O/801/21

TRADE MARKS ACT 1994

CONSOLIDATED PROCEEDINGS

IN THE MATTER OF INTERNATIONAL REGISTRATION NO. WO0000001486143 DESIGNATING THE UNITED KINGDOM IN THE NAME OF EURO GAMES TECHNOLOGY LIMITED:

IN CLASSES 9, 28 AND 41

AND

IN THE OPPOSITION THERETO UNDER NO. 419602 BY NOVOMATIC AG

AND

IN THE MATTER OF THE INTERNATIONAL REGISTATION NO. IR0000001102743 BY NOVOMATIC AG:

BURNING HOT

IN CLASSES 9, 28 AND 41

AND

THE APPLICATION FOR REVOCATION THEREOF UNDER NO. 503118 BY EURO GAMES TECHNOLOGY LIMITED

BACKGROUND AND PLEADINGS

1. These are consolidated proceedings between Novomatic AG ("Novomatic") and Euro Games Technology Limited ("Euro Games"). I will first set out the background regarding the parties' marks before setting out the basis of each parties' respective proceedings.

Novomatic's mark

2. On 7 June 2011, Novomatic applied to register the following international registration:

BURNING HOT

("Novomatic's mark")

3. With effect from the same date, Novomatic designated the UK as a territory in which it seeks to protect its mark under the terms of the Protocol to the Madrid Agreement. Protection of the mark in the UK was granted on 11 April 2012. The mark is protected for the following goods and services:

Class 9:	Computer hardware and software, in particular for casino and amusement arcade games, for gaming machines, slot machines or video lottery gaming machines, with or without prize payouts, or games of chance via telecommunications networks and/or the Internet, with or without prize payouts.
Class 28:	Casino equipment, namely roulette tables, roulette wheels; casino games with or without prize payouts, gaming machines and games machines, in particular for commercial use in casinos and amusement arcades, or games of chance, with or without prize payouts, connected with the internet or with telecommunications networks, games of chance, with or without prize payouts, for use in telecommunications apparatus; slot

machines and/or electronic money-based gaming apparatus with or without prizes; housings for slot machines and gaming machines; electronic or electro technical gaming apparatus, gaming machines and automatic gaming machines, slot machines operated by coins, tokens, banknotes, tickets or by means of electronic, magnetic or biometric storage media, in particular for commercial use in casinos and amusement arcades, with or without a prize payout; housings for slot machines, gaming apparatus, gaming machines and automatic gaming machines operated by means of coins, tokens, tickets or by means of electronic, magnetic or biometric storage media; electric, electronic or electromechanical apparatus for bingo games, lotteries or video lottery games and for betting offices; electro pneumatic and electric pulling machines (gaming machines).

Class 41: Operating casinos and gaming casinos, betting offices, bingo halls and/or lottery offices; operating gaming establishments and arcades and/or online Internet casinos and betting platforms.

Euro Games' mark

4. On 10 May 2019, Euro Games applied to register the following international registration:

("Euro Games' mark")

5. With effect from the same date, Euro Games designated the UK as a territory in which it seeks to protect its mark under the terms of the Protocol to the Madrid Agreement. Protection of the mark in the UK is sought for the following goods and services:

Class 9: Software; computer gaming software; computer software packages; computer operating system software; computer software, recorded; software drivers; virtual reality software; games software; entertainment software for computer games; computer programs for network management; operating computer software for main frame computers; monitors (computer hardware); computer hardware; apparatus for recording images; monitors (computer programs); computer game programs; computer programs for recorded games; apparatus for recording, transmission or reproduction of sound or images; communications servers [computer hardware]; electronic components for gambling machines; computer application software featuring games and gaming; computer software for the administration of on-line games and gaming; computer hardware for games and gaming; electronic components and computer software for gambling, gambling machines, gambling games on the internet and via telecommunication network.

Class 28: Gaming machines for gambling; chips for gambling; mah-jong; arcade games; gambling machines operating with coins, notes and cards; games; electronic games; parlor games; gaming chips; gaming tables; slot machines [gaming machines]; LCD game machines; slot machines and gaming devices; coin-operated amusement machines; roulette chips; poker chips; chips and dice [gaming equipment]; equipment for casinos; roulette tables; gaming roulette wheels; casino games; gambling machines and amusement machines, automatic and coin-operated; coin-operated amusement machines and/or electronic coin-operated amusement machines with or without the possibility of gain; boxes for coin-operated machines, slot machines and gaming machines; electronic or electrotechnical amusement machines and apparatus, gaming machines, coin-operated entertainment machines; housings for coin-operated machines, gaming equipment, gaming machines, machines for

gambling; electropneumatic and electrical gambling machines (slot machines).

Class 41: Gambling; services related to gambling; gaming services for entertainment purposes; casino, gaming and gambling services; training in the development of software systems; provision of equipment for gambling halls; providing casino equipment [gambling]; gaming machine entertainment services; providing casino facilities [gambling]; gaming hall services; amusement arcade services; games equipment rental; rental of gaming machines; providing amusement arcade services; rental of gaming machines with images of fruits; editing or recording of sounds and images; sound recording and video entertainment services; hire of sound reproducing apparatus; provision of gaming equipment for casinos; providing of casino facilities; online gambling services; casino, gaming and gambling services; provision of gaming establishments, gaming halls, internet casinos, online gaming services.

6. The request to protect Euro Games' mark was published on 29 November 2019.

Novomatic's opposition

7. On 26 February 2020, Euro Games' mark was opposed by Novomatic. The opposition is based on section 5(2)(b) of the Trade Marks Act 1994 ("the Act") and relies upon Novomatic's mark. The opposition is aimed at all of Euro Games' goods and services and relies upon the following goods only:

Class 9: Computer hardware and software, in particular for casino and amusement arcade games, for gaming machines, slot machines or video lottery gaming machines, with or without prize payouts, or games of chance via telecommunications networks and/or the Internet, with or without prize payouts.

Class 28: Casino games with or without prize payouts, gaming machines and games machines, in particular for commercial use in casinos and amusement arcades, or games of chance, with or without prize payouts, connected with the internet or with telecommunications networks, games of chance, with or without prize payouts, for use in telecommunications apparatus; slot machines and/or electronic money-based gaming apparatus with or without prizes; electronic or electro technical gaming apparatus, gaming machines and automatic gaming machines, slot machines operated by coins, tokens, banknotes, tickets or by means of electronic, magnetic or biometric storage media, in particular for commercial use in casinos and amusement arcades, with or without a prize payout; electro pneumatic and electric pulling machines (gaming machines).

8. In its notice of opposition, Novomatic states that as a result of the identity/high similarity between the marks and the parties' goods and services, there exists a likelihood of confusion on the part of the public including the likelihood of association. Euro Games filed a counterstatement denying the claims made and requesting that Novomatic prove use of the goods relied upon.

Euro Games' revocation application

9. On 1 May 2020, Euro Games, applied for the revocation in full of Novomatic's mark, relying on section 46(1)(b) of the Act. Euro Games claims that use of Novomatic's mark has been suspended for an uninterrupted period of five years in relation to the goods or services for which it is registered and that there are no proper reasons for non-use. The periods during which Euro Games alleges non-use of the trade mark is 10 May 2014 to 9 May 2019 ("the first relevant period") and 1 May 2015 to 30 April 2020 ("the second relevant period") (collectively referred to as "the relevant periods"), with revocation sought from either 10 May 2019 or 1 May 2020, being the date of the application.

10. Novomatic filed a counterstatement stating that it would adduce evidence of use with its consent during the relevant periods in respect of all goods and services.

11. By letter dated 14 December 2020, the Tribunal confirmed to the parties that the proceedings were to be consolidated pursuant to Rule 62(1)(g) of the Trade Marks Rules 2008.

12. Only Novomatic filed evidence. A hearing took place before me on 14 September 2021, by video conference. Novomatic was represented by Mr Michael Hicks of Hogarth Chambers, instructed by Shakespeare Martineau LLP, who have represented Novomatic throughout these proceedings. Euro Games was represented by Mr Benjamin Longstaff of Hogarth Chambers, instructed by Walker Morris LLP, who have represented Euro Games throughout these proceedings.

13. Although the UK has left the EU, section 6(3)(a) of the European Union (Withdrawal) Act 2018 requires tribunals to apply EU-derived national law in accordance with EU law as it stood at the end of the transition period. The provisions of the Act relied on in these proceedings are derived from an EU Directive. This is why this decision continues to make reference to the trade mark case-law of EU courts.

EVIDENCE

14. As set out above, only Novomatic filed evidence. This was in the form of five witness statements from four different individuals, all of whom are employed by companies within Novomatic's corporate structure. The persons who gave the witness statement are Ms Julia Schachter, Mr Alexander Roch, Mr Zane Mersich and Mr Nigel Kelly. Their statements are summarised briefly below.

15. Ms Schachter is the Deputy Head Group Legal of Novomatic, a position that she has held since July 2017. Ms Schachter has been employed by Novomatic since July 2011 and has held previous roles within the company, namely as a member of the Group Legal Department and internal IP counsel. Ms Schachter's statement is dated 16 October 2020 and is accompanied by six exhibits.

16. Mr Roch is the Head of Legal at Greentube Internet Entertainment Solutions GmbH ("Greentube"). Greentube has been a company in the Novomatic group of companies since 2010. Mr Roch's first statement is dated 16 October 2020 and is accompanied by six exhibits. Mr Roch's second statement is dated 12 April 2021 and is not accompanied by any further exhibits.

17. Mr Mersich is the Director and Chief Executive Officer of Novomatic UK Ltd, which is a wholly owned subsidiary of Novomatic. Mr Mersich has been in his role since 16 June 2008. He confirms that Novomatic UK was previously named Astra Games Limited, until 12 January 2015. Mr Mersich's statement is not accompanied by any exhibits.

18. Mr Kelly is a Compliance Manager at Novomatic Gaming UK Ltd. Mr Kelly has held this role since 15 June 2020. Prior to this, he was employed as a Compliance Officer from 1 March 1996 until 12 June 2020 (albeit during this time Novomatic Gaming UK Ltd was known as Astra Games Limited). Mr Kelly's statement is dated 19 October 2020 and is accompanied by two exhibits.

19. I do not propose to summarise the witness statements in full at this stage. However, I have taken them into consideration in reaching my decision and will refer to them below, where necessary.

MY APPROACH

20. In the event of Euro Games' application for revocation being successful on the basis of the first relevant period, Novomatic's mark will be deemed to have been revoked on 10 May 2019. In these circumstances, Novomatic's mark will not have been a valid mark as at the date of Novomatic's opposition meaning that its opposition will fall away. However, in the event that Euro Games' application for revocation is successful on the basis of the second relevant period only, Novomatic's mark will be deemed to have been revoked on 1 May 2020, being after the date of its opposition. In these circumstances, Novomatic's opposition will continue to run on the basis that Novomatic's mark was validly registered as at the date of the opposition. This position was confirmed by Professor Ruth Annand as

the Appointed Person in the case of *TAX ASSIST*, BL O/220/12. As a result, I consider it necessary to consider Euro Games' application for revocation first before moving to consider Novomatic's opposition, should it be necessary to do so.

DECISION

Euro Games' revocation

Section 46: legislation and case law

21. Section 46 of the Act states:

> "46. - (1) The registration of a trade mark may be revoked on any of the following grounds-
>
> (a) …..
>
> (b) that such use has been suspended for an uninterrupted period of five years, and there are no proper reasons for non-use;
>
> (c) …..
>
> (d) …..
>
> (2) For the purpose of subsection (1) use of a trade mark includes use in a form (the "variant form") differing in elements which do not alter the distinctive character of the mark in the form in which it was registered (regardless of whether or not the trade mark in the variant form is also registered in the name of the proprietor), and use in the United Kingdom includes affixing the trade mark to goods or to the packaging of goods in the United Kingdom solely for export purposes.

(3) The registration of a trade mark shall not be revoked on the ground mentioned in subsection (1)(a) or (b) if such use as in referred to in that paragraph is commenced or resumed after the expiry of the five year period and before the application for revocation is made:

Provided that, any such commencement or resumption of use after the expiry of the five year period but within the period of three months before the making of the application shall be disregarded unless preparations for the commencement or resumption began before the proprietor became aware that the application might be made.

(4) An application for revocation may be made by any person, and may be made either to the registrar or to the court, except that –

(a) if proceedings concerning the trade mark in question are pending in the court, the application must be made to the court; and

(b) if in any other case the application is made to the registrar, he may at any stage of the proceedings refer the application to the court.

(5) Where grounds for revocation exist in respect of only some of the goods or services for which the trade mark is registered, revocation shall relate to those goods or services only.

(6) Where the registration of a trade mark is revoked to any extent, the rights of the proprietor shall be deemed to have ceased to that extent as from-

(a) the date of the application for revocation, or

(b) if the registrar or court is satisfied that the grounds for revocation existing at an earlier date, that date."

22. Section 100 is also relevant, which reads:

> "If in any civil proceedings under this Act a question arises as to the use to which a registered trade mark has been put, it is for the proprietor to show what use has been made of it."

23. In *Walton International Ltd & Anor v Verweij Fashion BV* [2018] EWHC 1608 (Ch) Arnold J summarised the law relating to genuine use as follows:

> "114……The CJEU has considered what amounts to "genuine use" of a trade mark in a series of cases: Case C-40/01 *Ansul BV v Ajax Brandbeveiliging BV* [2003] ECR I-2439, *La Mer* (cited above), Case C-416/04 P *Sunrider Corp* v *Office for Harmonisation in the Internal Market (Trade Marks and Designs)* [2006] ECR I-4237, Case C-442/07 *Verein Radetsky-Order v Bundervsvereinigung Kamaradschaft 'Feldmarschall Radetsky'* [2008] ECR I-9223, Case C-495/07 *Silberquelle GmbH v Maselli-Strickmode GmbH* [2009] ECR I-2759, Case C-149/11 *Leno Merken BV v Hagelkruis Beheer BV* [EU:C:2012:816], [2013] ETMR 16, Case C-609/11 P *Centrotherm Systemtechnik GmbH v Centrotherm Clean Solutions GmbH & Co KG* [EU:C:2013:592], [2014] ETMR, Case C-141/13 P *Reber Holding & Co KG v Office for Harmonisation in the Internal Market (Trade Marks and Designs)* [EU:C:2014:2089] and Case C-689/15 *W.F. Gözze Frottierweberei GmbH v Verein Bremer Baumwollbörse* [EU:C:2017:434], [2017] Bus LR 1795.
>
> 115. The principles established by these cases may be summarised as follows:
>
> (1) Genuine use means actual use of the trade mark by the proprietor or by a third party with authority to use the mark: *Ansul* at [35] and [37].
>
> (2) The use must be more than merely token, that is to say, serving solely to preserve the rights conferred by the registration of the mark: *Ansul* at [36]; *Sunrider* at [70]; *Verein* at [13]; *Leno* at [29]; *Centrotherm* at [71]; *Reber* at [29].

(3) The use must be consistent with the essential function of a trade mark, which is to guarantee the identity of the origin of the goods or services to the consumer or end user by enabling him to distinguish the goods or services from others which have another origin: *Ansul* at [36]; *Sunrider* at [70]; *Verein* at [13]; *Silberquelle* at [17]; *Leno* at [29]; *Centrotherm* at [71]. Accordingly, affixing of a trade mark on goods as a label of quality is not genuine use unless it guarantees, additionally and simultaneously, to consumers that those goods come from a single undertaking under the control of which the goods are manufactured and which is responsible for their quality: *Gözze* at [43]-[51].

(4) Use of the mark must relate to goods or services which are already marketed or which are about to be marketed and for which preparations to secure customers are under way, particularly in the form of advertising campaigns: *Ansul* at [37]. Internal use by the proprietor does not suffice: *Ansul* at [37]; *Verein* at [14] and [22]. Nor does the distribution of promotional items as a reward for the purchase of other goods and to encourage the sale of the latter: *Silberquelle* at [20]-[21]. But use by a non-profit making association can constitute genuine use: *Verein* at [16]-[23].

(5) The use must be by way of real commercial exploitation of the mark on the market for the relevant goods or services, that is to say, use in accordance with the commercial *raison d'être* of the mark, which is to create or preserve an outlet for the goods or services that bear the mark: *Ansul* at [37]-[38]; *Verein* at [14]; *Silberquelle* at [18]; *Centrotherm* at [71]; *Reber* at [29].

(6) All the relevant facts and circumstances must be taken into account in determining whether there is real commercial exploitation of the mark, including: (a) whether such use is viewed as warranted in the economic sector concerned to maintain or create a share in the market for the goods and services in question; (b) the nature of the goods or services; (c) the characteristics of the market concerned; (d) the scale and

frequency of use of the mark; (e) whether the mark is used for the purpose of marketing all the goods and services covered by the mark or just some of them; (f) the evidence that the proprietor is able to provide; and (g) the territorial extent of the use: *Ansul* at [38] and [39]; *La Mer* at [22]-[23]; *Sunrider* at [70]-[71], [76]; *Leno* at [29]-[30], [56]; *Centrotherm* at [72]-[76]; *Reber* at [29], [32]-[34].

(7) Use of the mark need not always be quantitatively significant for it to be deemed genuine. Even minimal use may qualify as genuine use if it is deemed to be justified in the economic sector concerned for the purpose of creating or preserving market share for the relevant goods or services. For example, use of the mark by a single client which imports the relevant goods can be sufficient to demonstrate that such use is genuine, if it appears that the import operation has a genuine commercial justification for the proprietor. Thus there is no *de minimis* rule: *Ansul* at [39]; *La Mer* at [21], [24] and [25]; *Sunrider* at [72] and [76]-[77]; *Leno* at [55].

(8) It is not the case that every proven commercial use of the mark may automatically be deemed to constitute genuine use: *Reber* at [32]."

24. Proven use of a mark which fails to establish that "the commercial exploitation of the mark is real" because the use would not be "viewed as warranted in the economic sector concerned to maintain or create a share in the market for the goods and services protected by the mark" is not, therefore, genuine use.

Form of the Mark

25. In *Colloseum Holdings AG v Levi Strauss & Co.,* Case C-12/12, which concerned the use of one mark with, or as part of, another mark, the CJEU found that:

"31. It is true that the 'use' through which a sign acquires a distinctive character under Article 7(3) of Regulation No 40/94 relates to the period before its registration as a trade mark, whereas 'genuine use', within the meaning of Article

15(1) of that regulation, relates to a five-year period following registration and, accordingly, 'use' within the meaning of Article 7(3) for the purpose of registration may not be relied on as such to establish 'use' within the meaning of Article 15(1) for the purpose of preserving the rights of the proprietor of the registered trade mark.

32. Nevertheless, as is apparent from paragraphs 27 to 30 of the judgment in *Nestlé*, the 'use' of a mark, in its literal sense, generally encompasses both its independent use and its use as part of another mark taken as a whole or in conjunction with that other mark.

33. As the German and United Kingdom Governments pointed out at the hearing before the Court, the criterion of use, which continues to be fundamental, cannot be assessed in the light of different considerations according to whether the issue to be decided is whether use is capable of giving rise to rights relating to a mark or of ensuring that such rights are preserved. If it is possible to acquire trade mark protection for a sign through a specific use made of the sign, that same form of use must also be capable of ensuring that such protection is preserved.

34. Therefore, the requirements that apply to verification of the genuine use of a mark, within the meaning of Article 15(1) of Regulation No 40/94, are analogous to those concerning the acquisition by a sign of distinctive character through use for the purpose of its registration, within the meaning of Article 7(3) of the regulation.

35 Nevertheless, as pointed out by the German Government, the United Kingdom Government and the European Commission, a registered trade mark that is used only as part of a composite mark or in conjunction with another mark must continue to be perceived as indicative of the origin of the product at issue for that use to be covered by the term 'genuine use' within the meaning of Article 15(1)". (emphasis added)

26. Throughout the evidence I note that Novomatic's mark has been used in the following ways:

d. BURNING HOT 7's;

f. BURNING HOT Respin;

Marks labelled a) to c)

27. Firstly, Novomatic's mark is a word only mark that is registered in black and white. This means that it can be used in any colour and in any standard typeface. In my view, the marks shown at a) to c) above are in line with the notional fair use of the mark as registered. Therefore, I find that marks a) to c) are examples of use of the mark as registered in accordance with *Colloseum*.

Marks labelled d) to h)

28. For the same reasons set out at paragraph 27 above, the presentation of 'BURNING HOT' in these marks is within notional fair use of the mark as registered.

As per the case of *Colloseum*, use of a mark generally encompasses both its independent use and its use as part of another mark taken as a whole or in conjunction with that other mark. In my view, the addition of the elements '7's', 'RESPIN' and 'FORTIES' in marks d) to h) mean that the use of Novomatic's mark is as part of a composite mark. Despite being used as part of a composite mark, I consider that the 'BURNING HOT' element will be perceived independently and continued to be viewed as indicative of the primary origin of the goods at issue with the additional elements being seen as a secondary indication of origin. As a result, and in accordance with *Colloseum*, I consider marks d) to h) are examples of use of Novomatic's mark as registered.

Sufficient Use

29. I note that the evidence does not show any use of Novomatic's mark by Novomatic itself. However, the evidence sets out that its use was by a number of different companies through various licences and sub-licences. Before proceeding to consider whether this use is sufficient, I consider it necessary to assess the different licences and sub-licences to determine whether the use discussed is with consent of Novomatic.

30. Of the evidence I note the following:

a. on 1 January 2011, Novomatic UK were granted permission from Novomatic to not only use its mark but to also sublicense it.[1] This agreement covered use of Novomatic's mark in the UK for the entire duration of its protection, which covers the two relevant periods in these proceedings, being 10 May 2014 to 9 May 2019 and 1 May 2015 to 30 April 2020. This licence agreement was assigned from Novomatic UK to Astra Games on 6 June 2019;[2]
b. on 26 January 2011, Novomatic UK subsequently granted Greentube a sub-licence allowing for use of Novomatic's intellectual property rights.[3] As with the licence discussed at point a. above, this licence also granted Greentube permission to sub-licence the mark further;

[1] Exhibit JS2 of the Witness Statement of Julia Schachter
[2] Exhibit JS6
[3] Exhibit JS3

c. on 5 June 2019, Novomatic entered into a licence with Greentube directly that granted Greentube a non-exclusive sub-licensable licence of Novomatic's intellectual property;[4]

d. on 26 June 2019, Novomatic entered into a licence with Astra Games.[5] The purpose of this licence was to formalise a previously informal licence arrangement between the two companies. This was also done to clearly define the position as, at the time, it was anticipated that Astra Games would be sold outside of the Novomatic group of companies. While the company was eventually sold in October 2019, the casino division of that company was retained by Novomatic and continues as a part of Novomatic UK;

e. Greentube licences the online use of certain Novomatic games to L&L Europe Limited. L&L Europe is an online casino operator that offers online casino services in various territories including the UK. While no evidence of the licence is enclosed, this is confirmed by Mr Roch at paragraph 10 of his first witness statement;

f. Greentube also offers services in the UK via Greentube Alderney Limited. While no permission regarding this use is expressly discussed, the licences granted to Greentube referred to above are sub-licensable meaning that Greentube are entitled to sub-licence further. Further, I note that Greentube Alderney Limited is a subsidiary of Greentube, which in turn is a subsidiary of Novomatic. Overall, I am satisfied that any use by Greentube Alderney Limited is with consent of Novomatic; and

g. A company called Funstage GmbH ("Funstage") is discussed. While there is no licence provided or discussed in the evidence, Funstage is a wholly owned subsidiary of Greentube. Funstage is, therefore, a company within the Novomatic group of companies and while no permission is expressly discussed, I am satisfied that any use by Funstage is with consent of Novomatic.

31. Upon review of all of the licence agreements referred to above, I can see that they permit use of any or all of the trade marks of Novomatic for the purpose of 'remote gaming'. This includes Novomatic's mark for use on gaming applications such as

[4] Exhibit JS4
[5] Exhibit JS5

via websites, mobiles, interactive TV and/or other media applicable solutions based on computer programs. This expressly covers use on websites and mobile applications.

32. As a result of the above, I am content to conclude that, based on the evidence provided, and in light of the structural make-up of the Novomatic group of companies, any use of Novomatic's mark by Novomatic UK, Greentube, Astra Games, L&L Europe and Funstage was with the consent of Novomatic. For ease of reference, I will refer to any use by these companies as use by Novomatic.

33. At the hearing, both parties gave detailed submissions in respect of the use of Novomatic's mark. While I have taken those submissions into account, I do not intend to reproduce them here.

34. The evidence discusses different types of business operations, namely 'business-to-business' and 'business-to-consumer'. The 'business-to-business' operations involved a portfolio of Novomatic's casino games that were made available to L&L Europe who, in turn, made them available online to the end consumers. In respect of its direct business-to-consumer operations, these are a range of casino games that are available online in the UK under the name 'Admiral Casino'. Admiral Casino is a UK-based casino offering where consumers can play poker, roulette, blackjack, slot machine style games and more. There is also a social casino gaming operation in the UK that is a website-based game/mobile app game called 'GameTwist' that offers over 400 titles, two of which being 'Burning Hot 7's' and 'Burning Hot Respin'. GameTwist is a game that can be played without gambling real money but by using 'credits' that can either be bought or earnt by playing in game.

35. The evidence sets out that the game 'BURNING HOT 7s' has been available online in the UK since January 2015 through Admiral Casino and since February 2015 through 'GameTwist'. 'BURNING HOT Repsin' has been available via both of these platforms since January 2018 and was also listed as a 'top game' via the GameTwist website as at 12 May 2017.[6] Various print-outs obtained via the online

[6] Exhibit AR3 of the Witness Statement of Alexander Roch

archive facility 'The WayBack Machine' are provided that show both 'BURNING HOT 7's' and 'BURNING HOT Respin' on the GameTwist website throughout the relevant periods, namely 23 March 2015, 18 April 2015, 6 June 2017, 2 October 2017, 24 April 2018, 16 June 2018 and 22 June 2018.[7] While the first two print-outs only show 'BURNING HOT 7's', the remaining print-outs show both games.

36. Various invoices have been provided regarding the payment of royalties stemming from use of Novomatic's mark.[8] Of these invoices I note that there has been a total of £18,615.03 in royalties between 1 April 2019 and 31 January 2020. This covers the entirety of the second relevant period. However, taking into account that the first relevant period runs until 9 May 2019, the invoices only show royalties of l £5,567.68 during this time.

37. Further evidence of royalties is provided by way of a table of figures regarding use of Novomatic's mark that shows the royalty payments in respect of the 'BURNING HOT Respin' game in the UK between April 2019 and January 2020.[9] These figures are provided in euros and total €5,148.94 in respect of the first relevant period and €8,843.97 in respect of the second.

38. I have no evidence as to how these royalty payments are calculated, meaning that I am unable to determine what level of use these royalties equate to. The royalty payments do, however, indicate use of the mark. While I have no indication regarding the relevant market these figures are to be compared to, I would imagine it to be a fairly significant market in the sum of millions of pounds per annum. In my view, the figures referred to at paragraphs 36 and 37 above, when compared to the size of the market, are low.

39. Moving on to evidence of players and games played, there are three different tables provided that show the total active players and total games played of 'BURNING HOT 7's' and 'BURNING HOT Respin' during the relevant periods. Each table represents a breakdown of the total number of players/games in respect

[7] Exhibit AR4
[8] Exhibit AR5
[9] Exhibit AR6

of the different business operations used. Under the online casino model through Admiral Casino, the figures are broken down as follows:

Period (inclusive)	Total Active Players	Total Games Played
January 2015 to December 2015	38	598,725
January 2016 to December 2016	2	1,546
January 2017 to December 2017	0	0
January 2018 to December 2018	6,002	536,889
January 2019 to December 2019	4,286	346,749
January 2020 to April 2020	2,693	268,140
Total during Relevant Periods	**8,735**	**1,752,049**

40. Under the business-to-business model, the figures are broken down as follows:

Period (inclusive)	Total Active Players	Total Games Played
January 2015 to December 2015	0	0
January 2016 to December 2016	0	0
January 2017 to December 2017	0	0
January 2018 to December 2018	932	75,570
January 2019 to December 2019	1562	108,745
January 2020 to April 2020	414	36,499
Total during Relevant Periods	**2,908**	**220,814**

41. Finally, under the GameTwist website/app, the figures are broken down as follows:

Period (inclusive)	Total Active Players	Total Games Played
January 2015 to December 2015	38,015	9,769,829
January 2016 to December 2016	46,659	3,921,048
January 2017 to December 2017	46,240	4,271,613
January 2018 to December 2018	37,980	4,031,639
January 2019 to December 2019	30,975	2,917,752
January 2020 to April 2020	12,587	959,103
Total during Relevant Periods	**212,456**	**25,870,984**

42. These figures show a total of 224,099 active players that have played a total of 27,843,847 games. However, I note that the GameTwist website/app is not a gambling app and, instead, provides users with a platform to play slot machine style games for entertainment purposes, not gambling. As a result, I am of the view that these figures can be broken down further. In terms of actual games played for

gambling purposes, I note that the figures show 11,642 players who have played a total of 1,972,863 games during the relevant periods. As for the figures relating to games for entertainment purposes, the figures show 212,456 players who have played a total of 25,870,984.

43. While some of the figures from either end of the time periods inevitably fall outside of one of the relevant periods, the bulk of the figures fall within both relevant periods. While I have no indication how many total active players of online slot machines there are on a yearly basis across the UK or how many total games of online slot machines are played, I would imagine that this would total millions of users that play hundreds of millions of games per annum. I consider this applies to both online slot machines for gambling and entertainment purposes. In relation to the relevant market, the figures provided in the evidence are, in my view, low.

44. Moving on to physical slot machines, I note that the evidence sets out a process that involves converting an existing gaming machine to ones that have been rebranded with the 'BURNING HOT' branding that includes the 'BURNING HOT 7's' and 'BURNING HOT Respin' games. This is done by using a 'Conversion Kit'. From the evidence, I can see that a 'Conversion Kit' is the process of updating an existing gaming machine by using online software or USB memory sticks with replacement 'housing kits' provided to redecorate the machine with alternate branding/imagery. The evidence sets out there were a total of 30 conversion kits bearing Novomatic's mark for a total of £24,850. These were sold via four separate transactions to various companies that provide gaming via a number of ways such as in holiday parks and on the high street. I have no evidence or submissions as to what relevant market would apply to this type of goods. In the absence of such, I consider that this will be included in the market for gambling machines, which I consider to be a very significant market with an annual turnover of millions of pounds per annum.

45. I note that there is no evidence as to any advertising expenditure, press coverage or marketing efforts by Novomatic.

46. In assessing whether there has been genuine use of a mark, I am required to consider the evidence as a whole. My assessment of the evidence above sets out that the turnover figures and evidence of players/games played are low. On balance, I consider that these figures are not quantitively significant. However, the case law set out above states that use does not need to be quantitatively significant for it to be deemed genuine and that minimal use may qualify as genuine use if it is deemed to be justified in the economic sector concerned for the purpose of creating or preserving market share for its goods. Taking the evidence as a whole, I am satisfied that it points to genuine use of Novomatic's mark during the relevant periods.

Fair Specification

47. In light of my finding above, it is now necessary to consider whether, or the extent to which, the evidence shows use of Novomatic's mark in relation to the all of the goods and services. I note that during the hearing, Novomatic referred me to its skeleton arguments which proposed a fall-back specification in light of the evidence of use. Insofar as I consider there to have been genuine use of specific goods or services, I will consider the fall-back specification provided.

48. In *Property Renaissance Ltd (t/a Titanic Spa) v Stanley Dock Hotel Ltd (t/a Titanic Hotel Liverpool) & Ors* [2016] EWHC 3103 (Ch), Mr Justice Carr summed up the law relating to partial revocation as follows.

> "iii) Where the trade mark proprietor has made genuine use of the mark in respect of some goods or services covered by the general wording of the specification, and not others, it is necessary for the court to arrive at a fair specification in the circumstance, which may require amendment; *Thomas Pink Ltd v Victoria's Secret UK Ltd* [2014] EWHC 2631 (Ch) ("Thomas Pink") at [52].
>
> iv) In cases of partial revocation, pursuant to section 46(5) of the Trade Marks Act 1994, the question is how would the average consumer fairly describe the

services in relation to which the trade mark has been used; *Thomas Pink* at [53].

v) It is not the task of the court to describe the use made by the trade mark proprietor in the narrowest possible terms unless that is what the average consumer would do. For example, in *Pan World Brands v Tripp Ltd* (Extreme Trade Mark) [2008] RPC 2 it was held that use in relation to holdalls justified a registration for luggage generally; *Thomas Pink* at [53].

vi) A trade mark proprietor should not be allowed to monopolise the use of a trade mark in relation to a general category of goods or services simply because he has used it in relation to a few. Conversely, a proprietor cannot reasonably be expected to use a mark in relation to all possible variations of the particular goods or services covered by the registration. *Maier v Asos Pl*c [2015] EWCA Civ 220 ("Asos") at [56] and [60].

vii) In some cases, it may be possible to identify subcategories of goods or services within a general term which are capable of being viewed independently. In such cases, use in relation to only one subcategory will not constitute use in relation to all other subcategories. On the other hand, protection must not be cut down to those precise goods or services in relation to which the mark has been used. This would be to strip the proprietor of protection for all goods or services which the average consumer would consider to belong to the same group or category as those for which the mark has been used and which are not in substance different from them; *Mundipharma AG v OHIM* (Case T-256/04) ECR II-449; EU:T:2007:46."

49. Based on the evidence, I make the following findings in respect of fair specification:

Computer hardware and software, in particular for casino and amusement arcade games, for gaming machines, slot machines or video lottery gaming machines, with or without prize payouts, or games of chance via telecommunications networks and/or the Internet, with or without prize payouts.

50. In respect of the evidence relating to hardware, I note that it sets out that the conversion kits provided by Novomatic are installed through software updates that are loaded into the machines either via online software or USB stick. No breakdown is provided as to how many of the conversion kits are installed via online software or USB memory stick. While either method allows for the provision of software for casino games, gaming machines, slot machines or video lottery gaming machines, I am not convinced that it shows use of computer hardware. Firstly, while I accept that a USB memory stick is a piece of hardware, the provision of a USB memory stick pre-loaded with specific software is not the provision of the USB memory stick itself. Instead, it is simply a delivery mechanism for the actual goods, being software. Secondly, even if I were to accept this use as the provision of hardware, I do not consider that the sale of 30 conversion kits for £24,850 during the relevant periods is sufficient to shown genuine use for these types of goods, particularly when compared to the size of the relevant market which, as I have set out above, totals millions of pounds per annum. As a result, I do not consider that the evidence shows use of the above term insofar as it relates to computer hardware.

51. Turning to the evidence in respect of software, I note that the evidence shows use of online slot machine style games under the 'BURNING HOT' brand in the form of millions of games being played during the relevant periods. This use relates to both games played online with prize pay-outs (via the Admiral Casino platform) and those without (via the 'GameTwist' platform). While the figures are low, I am satisfied that they show genuine use of Novomatic's mark. In my view, this covers use of software relating to casino games via telecommunication networks and/or the internet with or without prize pay-outs only. While there is evidence showing the 'BURNING HOT' games on physical gaming machines via the installation of 'conversion kits', I have set out above that this evidence is insufficient in that it shows 30 sales of these during the relevant periods. As a result, I am of the view that fair specification for these goods extends only insofar as they relate to online games only.

52. Further, I note that the above term is not limited by its use of the phrase 'in particular'. This means that the term is not limited to casino and amusement games but can be used for any type of computer software or hardware. Given the limited

use of online casino games only, I do not consider it appropriate the allow the term to remain registered as it is currently worded. Therefore, I consider it necessary to limit the term as follows:

> "Computer software namely for casino games via telecommunications networks and/or the Internet."

53. This, in my view, is how the average consumer would fairly describe the goods and appropriately limits Novomatic to the goods for which its mark has actually been used and is not disproportionately wide.

Casino equipment, namely roulette tables, roulette wheels; casino games with or without prize payouts, gaming machines and games machines, in particular for commercial use in casinos and amusement arcades, or games of chance, with or without prize payouts, connected with the internet or with telecommunications networks, games of chance, with or without prize payouts, for use in telecommunications apparatus; slot machines and/or electronic money-based gaming apparatus with or without prizes; electronic or electro technical gaming apparatus, gaming machines and automatic gaming machines, slot machines operated by coins, tokens, banknotes, tickets or by means of electronic, magnetic or biometric storage media, in particular for commercial use in casinos and amusement arcades, with or without a prize payout; electric, electronic or electromechanical apparatus for bingo games, lotteries or video lottery games and for betting offices; electro pneumatic and electric pulling machines (gaming machines).

54. I note that at the hearing, Novomatic submitted that:

> "We also accept that it is possible, quite fairly, to carve out of the existing specification of goods things which are clearly distinct. […] For example, in class 28, we accept that we have not shown use for roulette tables or roulette wheels. Those we fully accept."

55. I accept that this was given as an example but I agree that the evidence provided has shown no use of roulette tables or wheels. There can, therefore, be no fair specification for these goods. Moving on to consider the remaining class 28 goods, I note that, aside from the evidence regarding the provision of conversion kits for existing gaming machines, the evidence points towards use of Novomatic's mark via online gaming only. While I note the presence of the conversion kits, this is a good provided to convert an existing machine and there is no evidence that the machine itself is provided under the branding of Novomatic's mark. While it is arguable that the term "casino games with or without prize payouts" covers use of online casino games, I do not consider this to be the case. I make this finding on the basis that these goods are registered in class 28 and, therefore, cover the apparatus of the casino games itself and not the software running the game. As a result, I do not consider that Novomatic has shown any use of the above goods on the basis that they cover the provision of physical gaming machines.

Housings for slot machines and gaming machines; housings for slot machines, gaming apparatus, gaming machines and automatic gaming machines operated by means of coins, tokens, tickets or by means of electronic, magnetic or biometric storage media.

56. The evidence sets out that when Novomatic provides a customer with a conversion kit, it comes with new housing units that are installed to alter the appearance of the machine so that the 'BURNING HOT' branding is displayed. The evidence shows that 30 conversion kits have been provided, meaning that Novomatic has only provided 30 housings for slot machines during the relevant periods. I have set out above that such a level of sales is insignificant in comparison with the size of the market. Therefore, I do not consider that Novomatic has shown a level of use of the above goods that would warrant granting it fair specification for the same.

Operating casinos and gaming casinos, betting offices, bingo halls and/or lottery offices; operating gaming establishments and arcades and/or online Internet casinos and betting platforms.

57. Firstly, I do not consider that Novomatic's evidence shows any use of the service of operating casinos, betting offices, bingo halls, lottery offices, gaming

establishments or arcades. Moving on to the service of online internet casinos and betting platforms, I note that the evidence shows internet casinos. However, the evidence sets out that the casino itself is not provided under the 'BURNING HOT' branding. Instead the online casinos are provided under the branding of either Admiral Casino or GameTwist. While two of the games provided are games under the 'BURNING HOT' branding, the casino services themselves are not. Further, I do not consider that the average consumer would log onto the casino website and believe that the casino services themselves were provided under the 'BURNING HOT' branding but would instead understand Admiral Casino or GameTwist to be the provider of those services. Finally, there is no evidence of any use of betting platforms. Therefore, I do not consider that the evidence shows any use of the above services

58. In respect of the goods for which genuine use has been found, it follows that the revocation application against those goods fails. However, the revocation application succeeds against the goods and services for which no genuine use has been found.

59. Novomatic's mark is hereby revoked for the following goods and services for reasons of non-use in accordance with section 46(1)(b) of the Act with an effective revocation date of 10 May 2019:

Class 9: Computer hardware […] in particular for casino and amusement arcade games, for gaming machines, slot machines or video lottery gaming machines, with or without prize payouts, or games of chance via telecommunications networks and/or the Internet, with or without prize payouts; Computer software in particular for […] amusement arcade games, for gaming machines, slot machines or video lottery gaming machines, without or without prize payouts.

Class 28: Casino equipment, namely roulette tables, roulette wheels; casino games with or without prize payouts, gaming machines

and games machines, in particular for commercial use in casinos and amusement arcades, or games of chance, with or without prize payouts, connected with the internet or with telecommunications networks, games of chance, with or without prize payouts, for use in telecommunications apparatus; slot machines and/or electronic money-based gaming apparatus with or without prizes; electronic or electro technical gaming apparatus, gaming machines and automatic gaming machines, slot machines operated by coins, tokens, banknotes, tickets or by means of electronic, magnetic or biometric storage media, in particular for commercial use in casinos and amusement arcades, with or without a prize payout; electric, electronic or electromechanical apparatus for bingo games, lotteries or video lottery games and for betting offices; electro pneumatic and electric pulling machines (gaming machines); housings for slot machines and gaming machines; housings for slot machines, gaming apparatus, gaming machines and automatic gaming machines operated by means of coins, tokens, tickets or by means of electronic, magnetic or biometric storage media.

Class 41: Operating casinos and gaming casinos, betting offices, bingo halls and/or lottery offices; operating gaming establishments and arcades and/or online Internet casinos and betting platforms.

60. However, it remains registered for the following goods:

Class 9: Computer software namely for casino games via telecommunications networks and/or the Internet.

61. Given that Novomatic’s mark remains registered, Novomatic’s opposition may proceed in reliance upon the remaining goods only.

Novomatic's opposition

Section 5(2)(b): legislation

62. Section 5(2) of the Act reads as follows:

> "(2) A trade mark shall not be registered if because –
>
> (a) […]
>
> (b) it is similar to an earlier trade mark and is to be registered for goods or services identical with or similar to those for which the earlier trade mark is protected,
>
> there exists a likelihood of confusion on the part of the public, which includes the likelihood or association with the earlier trade mark."

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

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

64. An earlier trade mark is defined in section 6 of the Act, the relevant parts of which state:

> "(6)(1) In this Act an "earlier trade mark" means –
>
> (a) a registered trade mark, international trade mark (UK) or Community trade mark or international trade mark (EC) which has a date of application for registration earlier than that of the trade mark in question, taking account (where appropriate) of the priorities claimed in respect of the trade marks,

(2) References in this Act to an earlier trade mark include a trade mark in respect of which an application for registration has been made and which, if registered, would be an earlier trade mark by virtue of subsection (1)(a) or (b), subject to its being so registered."

65. Given its filing date, Novomatic's mark qualifies as an earlier trade mark under the above provisions.

Proof of use

66. As I have set out above, the applicant sought to put the opponent to proof of use of its mark because it had completed its registration process more than 5 years before the date of the application in issue. Therefore, Novomatic's mark is subject to proof of use pursuant to section 6A of the Act.

67. The principles laid down in the case of *Walton* (cited above) apply equally here.

68. The relevant period under the proof of use requirements under Novomatic's opposition is 11 May 2014 to 10 May 2019, being the date of the application now being opposed. This differs to the first relevant period in Euro Games' revocation, by one day at either end of the period. Further, I note that the requirements under the revocation for non-use are identical to the proof of use provisions now at issue. I do not consider that the difference of one day in respect of the relevant period makes any material difference to the findings I have made under the revocation application above. This means that Novomatic's evidence is sufficient to show proof of use of its mark for the goods listed at paragraph 60 above. Therefore, the goods upon which Novomatic is capable of relying upon in the opposition proceedings are as follows:

Class 9:	Computer software namely for casino games via telecommunications networks and/or the Internet.

69. I will now proceed to consider the section 5(2)(b) opposition accordingly.

Section 5(2)(b): case law

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

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

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

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

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

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

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

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

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

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

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

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

Comparison of goods and services

71. Euro Games' goods and services are set out at paragraph 5 of this decision. Novomatic's goods are set out at paragraph 68 above.

72. When making the comparison, all relevant factors relating to the goods in the specifications should be taken into account. In the judgment of the CJEU in *Canon*, Case C-39/97, the court stated at paragraph 23 that:

"In assessing the similarity of the goods or services concerned, as the French and United Kingdom Governments and the Commission have pointed out, all the relevant factors relating to those goods or services themselves should be

taken into account. Those factors include, inter alia, their nature, their intended purpose and their method of use and whether they are in competition with each other or are complementary".

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

(a) The respective uses of the respective goods or services;

(b) The respective users of the respective goods or services;

(c) The physical nature of the goods or acts of service;

(d) The respective trade channels through which the goods or services reach the market;

(e) In the case of self-serve consumer items, where in practice they are respectively found or likely to be, found in supermarkets and in particular whether they are, or are likely to be, found on the same or different shelves;

(f) The extent to which the respective goods or services are competitive. This inquiry may take into account how those in trade classify goods, for instance whether market research companies, who of course act for industry, put the goods or services in the same or different sectors.

74. The General Court ("GC") confirmed in *Gérard Meric v Office for Harmonisation in the Internal Market*, Case T- 133/05, that, even if goods or services are not worded identically, they can still be considered identical if one term falls within the scope of another or (vice versa):

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

where the goods designated by the trade mark application are included in a more general category designated by the earlier mark".

Class 9 goods

75. "Computer software for gambling, gambling machines, gambling games on the internet and via telecommunication network" in Euro Games' specification is, in my view, identical to "computer software namely for casino games via telecommunications networks and/or the Internet" in Novomatic's specification.

76. "Electronic components […] for gambling, gambling machines, gambling games on the internet and via telecommunication network" and "electronic components for gambling machines" in Euro Games' specification, in my view, cover the internal components of the gambling machines or online servers themselves such as fuses, transistor, motors and so on. While the end purpose of these goods and Novomatic's goods overlap in that both relate to gambling, all other factors differ. For example, the nature of the goods differs, so too does the method of use. Further, the user base is different in that the user of Euro Games' goods will be a manufacturer of a casino game whereas the user of Novomatic's goods will be a member of the general public. I also do not consider that there is any overlap in trade channels in that a producer of the internal components of a gaming machine is unlikely to also produce the software for the game itself. Overall, despite the overlap in end purpose, I do not consider there to be any level of similarity between these goods. They are, therefore, dissimilar.

77. "Software", "computer gaming software", "computer software packages" and "computer software, recorded" in Euro Games' specification are broad types of software that can include software for use in casino games. I consider that Novomatic's goods falls within Euro Games' broader terms. As a result, these goods are identical under the principle outlined in *Meric.*

78. "Games software", "entertainment software for computer games", "computer game programs", "computer programs for recorded games", "computer application software featuring games and gaming" and "computer software for the

administration of on-line games and gaming" in Euro Games' specification are all terms that can include casino style games, be that for gambling or other purposes. As a result, Novomatic's goods can be said to fall within Euro Games' terms. As a result, I consider that these goods are identical under the principle outlined in *Meric.*

79. While "computer operating system software", "software drivers", "operating computer software for main frame computers" and "computer programs for network management" in Euro Games' specification are types of software, I do not consider them to be similar to the software covered by Novomatic's specification. This is on the basis that Euro Games' goods do not cover casino games. There is a general overlap in nature in that these goods are all types of software and also a superficial overlap in user on the basis that the goods may all be used by members of the general public. However, I do not consider they overlap in purpose, method of use or trade channels. Further, these goods are not complementary or competitive with one other. I do not consider the general overlap in nature and superficial overlap in user to be sufficient to warrant a finding of similarity between these goods. These goods are, therefore, dissimilar.

80. While "virtual reality software" in Euro Games' specification can include games, I do not consider that it will cover casino style games that relate to gambling, being the type of games covered by Novomatic's goods. Therefore, for the same reasons as set out in paragraph 79 above, I do not consider there is any similarity between these goods and the goods in Novomatic's specification.

81. I do not consider there to be any obvious level of similarity between "computer hardware", "monitors (computer hardware)", "communications servers [computer hardware]", "apparatus for recording images", "monitors (computer programs)" and "apparatus for recording, transmission or reproduction of sound or images" in Euro Games' specification and the goods in Novomatic's specification. These goods are, therefore, dissimilar.

82. "Computer hardware for games and gaming" in Euro Games' specification can include computer hardware such as controllers and consoles as well as internal

hardware such as chips and motherboards. I am of the view that this term can cover hardware used for the purposes of gambling such as slot machines. While there may be a general overlap in purpose between these goods and Novomatic's goods, I do not consider the remaining factors to overlap. The nature and method of uses of the goods are different. Additionally, the user is unlikely to be the same as the user of Euro Games' term is likely to be the casino provider or the manufacturer of the machine itself whereas the user of Novomatic's term is likely to be a member of the public playing the game itself online. I do not consider that the producer of a monitor to be used on a slot machine, for example, will also produce the software for the games themselves to be played online. Overall, I do not consider a general overlap in purpose to warrant a finding that these goods are similar. These goods are, therefore, dissimilar.

Class 28

83. "Gaming machines for gambling", "gambling machines operating with coins, notes and cards", "LCD game machines", "slot machines and gaming devices", "coin-operated amusement machines", "casino games", "gambling machines and amusement machines, automatic and coin-operated", "coin-operated amusement machines and/or electronic coin-operated amusement machines with or without the possibility of gain", "electronic or electrotechnical amusement machines and apparatus, gaming machines, coin-operated entertainment machines", "electropneumatic and electrical gambling machines (slot machines)" and "slot machines [gaming machines]" in Euro Games' specification are all goods that are used to play games on which the user can gamble. There is clearly an overlap in purpose between these goods and Novomatic's goods in that they are all used to gamble. As for users, I am of the view that these will differ on the basis that the user of Novomatic's goods will be someone looking to play the game itself whereas, generally speaking, it will be a casino provider who looks to buy Euro Games' goods. However, I do appreciate that the end user for both parties' goods will overlap as someone who attends a casino to play physical slot machines may also play them online. For this same reason, I consider the goods also have a competitive relationship in that the user may choose one over the other. As for nature and method of use, these clearly do not overlap. While I appreciate games

found in casinos can also be found online, it does not necessarily follow that the actual manufacturer of the gaming machines is the provider of the gaming software that is actually played on the machine. Overall, I consider the above findings to be sufficient to warrant a finding that these goods are similar, but only to a low degree.

84. "Games" and "electronic games" in Euro Games' specification are broad terms that can include a wide range of games, including gambling games. For the same reason as those set out at paragraph 83 above, I consider these goods to be similar to a low degree with Novomatic's goods.

85. I have no submissions as to what is covered by the term "parlor games" in Euro Games' specification. In the absence of such, I consider it to cover a range of games such as charades and 'I spy'. While these are often played without the aid of physical equipment, I acknowledge that some parlor games require physical equipment that may be purchased. I see no obvious levels of similarity between these goods and Novomatic's goods. These goods are, therefore, dissimilar.

86. I also have no submissions as to what are "boxes for coin-operated machines, slot machines and gaming machines" and "housings for coin-operated machines, gaming equipment, gaming machines, machines for gambling". In the absence of such submissions, I consider that these goods are used as components to the coin-operated machines themselves. Despite their connection to the gambling industry, I do not consider there to be any obvious level of similarity between these goods and Novomatic's goods. These goods are, therefore, dissimilar.

87. "Arcade games" in Euro Games' specification are, in my view, physical arcade units that are commonly used to play games for entertainment purposes and are not used for gambling. While this is the case, Novomatic's goods can also cover games that are played for entertainment purposes. As a result, there is some overlap in purpose between these goods. There may also be an overlap in end user in that both will be played by the public at large. Finally, I do not consider there to be an overlap in nature, method of use or trade channels. Overall, the overlap in end user

and the general overlap in purpose in that the goods are for entertainment are not, in my view, sufficient to warrant a finding of similarity between these goods.

88. "Chips for gambling", "gaming chips", "gaming tables", "roulette chips", "poker chips", "chips and dice [gaming equipment]", "roulette tables" and "gaming roulette wheels" in Euro Games' specification are all types of goods that are used during different types of gambling games. I am of the view that their purpose is quite specific in that they are used to assist the user in playing a gambling game such as poker or roulette. While it could be said that their end purpose is similar to that of Novomatic's goods, in that they relate to gambling, any overlap is, in my view, superficial. As for user, I am of the view that the main user for Euro Games' goods will be casino providers. However, I do appreciate that they are also available to members of the general public who, for example, are looking to play poker at home. Therefore, I accept that there is some overlap in user. Turning to the goods' nature and method of uses, I find that there are different. Further, I do not consider that there is any overlap in trade channels between them on the basis that a provider of computer software for casino games online would not produce the physical goods covered by Euro Games' specification and vice versa. Overall, I do not consider that the superficial overlap in purpose and overlap in user are sufficient to warrant a finding of similarity between these goods. They are, therefore, dissimilar.

89. In my view, "mah-jong" in Euro Games' specification does not include the computer software version of the game but instead covers the physical game itself. When buying this good, the user will be buying the tiles that are used to play the game. The purpose of these goods is to allow the user to play mah-jong. I do, however, appreciate that their end purpose may be that they are used in gambling games. In my view, there is an overlap in purpose with Novomatic's goods. However, the overlap is superficial. There is also a limited overlap in user in that both goods will be used by members of the general public at large. The nature and method of use of these goods differ. Further, I do not consider that a provider of the physical mah-jong game will also provide computer software for playing mah-jong online. I accept that there may be a competitive relationship between the goods as a user may wish to play a physical game of mah-jong for fun or to play it online. Overall, the

superficial overlap in purpose, limited overlap in user and potential competitive relationship between the goods is not, in my view, sufficient to warrant a finding of similarity between these goods. They are, therefore, dissimilar.

90. "Equipment for casinos" in Euro Games' specification is very broad term that can cover a wide range of casino equipment. Given the broadness of the term, it can be said to cover those goods referred to at paragraph 83 above. On the basis that it covers goods that I have already found to be similar to a low degree, I am of the view that same finding also applies here. Therefore, for the same reasons given at paragraph 83 above, I consider these goods to be similar to a low degree with Novomatic's goods.

Class 41 services

91. Euro Games' services in class 41 include a wide range of services that relate to the provision of gambling, namely:

> "Gambling", "services related to gambling", "gaming services for entertainment purposes", "casino, gaming and gambling services", "provision of equipment for gambling halls", "providing casino equipment [gambling]", "gaming machine entertainment services", "providing casino facilities [gambling]", "gaming hall services", "amusement arcade services", "providing amusement arcade services", "providing of casino facilities", "online gambling services", "casino, gaming and gambling services" and "provision of gaming establishments, gaming halls, internet casinos, online gaming services"

92. I do not consider the above services to be similar to Novomatic's goods. The purpose of Euro Games' services is to provide the gambling services themselves such as operating a casino or website where gambling is permitted whereas the purpose of Novomatic's goods is to be played by the user online, albeit for gambling purposes. While both relate to gambling, I do not consider that their purposes necessarily overlap. Further, the nature and method of use of the goods and services differ. I also do not consider the trade channels overlap as a provider of

computer software for casino games online is likely to be a game or software developer whereas the provider of Euro Games' class 41 services is likely to be a casino operator who will buy, rent or license the games in its casino from various types of providers. I do not consider the goods and services to be competitive or complementary. For example, I do not consider computer software for online gambling games to be important and/or indispensable to Euro Games' services. While the end user of both the goods and the services will be members of the general public over the age of 18, I do not consider this sufficient to warrant a finding of similarity between them. Therefore, I consider these goods to be dissimilar.

93. "Games equipment rental", "rental of gaming machines", "rental of gaming machines with images of fruits" and "provision of gaming equipment for casinos" in Euro Games' specification are services that will be provided by manufacturers of those machines and not the casino provider itself. In my view, outside of the reference to games, there is no obvious level of similarity between these services and Novomatic's goods. The user will differ in that someone seeking Euro Games' services will be a casino provider whereas Novomatic's goods will be played by members of the public. Further, there is a clear difference in nature and method of use. As for trade channels, I do not consider that an undertaking that rents out gaming machines will be the producer of the software content within the games. These goods are, therefore, dissimilar.

94. I do not consider there to be any obvious level of similarity between "training in the development of software systems", "editing or recording of sounds and images", "sound recording and video entertainment services" and "hire of sound reproducing apparatus" in Euro Games' specification and any of the goods in Novomatic's specification. In the absence of any submissions to the contrary, I find that these goods are dissimilar.

95. As some degree of similarity between goods and services is necessary to engage the test for likelihood of confusion, my findings above mean that the opposition

aimed against those goods and services I have found to be dissimilar will fail.[10] For ease of reference, the opposition may only proceed against the following goods in Euro Games' specification:

Class 9: Computer software for gambling, gambling machines, gambling games on the internet and via telecommunication network; software; computer gaming software; computer software packages; computer software, recorded; games software; entertainment software for computer games; computer game programs; computer programs for recorded games; computer application software featuring games and gaming; computer software for the administration of on-line games and gaming.

Class 28: Gaming machines for gambling; gambling machines operating with coins, notes and cards; LCD game machines; slot machines and gaming devices; coin-operated amusement machines; casino games; gambling machines and amusement machines, automatic and coin-operated; coin-operated amusement machines and/or electronic coin-operated amusement machines with or without the possibility of gain; electronic or electrotechnical amusement machines and apparatus, gaming machines, coin-operated entertainment machines; electropneumatic and electrical gambling machines (slot machines); slot machines [gaming machines]; games; electronic games; equipment for casinos.

The average consumer and the nature of the purchasing act

96. The case law, as set out earlier, requires that I determine who the average consumer is for the respective parties' goods. I must then decide the manner in which these goods are likely to be selected by the average consumer in the course of trade. In *Hearst Holdings Inc, Fleischer Studios Inc v A.V.E.L.A. Inc, Poeticgem*

[10] *eSure Insurance v Direct Line Insurance,* [2008] ETMR 77 CA

Limited, The Partnership (Trading) Limited, U Wear Limited, J Fox Limited, [2014] EWHC 439 (Ch), Birss J. described the average consumer in these terms:

> "60. The trade mark questions have to be approached from the point of view of the presumed expectations of the average consumer who is reasonably well informed and reasonably circumspect. The parties were agreed that the relevant person is a legal construct and that the test is to be applied objectively by the court from the point of view of that constructed person. The words "average" denotes that the person is typical. The term "average" does not denote some form of numerical mean, mode or median."

97. For the goods at issue that relate to gambling, the average consumer will be members of the general public over the age of 18. However, some of the goods do not specifically refer to gambling and can be played for entertainment purposes and I find that the average consumer for those goods will be members of the general public at large. I also find that the average consumer for some of the goods, such as casino gaming equipment, will be a business user.

98. For members of the general public at large, the goods will either be selected online via websites or app stores on a consumer's device or, more specifically, where they relate to gambling, they may be selected in person at a casino or gambling hall. When selected online, the goods will be selected after viewing an image displayed on a website. In casinos or gambling halls, the goods will be selected after seeing them either on gaming machines themselves or on signage throughout the casino/gambling hall. For business users, the goods will be selected via specialist retailers or their online equivalents. Where selected at specialist retailers, the goods will be selected after having viewed them in a catalogue or pamphlet. When selected online, the goods will be selected after viewing an image displayed on a website. Regardless of who the average consumer is, I conclude that the selection of the goods will be primarily visual, but I do not discount an aural component playing a part in the form of word of mouth recommendations.

99. The price of the goods will vary. For example, goods such as slot machine video games for use on mobile phones may be relatively inexpensive or even free (albeit

with in app purchases) whereas casino equipment is likely to be moderately expensive. The goods are likely to range from being purchased/selected frequently (the decision to play online slot machines, for example) to infrequently (various casino equipment, for example).

100. As for the level of attention paid, I find that this will vary somewhat. I am of the view that the level of attention for slot machine type games with no prize payout that can be downloaded from an app store on a mobile device will be low. As for the goods that relate to gambling, the cost of gambling can range in the value. Additionally, users may gamble for a variety of purposes such as to win money or purely for entertainment purposes. It is my view that the average consumer will, generally speaking, pay a medium degree of attention when gambling. However, I acknowledge that for some average consumers who are looking to potentially risk a significant amount of their own money when gambling, the attention paid will be higher, although not considerably so. Further, I consider that business users are likely to pay a higher degree of attention (but not considerably so) when selecting the goods such as purchasing various types of casino equipment because they are likely to require additional information about the goods.

Distinctive character of Novomatic's mark

101. In Lloyd Schuhfabrik Meyer & Co. GmbH v Klijsen Handel BV, Case C-342/97 the CJEU stated that:

> "22. In determining the distinctive character of a mark and, accordingly, in assessing whether it is highly distinctive, the national court must make an overall assessment of the greater or lesser capacity of the mark to identify the goods or services for which it has been registered as coming from a particular undertaking, and thus to distinguish those goods or services from those of other undertakings (see, to that effect, judgment of 4 May 1999 in Joined Cases C-108/97 and C-109/97 *Windsurfing Chiemsee v Huber and Attenberger* [1999] ECR I-0000, paragraph 49).

23. In making that assessment, account should be taken, in particular, of the inherent characteristics of the mark, including the fact that it does or does not contain an element descriptive of the goods or services for which it has been registered; the market share held by the mark; how intensive, geographically widespread and long-standing use of the mark has been; the amount invested by the undertaking in promoting the mark; the proportion of the relevant section of the public which, because of the mark, identifies the goods or services as originating from a particular undertaking; and statements from chambers of commerce and industry or other trade and professional associations (see Windsurfing Chiemsee, paragraph 51)."

102. Registered trade marks possess various degrees of inherent distinctive character, ranging from the very low, because they are suggestive or allusive of a characteristic of the goods or services, to those with high inherent distinctive character, such as invented words which have no allusive qualities. The distinctiveness of a mark can be enhanced by virtue of the use made of it. In this case, Novomatic has not expressly pleaded that its mark has acquired enhanced distinctiveness through use. In any event, I do not consider the evidence filed by Novomatic is sufficient to demonstrate enhanced distinctiveness. Novomatic has failed to provide evidence of the market share held by its mark in the UK and when assessing the level of use shown against the relevant markets at issue, the use is low. Further, there is no evidence of annual turnover generated from Novomatic's mark, nor is there any evidence to suggest it has undertaken any advertising or marketing efforts. In my view, whilst the evidence demonstrates some use, it fails to illustrate that Novomatic's mark benefits from an enhanced level of distinctiveness because of the use made of it. Consequently, I have only the inherent position to consider.

103. At the hearing, Novomatic referred to Euro Games' skeleton argument that suggested 'BURNING HOT' had a low level of distinctiveness and set out that it disagreed with this and, instead, suggested that it was "a really good name for the kind of goods and services in issue" and that it was "not descriptive". On this point, Euro Games submitted that 'BURNING HOT' is "simply plain, descriptive and, perhaps, laudatory".

104. While I accept that when a player of a slot machine wins a number of games in a row, they may be considered to be on a 'hot streak', I do not consider that the average consumer will necessarily make the connection to this meaning and the term 'BURNING HOT'. Therefore, I am of the view that 'BURNING HOT' will not be viewed as being descriptive or laudatory. While this may be the case, I do not consider 'BURNING HOT' on Novomatic's goods to be particularly remarkable. Overall, I consider that Novomatic's mark enjoys a medium degree of inherent distinctive character.

Comparison of the marks

105. It is clear from *Sabel v Puma AG* (particularly paragraph 23) that the average consumer normally perceives a trade mark as a whole and does not proceed to analyse its various details. The same case also explains that the visual, aural and conceptual similarities of the trade marks must be assessed by reference to the overall impressions created by the trade marks, bearing in mind their distinctive and dominant components.

106. The CJEU stated at paragraph 34 of its judgment in Case C-591/12P, *Bimbo SA v OHIM*, that:

> "… it is necessary to ascertain, in each individual case, the overall impression made on the target public by the sign for which registration is sought, by means of, inter alia, an analysis of the components of a sign and of their relative weight in the perception of the target public, and then, in the light of that overall impression and all factors relevant to the circumstances of the case, to assess the likelihood of confusion."

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

108. The respective trade marks are shown below:

Novomatic's mark	Euro Games' mark
BURNING HOT	

109. I have submissions from both parties in respect of the comparison of the marks. However, I do not intend to reproduce these here but have taken them into account in making my following comparison.

Overall Impression

Euro Games' mark

110. Euro Games' mark consists of three word elements. The first two are 'BURNING' and 'HOT' presented in a standard green typeface with the word 'BURNING' sitting atop the word 'HOT'. In my view, these words form a unit and will be viewed as such. Above and towards the beginning of the word 'BURNING' sits a smaller word, being 'MINI', presented in a standard yellow typeface. Given the size and placement of the words, I am of the view that 'BURNING HOT' plays the larger role in the overall impression of the mark with 'MINI' playing a lesser role.

Novomatic's mark

111. Novomatic's mark is a word only mark made up of two words, 'BURNING' and 'HOT' that, in my view, form a unit. There are no other elements to contribute that its overall impression, which lies in the words themselves.

Visual Comparison

112. Visually, both marks contain the words ‘BURNING HOT’. Euro Games’ mark consists of the word ‘MINI’ that is not present in Novomatic’s mark. While the word ‘MINI’ plays a lesser role in Euro Games’ mark, it still constitutes a visual difference. However, given the dominance of the ‘BURNING HOT’ element in both marks, I am of the view that the marks are visually similar to a high degree.

Aural Comparison

113. Both marks consist of ordinary dictionary words that will be pronounced in the ordinary way. The ‘BURNING HOT’ element of both marks will be pronounced identically. The only aural difference is the word ‘MINI’ that will be pronounced at the beginning of Euro Games’ mark. This constitutes less than half of the aural element of the mark. Taking all of this into account, I am of the view that the marks are aurally similar to a high degree.

Conceptual Comparison

114. The words ‘BURNING HOT’ will, in my view, be understood as something that is of an extremely high temperature. This concept will carry over to both parties’ marks. However, the marks differ with the introduction of ‘MINI’ in Euro Games’ mark. This will be understood as a small version of something and, on this point, Euro Games submitted that the addition of ‘MINI’ “adds a quirkiness or conceptual difference” to its mark. I agree on the first point in that its addition to the concept of something that is extremely high in temperature does add an element of quirkiness. I also agree that it does point to a conceptual difference between the mark, but only slightly. Overall, I consider the marks are dominated by the concept of ‘BURNING HOT’ with the slight conceptual difference between them resulting in a finding that the marks are conceptually similar to a high degree.

Likelihood of confusion

115. Confusion can be direct or indirect. Direct confusion involves the average consumer mistaking one mark for the other, while indirect confusion is where the

average consumer realises the marks are not the same but puts the similarity that exists between the marks and the goods and services down to the responsible undertakings being the same or related. There is no scientific formula to apply in determining whether there is a likelihood of confusion; rather, it is a global assessment where a number of factors need to be borne in mind. The first is the interdependency principle i.e. a lesser degree of similarity between the respective trade marks may be offset by a greater degree of similarity between the respective goods and services and vice versa. As I mentioned above, it is necessary for me to keep in mind the distinctive character of the earlier marks, the average consumer for the goods and services and the nature of the purchasing process. In doing so, I must be alive to the fact that the average consumer rarely has the opportunity to make direct comparisons between trade marks and must instead rely upon the imperfect picture of them that he has retained in his mind.

116. I have found some of the parties' goods to be either identical or similar to a low degree. I have also found some goods and services to be dissimilar, however, as set out above, these will not factor into the following assessment. I have found that the average consumer for the parties' goods will be either members of the general public or business users. I have concluded that regardless of who the average consumer is, the purchase/selection process will be primarily visual, although I do not discount an aural component. I have concluded that the average consumer will, for the most part, pay a medium degree of attention during the purchase/selection process but that for some goods, it will range from low to higher (although not the highest). I have found that Novomatic's mark enjoys a medium degree of inherent distinctive character. Finally, I have found the parties' marks to be visually, aurally and conceptually similar to a high degree.

117. The 'BURNING HOT' element in the marks is the dominant element of Novomatic's mark and plays the greater role in the overall impression of Euro Games' mark. Taking all of the above factors and the principle of imperfect recollection into account, I consider it likely that the addition of 'MINI' in Euro Games' mark will be overlooked meaning that the average consumer is likely to mistake the parties' marks for one another. Consequently, I consider that there is

a likelihood of direct confusion between the marks. I consider that this finding will apply to those goods that I have found to be identical and in circumstances where the average consumer may pay a higher degree of attention. In respect of those goods that I have found to be similar to a low degree, I consider that the high degree of similarity between the marks will off-set the low degree of similarity between the goods meaning that my finding of direct confusion applies to those services also. In the event that I am wrong on my finding of direct confusion, I will proceed to consider indirect confusion.

118. Indirect confusion involves recognition by the average consumer of the difference between the marks. In the present case, even if the average consumer notices the differences between the marks, the shared common element of 'BURNING HOT' remains the dominant element of both marks. As a result, I am of the view that the differences will be seen by the average consumer as indicative of a sub-brand or an alternative mark from the same or economically linked undertakings.[11] I am of the view that the addition of 'MINI' in Euro Games' mark will, on the goods at issue, be seen simply as a 'mini' version of 'BURNING HOT'. For example, it is common for undertakings to provide 'mini' versions of their goods. Consequently, I consider there to be a likelihood of indirect confusion between the marks on those goods that I have found to be identical and in circumstances where the average consumer may pay a higher degree of attention. As per my findings at paragraph 117 above, I consider that this finding will also apply to those goods that I have found to be similar to a low degree.

CONCLUSION

119. Euro Games' revocation application has succeeded in respect of a majority of the goods and services against which is was aimed. Novomatic's mark is hereby revoked in respect of the following goods and services for reasons of non-use in accordance with section 46(1)(b) of the Act with an effective revocation date of 10 May 2019:

[11] Paragraphs 16 & 17 of *L.A. Sugar Limited v By Back Beat Inc*, Case BL-O/375/10

Class 9: Computer hardware in particular for casino and amusement arcade games, for gaming machines, slot machines or video lottery gaming machines, with or without prize payouts, or games of chance via telecommunications networks and/or the Internet, with or without prize payouts; computer software in particular for amusement arcade games, for gaming machines, slot machines or video lottery gaming machines, without or without prize payouts.

Class 28: Casino equipment, namely roulette tables, roulette wheels; casino games with or without prize payouts, gaming machines and games machines, in particular for commercial use in casinos and amusement arcades, or games of chance, with or without prize payouts, connected with the internet or with telecommunications networks, games of chance, with or without prize payouts, for use in telecommunications apparatus; slot machines and/or electronic money-based gaming apparatus with or without prizes; electronic or electro technical gaming apparatus, gaming machines and automatic gaming machines, slot machines operated by coins, tokens, banknotes, tickets or by means of electronic, magnetic or biometric storage media, in particular for commercial use in casinos and amusement arcades, with or without a prize payout; electric, electronic or electromechanical apparatus for bingo games, lotteries or video lottery games and for betting offices; electro pneumatic and electric pulling machines (gaming machines).

Class 41: Operating casinos and gaming casinos, betting offices, bingo halls and/or lottery offices; operating gaming establishments and arcades and/or online Internet casinos and betting platforms.

120. However, Novomatic’s mark remains registered for the following goods:

Class 9: Computer software namely for casino games via telecommunications networks and/or the Internet.

121. Turning to Novomatic's opposition against Euro Games' mark, this has succeeded in respect of some of the goods and services against which it was aimed. Euro Games' application is, therefore, refused in respect of the following goods:

Class 9: Computer software for gambling, gambling machines, gambling games on the internet and via telecommunication network; software; computer gaming software; computer software packages; computer software, recorded; games software; entertainment software for computer games; computer game programs; computer programs for recorded games; computer application software featuring games and gaming; computer software for the administration of on-line games and gaming.

Class 28: Gaming machines for gambling; gambling machines operating with coins, notes and cards; LCD game machines; slot machines and gaming devices; coin-operated amusement machines; casino games; gambling machines and amusement machines, automatic and coin-operated; coin-operated amusement machines and/or electronic coin-operated amusement machines with or without the possibility of gain; electronic or electrotechnical amusement machines and apparatus, gaming machines, coin-operated entertainment machines; electropneumatic and electrical gambling machines (slot machines); slot machines [gaming machines]; games; electronic games; equipment for casinos.

122. Euro Games' application can proceed to registration for the following goods and services which I have found to be dissimilar with Novomatic's goods:

Class 9: Electronic components for gambling, gambling machines, gambling games on the internet and via telecommunication network; electronic components for gambling machines; computer operating system software; software drivers; operating computer software for main frame computers; computer programs for network management; computer hardware; monitors (computer hardware); communications servers [computer hardware]; apparatus for recording images; monitors (computer programs); apparatus for recording, transmission or reproduction of sound or images.

Class 28: Parlor games; boxes for coin-operated machines, slot machines and gaming machines; housings for coin-operated machines, gaming equipment, gaming machines, machines for gambling; Chips for gambling; gaming chips; gaming tables; roulette chips; poker chips; chips and dice [gaming equipment]; roulette tables; gaming roulette wheels; mah-jong; arcade games.

Class 41: Gambling; services related to gambling; gaming services for entertainment purposes; casino, gaming and gambling services; training in the development of software systems; provision of equipment for gambling halls; providing casino equipment [gambling]; gaming machine entertainment services; providing casino facilities [gambling]; gaming hall services; amusement arcade services; games equipment rental; rental of gaming machines; providing amusement arcade services; rental of gaming machines with images of fruits; editing or recording of sounds and images; sound recording and video entertainment services; hire of sound reproducing apparatus; provision of gaming equipment for casinos; providing of casino facilities; online gambling services; casino, gaming and gambling services; provision of gaming establishments, gaming halls, internet casinos, online gaming services.

COSTS

123. On balance, I am of the view that Euro Games has enjoyed a greater degree of success in these proceedings. As a result, it is entitled to a contribution towards its costs based upon the scale published in Tribunal Practice Notice 2/2016. I have reduced the amount of costs awarded to reflect the fact that Novomatic's opposition was successful to some degree. In the circumstances, I award the applicant the sum of **£1,700** as a contribution towards its costs. The sum is calculated as follows:

Filing an application for invalidation:	£200
Considering the Novomatic's statement / preparing counterstatement:	£200
Considering Novomatic's evidence:	£400
Preparing for and attending a hearing:	£700
Official fees:	£200
Total	**£1,700**

124. I therefore order Novomatic AG to pay Euro Games Technology Ltd the sum of £1,700. This sum should be paid within 21 days of the expiry of the appeal period or, if there is an appeal, within 21 days of the conclusion of the appeal proceedings.

Dated this 27th day of October 2021

A COOPER
For the Registrar