier trade mark and the identity or similarity of 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 trade mark is protected. The likelihood of confusion includes the likelihood of association with the earlier trade mark
- 80 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 on the part of the public, in the absence of which

Article 8(1) EUTMR does not apply (29/09/1998, C-39/97, Canon, EU:C:1998:442, § 29; 22/06/1999, C-342/97, Lloyd Schuhfabrik, EU:C:1999:323, § 17).

- 81 It is settled case-law that the likelihood of confusion must be appreciated globally, taking into account all factors relevant to the circumstances of the case. That global appreciation of the visual, aural or conceptual similarities 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. The average consumer normally perceives a mark as a whole and does not proceed to analyse its various details, as said consumer only rarely has the chance to make a direct comparison between the different marks but must place his or her trust in the imperfect picture of them that he or she has kept in his or her mind (11/11/1997, C-251/95, Sabèl, EU:C:1997:528, § 22-23; 22/06/1999, C-342/97, Lloyd Schuhfabrik, EU:C:1999:323, § 26).

Relevant public and territory

- 82 In the global assessment of the likelihood of confusion, account should be taken of the average consumer of the category of goods or services concerned, who is reasonably well informed and reasonably observant and circumspect. It should also be borne in mind that the average consumer's level of attention is likely to vary according to the category of goods or services in question (13/02/2007, T-256/04, Respicur, EU:T:2007:46, § 42; 24/11/2021, T-551/20, Riviva, EU:T:2021:816, § 57; 10/11/2021, T-756/20, VDL e powered, EU:T:2021:770, § 27; 16/12/2020, T-883/19, Helix Elexir, EU:T:2020:617, § 22).
- 83 The 'average consumer' is not an individual consumer belonging to the 'general public', but rather a consumer belonging to the public typically targeted by the goods and services in question (04/12/2024, T-22/24, Mula, EU:T:2024:875, § 23).
- 84 The relevant public is made up of consumers liable to use both the goods and services of the earlier mark and the goods and services covered by the mark applied for (13/05/2015, T-169/14, Koragel, EU:T:2015:280, § 25).
- 85 The relevant goods in Class 28 can target the public at large with an average level of attention and partly also sports, whether amateurs or professionals.
- 86 Even though several of the goods are specifically destined for sporting activities, the Court has confirmed that even then it is generally not appropriate to find that the average consumer displays a high degree of attention (16/10/2013, T-455/12, Zoo Sport, EU:T:2013:531, § 42).
- 87 Yet, in some exceptional cases in relation to goods destined for specific sports, a part of the relevant consumers may pay particular attention when examining the goods in question, for example, to their technical qualities for enhanced performance and comfort, and the level of attention of that section of the public will thus be higher (15/11/2011, T-434/10, Alpine Pro Sportswear & Equipment, EU:T:2011:663, § 30). However, this is not the case here.
- 88 In any event, it is recalled that account must be taken of the consumer with the lowest level of attention, which will thus be average (20/10/2021, T-351/20, Vital like nature,

EU:T:2021:719, § 25; 25/06/2020, T-114/19, B, EU:T:2020:286, § 36-37; 15/02/2011, T-213/09, Yorma's, EU:T:2011:37, § 25).

- 89 The earlier mark is an IR with effect in the EUTM. Therefore, the relevant territory in respect of which the likelihood of confusion must be assessed is the European Union.
- 90 The unitary character of the EUTM system means that an earlier EUTM or an international mark with effect in the European Union can be relied on in opposition proceedings against any application for registration of an EUTM which would adversely affect the protection of the earlier mark, even if only in relation to the perception of consumers in part of the European Union (20/03/2024, T-540/23, Patapouf, EU:T:2024:193, § 38; 01/12/2021, T-467/20, Zara, EU:T:2021:842, § 104).

Comparison of the goods

- 91 Goods or services are identical when they are included in a more general category designated by the other mark (05/02/2020, T-44/19, TC Touring Club, EU:T:2020:31, § 91; 13/09/2018, T-94/17, Tigha, EU:T:2018:539, § 46; 07/09/2006, T-133/05, Pam-Pym's Baby-Prop, EU:T:2006:247, § 29).
- 92 According to settled case-law, in assessing the similarity of the goods or services in question, all relevant factors pertaining to the relationship between those goods and services should be taken into account. Those factors include, in particular, their nature, purpose, method of use, and whether they are in competition or are complementary (29/09/1998, C-39/97, Canon, EU:C:1998:442, § 23).
- 93 Goods and services that are complementary are those where there is a close connection between them, in the sense that one is indispensable or important for the use of the other in such a way that consumers may think that the responsibility for the production of those goods or the supply of the services lies with the same undertaking (29/01/2025, T-607/23, Elios, EU:T:2025:112, § 50). Therefore, for the purposes of the assessment of whether goods or services are complementary, the perception of the relevant public of the importance of a product for the use of another product or service should, ultimately, be taken into account (22/09/2022, T-624/22, primagran, EU:T:2022:620, § 66; 01/12/2021, T-467/20, Zara, EU:T:2021:842, § 123; 12/03/2020, T-296/19, Sumo11, EU:T:2020:93, § 41; 02/10/2013, T-285/12, Boomerang, EU:T:2013:520, § 26; 12/07/2012, T-361/11, Dolphin, EU:T:2012:377, § 48). By definition, goods or services intended for different publics cannot be complementary (08/01/2025, T-163/24, Ratpac, EU:T:2025:3, § 28).
- 94 On some occasions, the Court has also taken into consideration the market practice (02/06/2021, T-177/20, Hispano Suiza, EU:T:2021:312, § 55) or the economic reality on the market (16/01/2018, T-273/16, Metaporn, EU:T:2018:2, § 42).
- 95 The reference point is whether the relevant public would perceive the relevant goods or services as having a common commercial origin (04/11/2003, T-85/02, Castillo, EU:T:2003:288, § 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).

96 It is not required that the examination of relative grounds for refusal must necessarily be carried out in relation to each of the goods or services covered by the earlier mark. Where two marks are similar, it is sufficient for there to be a likelihood of confusion between the goods covered by the contested sign and a portion of the goods covered by the earlier mark for registration of the contested sign to be refused (29/03/2023, T-436/22, Almara Soap, EU:T:2023:167, § 44).

97 The goods and services to be compared are as follows:

Class 28: <i>Outdoor toys, games, playthings; balls, footballs, beach balls, frisbees; sporting goods in this class, namely balls</i>	Class 28: <i>Sports equipment.</i>
<i>Earlier mark</i>	<i>Contested EUTM</i>

98 The contested *sports equipment* is a broad category, that includes the earlier *balls, footballs and frisbees* used in sports. Therefore, bearing in mind the case-law in paragraph 91, the contested goods must be considered identical to the earlier *balls, footballs, frisbees; sporting goods in this class, namely balls*.

99 Indeed, as the cancellation applicant rightly draws attention to, in the ‘Betwin’ judgment, the General Court held that *balls for games, rubber action balls and jumping ropes* were identical or similar to *gymnastic and sporting articles (other than clothing, footwear and mats)*, which are analogous to the goods at issue that are not mere *playing balls*.

100 Nevertheless, even if the Board would not have considered these goods identical, the above earlier goods for which genuine use has been proven would still have relevant similarities to the contested goods.

101 Insofar as the Board found genuine use for *balls, footballs, sporting goods in this class, namely balls*, the present case can be distinguished from the General Court judgments on which the Cancellation Division relied (04/06/2013, T-514/11, Betwin, EU:T:2013:291; 04/12/2019, T-524/18, Billa / Billabong et al., EU:T:2019:838; T-657/13/11, Alex / Alex et al., EU:T:2015:449).

102 In the ‘Alex’ case, *sporting articles* in Class 28 were compared to *children’s bath toys; and children’s educational and developmental activity toys; none of the aforementioned goods including sporting articles*. This case is not comparable given that in the present case, the contested *sporting equipment* is to be compared to the earlier *balls, footballs; sporting goods in this class, namely balls*, and not mere *toys*.

103 Likewise, ‘Billa’ concerned the comparison of *games* with *sporting goods* is not comparable.

104 Moreover, in ‘Betwin’, the General Court conceded that it could not be ruled out that, for certain *gymnastic and sporting articles*, on the one hand, and certain *toys, games and playthings*, on the other, a link can be drawn insofar as certain sporting articles can be used for games, and certain games can also be sporting articles. However, it did not consider this to be pertinent in that case, in the absence of precise information bodies as to the specific goods concerned and as regards the manner in which those goods might be

affected (04/06/2013, T-514/11, Betwin, EU:T:2013:291, § 36). This is not the case here in which there genuine of the earlier mark for *balls, footballs; sporting goods in this class, namely balls*, which for the reasons explained above are not mere *toys*.

105 The Board also distinguishes the present case from the recent ‘Bimba Toys’ case (21/12/2022, T-129/22, Bimba Toys / Simba) in which proof of use, too, was not at issue and which compared the contested *gymnastic and sporting articles* to the earlier *toys, with the exception of soft toy animals, games*.

106 Accordingly, the Board finds relevant the ‘Knut’ case, in which the General Court confirmed there was a distant similarity and a certain degree of overlap between *sports equipment*, on the one hand, and games played using sports goods, **as is the case with the boomerang or the kite**, ... and many sports goods are available **in a simplified form as toys, such as balls or rackets** (16/09/2013, T-250/10, Knut, EU:T:2013:448, § 47 to 51).

107 Thus, in the present case, if the contested goods were not considered identical to the earlier *balls, footballs, frisbees; sporting goods in this class, namely balls*, at the very least an average degree of similarity must be found between.

108 These goods are similar in nature and purpose. Playing with a ball, can be both recreational and played for fun, while still being a sport; for example, friends playing a casual game of soccer are engaging in the sport of soccer recreationally, whether played on the beach or any yard.

109 Moreover, the broad wording of the contested *sporting articles* includes items or equipment designed for active leisure and goods that can be used in both competitive and recreational sports settings.

Comparison of the signs

110 With regard to the comparison of the signs, the likelihood of confusion must be determined by means of a global appraisal of the visual, phonetic and conceptual similarities between the signs, on the basis of the overall impression given by them, bearing in mind in particular their distinctive and dominant components (11/11/1997, C-251/95, Sabèl, EU:C:1997:528, § 23). The greater or lesser degree of distinctiveness of the elements common to the mark applied for and an earlier mark is one of the relevant factors in assessing the similarity of those signs (02/06/2021, T-17/20, Gameland, EU:T:2021:313, § 47).

111 According to settled case-law, two marks are similar when, from the point of view of the relevant public, they are at least partially identical as regards one or more relevant aspects (10/03/2021, T-693/19, Kerrymaid, EU:T:2021:124, § 48).

112 The signs to be compared are:

	WAHU
<i>Earlier mark</i>	<i>Contested EUTM</i>

- 113 The **earlier mark** is a figurative mark consisting of the term ‘Wahu’ in a slightly stylised white italic script within a dark oval background outlined with a fine white line and then an exterior black outline. Below the verbal element ‘Wahu’ appears a wavy line which cuts the lower part of the oval background.
- 114 Where a mark consists of verbal and figurative elements, the former are, in principle, more distinctive than the latter, because the average consumer will more readily refer to the product in question by citing the name of the mark than by describing the figurative element of that mark (29/01/2025, T-607/23, *Elios*, EU:T:2025:112, § 43; 24/11/2024, T-1134/23, *Carmen says*, EU:T:2024:854, § 33; 12/06/2024, T-472/23, *Deshi* (fig.), EU:T:2024:374, § 25; 08/06/2022, T-355/21, *Polo Club, Düsseldorf Est. 1976*, EU:T:2022:348, § 33).
- 115 There is no reason why this general principle would not apply in the present case. The graphic features are limited to the typeface, the oval background, the contrast of the colour shade. The typeface is fairly standard. The oval background, the use of the two contrasting shades and the wavy line are decorative features that serve to highlight the verbal element ‘Wahu’. These features will be perceived mainly as decorative and not as indicating the commercial origin of the goods (15/12/2009, T-412/08, *Trubion*, EU:T:2009:507, § 45; 24/06/2004, C-49/02, *Blau/Gelb*, EU:C:2004:384, § 38).
- 116 The verbal element ‘Wahu’ does not have an apparent meaning in any of the EU languages. No meaning has moreover been argued by the parties.
- 117 It follows that the verbal element ‘Wahu’ is the most distinctive and dominant element of the earlier mark and the element by which this mark will be identified and referred to.
- 118 The **contested EUTM** consists of the word element ‘WAHU’.
- 119 For the protection of a word mark, it is irrelevant whether it is written in upper- or lower-case letters (23/03/2022, T-146/21, *Deltatic*, EU:T:2022:159, § 56; 18/11/2020, T-21/20, *K7*, EU:T:2020:550, § 40; 31/01/2013, T-66/11, *Babilu*, EU:T:2013:48, § 57).
- 120 A word mark does not have a dominant element since, by its nature, none of the constituent elements has a particular graphic or stylistic aspect capable of giving it this dominant character (02/03/2022, T-149/21, *Vitadha*, EU:T:2022:103, § 79).
- 121 **Visually**, the contested EUTM reproduces the sole dominant and most distinctive element of the earlier mark. The figurative aspects of the earlier mark are decorative and not particularly distinctive. The signs are visually similar to a high degree.
- 122 **Phonetically**, the signs are identical.
- 123 **Conceptually**, it is common ground that ‘WAHU’ has no meaning in any EU language. Therefore, the conceptual comparison remains neutral.

Distinctiveness of the earlier mark

- 124 The distinctive character of a trade mark, within the meaning of the EUTMR, means that that mark must serve to identify the goods or services in respect of which registration is sought as originating from a particular undertaking, and thus to distinguish them from

those of other undertakings. The distinctiveness of a mark must be assessed, first, by reference to those goods or services and, second, by reference to the relevant public's perception thereof, which consists of average consumers of the goods or services in question, who are reasonably well informed and reasonably observant and circumspect (10/10/2019, T-700/18, *Dungeons*, EU:T:2019:739, § 57).

- 125 The cancellation applicant did claim enhanced distinctiveness of the earlier mark. The Cancellation Division did not examine this claim based on the finding that the outcome would remain unchanged since the goods at issue were dissimilar.
- 126 The Board, for its part, for reasons of procedural economy does not need to address this claim as explained below.
- 127 The earlier mark as a whole has no meaning for any of the earlier goods in Class 28 and, therefore, its distinctiveness must be seen as normal.

Overall assessment of the likelihood of confusion

- 128 The appreciation of a likelihood of confusion on the part of the public depends on numerous elements and, in particular on the recognition of the earlier mark on the market, the association that can be made with the registered mark, and the degree of similarity between the marks and between the goods or services identified (eighth Recital of the EUTMR). It must be appreciated globally, taking into account all factors relevant to the circumstances of the case (22/06/1999, C-342/97, *Lloyd Schuhfabrik*, EU:C:1999:323, § 18; 11/11/1997, C-251/95, *Sabèl*, EU:C:1997:528, § 22).
- 129 Such a global assessment of a likelihood of confusion implies some interdependence between the relevant factors and, in particular, the similarity between the trade marks and between the goods or services. Accordingly, a greater degree of similarity between the goods or services may be offset by a lower degree of similarity between the marks, and vice versa (22/06/1999, C-342/97, *Lloyd Schuhfabrik*, EU:C:1999:323, § 20; 11/11/1997, C-251/95, *Sabèl*, EU:C:1997:528, § 24; 29/09/1998, C-39/97, *Canon*, EU:C:1998:442, § 17). The more distinctive the earlier mark, the greater the risk of confusion, and marks with a highly distinctive character, either per se or because of the reputation they possess on the market, enjoy broader protection than marks with a less distinctive character (29/09/1998, C-39/97, *Canon*, EU:C:1998:442, § 18).
- 130 Furthermore, the fact that the consumer rarely has the opportunity to make a direct comparison between the different marks, but must place his or her trust in the imperfect recollection of them that he or she has kept in his or her mind (11/11/1997, C-251/95, *Sabèl*, EU:C:1997:528, § 23; 03/03/2004, T-355/02, *Zirh*, EU:T:2004:62, § 41; 18/04/2007, T-333/04 & T-334/04, *House of Donuts*, EU:T:2007:105, § 44).
- 131 The contested *sports equipment* is identical or at least similar to an average degree to the earlier *balls, footballs, frisbees; sporting goods in this class, namely balls* for which genuine use of the earlier mark has been found.
- 132 The signs are visually similar to a high degree and phonetically identical since the contested EUTM is identical to the most dominant and distinctive element of the earlier mark, the figurative aspects of the earlier mark being decorative. The conceptual

comparison remains neutral and, in any event, is not a determinant in the comparison of the signs. The earlier mark is inherently distinctive to an average degree.

- 133 Even if the goods were not to be considered identical, the high degree of visual similarity and the phonetic identity would counterbalance the similarities of contested goods to the earlier *sports balls, footballs, frisbees; sporting goods in this class, namely sports balls* for which genuine use of the earlier mark has been found.
- 134 It follows that there is a likelihood of confusion in the European Union within the meaning of Article 8(1)(b) EUTMR.
- 135 The appeal is upheld, the contested decision annulled, the invalidity request upheld in its entirety, and the contested EUTM must be declared invalid for all the goods at issue in the present appeal proceedings.

Costs

- 136 Pursuant to Article 109(1) EUTMR and Article 18 EUTMIR, the EUTM proprietor, as the losing party, must bear the invalidity applicant's costs of the cancellation and appeal proceedings.
- 137 As to the appeal proceedings, these consist of the appeal fee of EUR 720 and the cancellation applicant's costs of professional representation of EUR 550.
- 138 As to the cancellation proceedings, the EUTM proprietor must reimburse the cancellation fee of EUR 630 and the cancellation applicant's costs of professional representation of EUR 450.
- 139 The total amount is fixed at EUR 2 350.

Order

On those grounds,

THE BOARD

hereby:

- 1. Annuls the contested decision.**
- 2. Declares EUTM No 18 246 076 invalid in its entirety.**
- 3. Orders the EUTM proprietor to bear the cancellation applicant's costs incurred in the appeal and cancellation proceedings in the amount of EUR 2 350.**

Signed

V. Melgar

Signed

R. Ocquet

Signed

A. Pohlmann

Registrar:

Signed

K. Zajfert

