

O/0231/23

TRADE MARKS ACT 1994

**CONSOLIDATED PROCEEDINGS**

IN THE MATTER OF APPLICATION NOS.UK00003693827, UK00003693839,  
UK00003693850 AND UK00003693845  
BY CRYPTO INVESTMENTS LIMITED TO REGISTER:

<b>Q</b>	<b>Q CRYPTO</b>	<b>Q COIN</b>	<b>Q MONEY</b>
IN CLASS 36	IN CLASS 36	IN CLASSES 9,36,42	IN CLASS 36

AND IN THE MATTER OF OPPOSITION THERETOR UNDER NOS. 430586, 430761,  
430760 AND 430765 BY ARQUIA BANK,S.A.

AND

IN THE MATTER OF  
TRADE MARK APPLICATION NO. UK00917805599  
IN THE NAME OF CRYPTO INVESTMENTS LTD.  
FOR THE FOLLOWING TRADE MARK

**Q CASH**

AS A TRADE MARK  
IN CLASS 36

AND

THE APPLICATION FOR DECLARATION OF INVALIDITY  
UNDER NO.504658  
BY ARQUIA BANK, S.A.

## BACKGROUND AND PLEADINGS

1. These are consolidated proceedings between Crypto Investments Ltd (“Crypto”) and Arquia Bank, S.A. (“Arquia”) involving four oppositions and one application for a declaration of invalidity. In all these actions, Crypto’s marks are the ones under attack. I will first set out the background regarding the parties’ marks before setting out the basis of the proceedings.

### Crypto’s applications

No:	TM No:	Trade Mark:	Class (es):	Filing Date:	Priority Date:	Published for opposition:
1	UK3693827	Q	36	13 September 2021	12 February 2018	29 October 2021
2	UK3693839	Q CRYPTO	36	13 September 2021	12 February 2018	5 November 2021
3	UK3693845	Q MONEY	36	13 September 2021	2 August 2018	5 November 2021
4	UK3693850	Q COIN	9, 36, 42	13 September 2021	12 February 2018	5 November 2021

### Crypto’s registered trade mark

No:	TM No:	Trade Mark:	Class (es):	Filing Date:	Date of entry in register:
5	UK00917805599	Q CASH	36	12 February 2018	3 August 2018

2. For the avoidance of doubt, I will refer to Crypto’s marks as Q solus, the Crypto mark, the Money mark and the Coin mark respectively.

3. I note that the specifications for the Q solus, Crypto mark, Money mark and Cash mark are identical. These services are set out in **Annex 1** to this decision. The specification for the Coin mark differs in the addition of classes 9 and 42 and the absence of the limitation which

is found in class 36 of the aforementioned marks. The full specification for the goods and services for Crypto's Coin mark is present in **Annex 2** to this decision.

### Arquia's mark

4. Arquia is the registered proprietor of the following UK trade mark:



UK registration no. UK00917129974.

Filing date 22 August 2017; date of entry in register 26 December 2017.

The specification of Arquia's mark is set out in **Annex 3** of this decision.

("Arquia's mark")

### Arquia's oppositions

5. On 27 January 2022, Crypto's Q solus mark was opposed by Arquia. On 3 February 2022, Crypto's Crypto, Money and Coin marks were opposed by Arquia. The oppositions are based on section 5(2)(b) of the Trade Marks Act 1994 ("the Act") and are aimed at all of Crypto's services. Arquia relies on the following services in its oppositions to all of Crypto's marks:

*Class 36: Insurance; financial affairs; monetary affairs; real estate affairs; administration of savings accounts; financial services relating to savings; savings scheme services; management of investment funds; financial advice relating to investment; financial investment brokerage; investment fund management; financing services; pension fund administration services; pension consultancy; planning services relating to pensions; provision of information relating to stock broking; consultancy services relating to credit.*

6. Arquia submits that there is a likelihood of confusion because Crypto's marks are similar to its own mark and the respective goods and services are identical or similar. Crypto filed a defence and counterstatement denying the claims made.

#### Arquia's invalidation application

7. On 10 March 2022, Arquia filed an application to invalidate Crypto's Cash mark under section 47 of the Act. Arquia relies upon section 5(2)(b) of the Act. The invalidation is directed at all the services in the registration.

8. Arquia submits that there is a likelihood of confusion, which includes a likelihood of association, because Crypto's Cash mark is similar to its own mark and the respective services are identical or similar. Crypto filed a defence and counterstatement denying the claims made.

9. Upon the filing of Crypto's counterstatement to the invalidation application, the Tribunal wrote to the parties on 11 July 2022 and confirmed that under Rule 62 of the Trade Mark Rules 2008 ("the Rules"), the proceedings would be consolidated.

10. Crypto is represented by Taylor Wessing LLP. Arquia is represented by Withers & Rogers LLP. No hearing was requested. Both parties filed submissions in lieu of a hearing. This decision is taken following a careful perusal of the papers.

11. 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**

12. Only Crypto filed evidence in these proceedings. Crypto's evidence came in the form of the witness statement of Christopher Morgan dated 27 September 2022 and was accompanied by 1 exhibit. Mr Morgan is a Chartered Trade Mark Attorney at Taylor Wessing LLP. I do not intend to summarise the evidence or the parties' submissions in full at this stage. However, I have taken them all into consideration in reaching my decision and will refer to them below, where necessary.

## **My Approach**

13. In the event that Arquia's application for invalidation is successful, Crypto's mark will be invalidated and treated as if it had never been registered. The invalidation is based on a mark that has already been registered by Crypto and does not affect Arquia's ability to rely on its mark for the basis of the opposition. Therefore, regardless of whether the invalidation application fails or is partially successful, the oppositions will proceed. Given that the oppositions are not dependent upon the outcome of the invalidation application, it is irrelevant which I address first. I will address the opposition proceedings first.

## **DECISION**

### **The oppositions**

#### **Section 5(2)(b): legislation and case law**

14. Section 5(2)(b) 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.”

15. Section 5A of the Act is as follows:

“5A Where grounds for refusal of an application for registration of a trade mark exist in respect of only some of the goods or services in respect of which the trade mark is applied for, the application is to be refused in relation to those goods and services only.”

16. Given its filing date, Arquia's mark qualifies as an earlier trade mark under section 6(1) provisions. Arquia's mark had not completed its registration process more than five years before the priority dates of the applications at issue. The conditions of use do not, therefore, apply to the mark and Arquia can rely on all the goods and services for which its mark is registered. As mentioned above in paragraph 5, I note Arquia is relying on the services in class 36 for its opposition.

17. 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 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 impression 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 greater 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 to mind the earlier mark, 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 will wrongly believe that the respective goods or services come from the same or economically-linked undertakings, there is a likelihood of confusion.

## **COMPARISON OF THE GOODS AND SERVICES**

18. Crypto's goods and services are set out in **Annexes 1 and 2** of this decision. Arquia's services can be found in **Annex 3** of this decision.

19. When making the comparison, all relevant factors relating to the goods and services in the specifications should be taken into account. In *Canon*, Case C-39/97, the Court of Justice of the European Union ("CJEU") stated at paragraph 23 of its judgment 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”.

20. Guidance on this issue has also come from Jacob J. (as he was then) in the *Treat* case, [1996] R.P.C. 281, where he identified the factors for assessing similarity as:

(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.”

21. In *Gérard Meric v Office for Harmonisation in the Internal Market (Trade Marks and Designs) (OHIM)*, Case T-133/05, the General Court (“GC”) stated:

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

22. In *Kurt Hesse v OHIM*, Case C-50/15 P, the CJEU stated that complementarity is an autonomous criterion capable of being the sole basis for the existence of similarity between

goods. In *Boston Scientific Ltd v OOHIM*, Case T-325/06, the GC stated that "complementary" means:

"... there is a close connection between them, in the sense that one is indispensable or important for the use of the other in such a way that customers may think the responsibility for those goods lies with the same undertaking."

23. I have set out above that the specification for the Q solus, Q crypto and Q money of Crypto's marks are identical. I note that the aforementioned marks' specifications all include the following limitation "*all of the aforesaid in relation to cryptocurrency*". The coin mark's specification is not identical to the aforementioned Crypto's marks, given its addition of classes 9 and 42 and the absence of the limitation in class 36. Whilst I do not intend to reproduce the limitation throughout the following comparison, I will keep it in mind. However, I note that the Coin mark, in the absence of the limitation is broader and would encompass the services with the limitation.

24. I note that Crypto and Arquia have made written observations in respect of the similarity of the goods and services in the documents filed. I do not intend to reproduce these here but I confirm that I have taken them into account in making the following assessment.

*Crypto's Q solus, Crypto, Money and Coin marks*

#### Class 36

25. It is my view that "*financial services*" in Crypto's specifications is encompassed by "*financing services*" in Arquia's specification. Therefore, I find the services to be identical on the principle outlined in *Meric*. Even taking into account the limitation in Crypto's marks, I consider that these terms are identical on the principle outlined in *Meric*.

26. In the absence of any submissions or evidence to the contrary, in my view, monetary affairs services are services that relate to money or currency. These monetary transactions could include, especially in today's world, an exchange of digital, electronic and cryptocurrency. Applying that understanding, it is my view that the following services in Crypto's specifications are encompassed by "*monetary affairs*" in Arquia's specification and are identical on the principle outlined in *Meric*. Even taking into account the limitation in Crypto's marks, I consider that the following terms are identical on the principle outlined in *Meric*:

*“Currency trading and exchange services”, “currency brokerage services”, “cash management, namely, facilitating and tracking transfers of electronic cash equivalents”, “crypto currency exchange services”, “virtual currency exchange transaction services for transferrable electronic cash equivalent units having a specified cash value”, “financial services, namely, providing a virtual currency for use by members of an on-line community via a global computer network”, “financial services, namely, electronic transfer of a virtual currency for use by members of an on-line community via a global computer network”, “financial services, in particular trading of virtual and digital currency”.*

27. *“Providing financial information”* in Crypto’s specifications is a broad category that encompasses financial information on a wide range of specific financial areas which is inclusive of, but not limited to, stock broking. Taking this into account, and that the term has not been narrowed down, I consider the above term and *“provision of information relating to stock broking”* in Arquia’s specification to be identical on the principle outlined in *Meric*. Even taking into account the limitation in Crypto’s marks, I consider that these terms are identical on the principle outlined in *Meric*.

28. I consider that *“financial analysis”* in Crypto’s specifications is similar to *“financial affairs”* and *“monetary affairs”* in Arquia’s specification. In the absence of any evidence or submissions to the contrary, it is my view that financial affairs are services that relate to money or the way that money is managed. I consider that financial analysis is encompassed by Arquia’s services. Therefore I find them to be identical on the principle outlined in *Meric*. However, if I am mistaken, it is my view that the services are all financial services that have the same distribution channels, target the same consumers and are complementary as they are frequently offered by the same undertakings, i.e. banks, financial institutions. Further, the services may overlap in purpose and nature. Taking this into account, I find the services to be at least highly similar. Even taking into account the limitation in Crypto’s marks, I consider the services to be identical on the principle outlined in *Meric*, or if I am mistaken, at least highly similar.

29. In the absence of any evidence or submissions to the contrary, it is my view that securities brokerage is the service of trading in stocks and bonds on behalf of a client. Financial investment brokerage is a service where an investment broker trades securities on behalf of its client. Taking this into account, I consider that whilst phrased differently *“securities brokerage and trading services”* in Crypto’s specification and *“financial investment brokerage”*

in Arquia's specification are synonymous with one another and, therefore, are identical. Even taking into account the limitation in Crypto's services, I find the services to be identical.

30. *"Provision of information relating to digital and crypto currencies"* in Crypto's specification is similar to *"monetary affairs"* in Arquia's specification. As mentioned above in paragraph 26, monetary affairs services are services that relate to money or currency. These services coincide in nature as they concern the management of money and capital. There is also an overlap in purpose, as part of the role of the monetary affairs services will be to provide information about digital and crypto currency. In addition, the services will be provided by the same professionals and from the same financial institutions, businesses and organisations and will be aimed at the same end-users. The provision of information services will be an essential element of the services pertaining to cryptocurrency and monetary affairs; therefore, I find the services to be complementary. However, it is not my view that the services are in competition. Taking all the above into account, I find the services to be similar to a medium degree. Based on the same reasoning above, I find *"provision of financial information relating to stock exchanges"* in Crypto's specification and *"financial investment brokerage"* in Arquia's specification to be similar to a medium degree. Even taking into account the limitation in Crypto's services, I find these services to be similar to a medium degree.

*The Coin mark*

#### Class 9

31. *"Computer software for use in electronic payment services", "computer software that enables users to make payments and transactions direct through use of mobile phone numbers", "computer software for facilitating payment transactions by electronic means and recording financial operations", "software for facilitating secure payment transactions by electronic means", "computer software for currency trading and exchange services", "computer communications software to enable and facilitate the use of block chain or distributed ledgers" and "computer [...] software for facilitating payment transactions by electronic means over wireless networks, global computer networks and/or mobile telecommunications devices"* in Crypto's specification are similar to *"monetary affairs"* in Arquia's specification. Arquia's mark is registered for *"monetary affairs"*, monetary affairs and the associated transactions could include, especially in today's world, an exchange of digital, electronic and cryptocurrency. Services which concern themselves with the movement of such monies are often likely to utilise software that would enable such movement. The goods below

in Crypto's specification are all types of software that pertain to commerce and currency and, consequently, I consider them to be complementary insofar as they are important or indispensable to one another in such a way that customers may think the responsibility for those goods lies with the same undertaking. Further, it is my view that the goods and services will overlap in users. The services do not coincide in nature, purpose or distribution channels. It is not my view that the services are in competition. Taking all the above into account, I find the services to be similar to a low to medium degree.

32. *"Computer software for financial services"* and *"computer software for enabling and facilitating online financial services"* in Crypto's specification are a type of software that pertains to finance. I consider these services to be similar to *"financing affairs"* in Arquia's specification. It is my view that financing affairs are services that provide finance to businesses and individuals, e.g. loans, and other ways of raising capital. Services which concern themselves with the movement of such finances are often likely to utilise software that would enable such movement. Consequently, I consider Crypto's and Arquia's services to be complementary insofar as they are important or indispensable to one another in such a way that customers may think the responsibility for Crypto's goods lies with the same undertaking as Arquia's services. Further, it is my view that the goods and services will overlap in users. The services do not coincide in nature, purpose or distribution channels. It is not my view that the services are in competition. Taking all the above into account, I find the goods and services to be similar to a low to medium degree.

33. Applying the reasoning above in paragraph 32, I consider that *"computer software for securities brokerage and trading services"* and *"computer software for currency brokerage services"* are similar to *"financial investment brokerage"* in class 36 in the earlier mark. Therefore, I find the goods and services to be similar to a low to medium degree.

34. *"Software for enabling electronic and online identity verification and fraud prevention"* in Crypto's specification and *"financial affairs"* in Arquia's specification in class 36 are similar. I note that Crypto submits in its submissions in lieu of a hearing that the class 9 services in Crypto's specification are dissimilar to Arquia's class 36 services. In particular Crypto submits:

"Although many financial services, such as online banking platforms, are rendered with the use of software (e.g. validation software), this software is an integral part of the financial services themselves and is not sold independently. Financial companies or institutions are not normally engaged in the development of highly specialised

software. Instead, they usually outsource the development of this software to IT companies.

In consideration of the above, the Applicant argues that the goods in Class 9 would be provided by different undertakings with expertise in completely different areas, and target different users, which rules out not only similarity but also any complementary relationship with Class 36 services.

Moreover, taking into account that goods are by nature different from services, they do not coincide in their purpose, method of use or distribution channels.”

35. Crypto submits that the goods and services target different users. To the extent that Crypto meant by this that the purchasers of the software to e.g. verify identity and provide fraud prevention (i.e. the financial service providers) would be different to the ultimate recipients of the financial services, then I agree. But it seems highly likely that the end-users of the financial services would or at least could also be users of the software to verify their identity or prevent fraud. I also consider that in finance, the users may also expect to find that the software that they are using is ‘bespoke’ in the sense that it is presented as being unique to the company providing the financial services.

36. I agree with Crypto that the purpose, nature and trade channels of the goods and services are different. Further, it is my view that the goods and services are not in competition. However, I disagree that the services are not complementary. As I mentioned above, financial services can and are often provided using computer software, often of a bespoke nature. It is also my view that, services which concern themselves with the movement of finances and financial affairs are often likely to utilise software that would enable users to verify their identity and for fraud prevention. I consider Crypto’s and Arquia’s services to be complementary insofar as they are important or indispensable to one another in such a way that customers may think the responsibility for Crypto’s goods lies with the same undertaking as Arquia’s services. Taking this into account, I find the services to be similar to a low to medium degree.

37. Applying the reasoning above, I consider that “*computer hardware [...] for facilitating payment transactions by electronic means over wireless networks, global computer networks and/or mobile telecommunications devices*” and “*computer hardware modules for delivering secure cryptographic services in the field of cryptocurrency*” in Crypto’s specification and “*monetary affairs*” in Arquia’s specification are similar to a low to medium degree.

38. I was unable to find any similarity between “*computer software for enabling the searching of electronic data*” in Crypto’s specification and any of the services in Arquia’s specification. Therefore, I find these goods to be dissimilar.

#### Class 42

39. I was unable to find any similarity between “*software as a service (saas) featuring computer software for services to enable the secure exchange of funds and information in electronic payment transactions*”, “*software as a service (saas) featuring computer software for services to enable transactions in currency trading and exchange services; software as a service (saas) featuring computer software for securities brokerage and trading services*” and “*software as a service (saas) featuring computer software for currency brokerage services*” in Crypto’s specification and any of the services in Arquia’s specification. Even when compared to the closest clash that I can identify in Arquia’s specification, being “*financial affairs*” in class 36, the services differ in nature, purpose and method of use. They do not coincide in their producer/provider and do not share the same distribution channels. Furthermore, these services are neither in competition nor do they target the same users, however, the services may overlap in end users. Financial companies or institutions are not normally engaged in the delivery of software as a service, rather, they would outsource the delivering of such services to IT and data security companies. These services are clearly provided by different undertakings with expertise in completely different areas. Even if these services could be complementary, in the sense that the financial services require data security or a computer platform to function, this is not sufficient to find them similar. The overlap in end users is insufficient to substantiate similarity between the services. Therefore, I find these services to be dissimilar.

40. As some degree of similarity between the goods and services is necessary to engage the test for likelihood of confusion,<sup>1</sup> the opposition must fail in respect of the following goods and services in Crypto’s coin mark that I have found to be dissimilar to Arquia’s services:

Class 9: *Computer software for enabling the searching of electronic data.*

Class 42: *Software as a service (saas) featuring computer software for services to enable the secure exchange of funds and information in electronic payment transactions; software as a service (saas) featuring computer software for services to*

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<sup>1</sup> *eSure Insurance v Direct Line Insurance* [2008] ETMR 77 CA

*enable transactions in currency trading and exchange services; software as a service (saas) featuring computer software for securities brokerage and trading services; software as a service (saas) featuring computer software for currency brokerage services.*

## **THE AVERAGE CONSUMER**

41. As the law above indicates, it is necessary for me to determine who the average customer is for the parties' goods and services. I must then determine the manner in which the goods and services are likely to be selected by the average consumer. In *Hearst Holdings Inc, Fleischer Studios Inc v A.V.E.L.A. Inc, Poeticgem Limited, The Partnership (Trading) Limited, U Wear Limited, J Fox Limited*, [2014] EWHC 439 (Ch), Birss J (as he then was) described the average consumer in these terms:

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

42. The parties' specifications cover a range of financial services and goods that can be aimed at an ordinary member of the public and/or at a more specialised commercial customer or financial institution. In relation to the services, there is a degree of overlap in the sense that a commercial consumer will still use, for example, a personal credit card or banking service. In the case of a consumer seeking, for example, a payment system to use for their business this will involve a fairly high level of attention and consideration prior to the purchasing act. In contrast, a customer who simply wishes to withdraw money from a cash machine or make a credit card payment will be a member of the general public who will pay a much lower but higher than medium level of attention (but not the highest) to the transaction. That said, the purchasing act for all of the respective services will be at least well considered as the average consumer, whether an individual or a commercial undertaking, will take note of, inter alia, charges, interest rates, price comparisons and accessibility of services, before entering into the purchasing act.

43. In relation to the goods, the cost of the goods at issue is likely to vary dependent on the goods provided and the frequency of the purchases. There is a degree of overlap in the sense that a commercial consumer will still use, for example, software for facilitating secure payment transactions by electronic means. In the case that a consumer seeking, for example, software to enable identity verification and fraud prevention this will involve a fairly high level of attention and consideration prior to the purchasing act. In contrast, a consumer who simply wishes to make payments and transactions directly through their mobile phone will be a member of the general public who will pay a much lower but at least medium degree of attention to the transaction. That said, the purchasing act for all of the respective goods will be at least well considered as the average consumer, whether an individual or a commercial undertaking, will take note of, inter alia, security, nature of the provider and ease of use before entering into the purchasing act.

44. In all cases in relation to the goods and services, the purchase may be made visually from a website, brochure, prospectus, etc., or aurally such as in their local branch of a bank, over the telephone or via a broker, financial advisor or other intermediary. However, given that word-of-mouth recommendations and advice from financial advisors, for example, may also play a part, I do not discount that there will be an aural component to the selection of the goods and services.

## **COMPARISON OF THE MARKS**

45. The respective trade marks are shown below:

<p><b>Q</b> (Q solus)</p> <p><b>Q CRYPTO</b> (the Crypto mark)</p> <p><b>Q MONEY</b> (the Money mark)</p> <p><b>Q COIN</b> (the Coin mark)</p>	
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Crypto's mark	Arquia's mark

46. It is clear from *Sabel BV 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 trade marks must be assessed by reference to all the overall impressions created by the trade marks, bearing in mind their distinctive and dominant components. 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.”

47. 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.

#### Overall impression

48. Arquia's mark consists of a word mark of the letter 'Q' which appears stylised and in orange. The letter 'Q' has a greater impact on the overall impression of the mark with the stylisation and colour playing a lesser role.

49. Crypto's Q solus mark is a word mark of the letter 'Q' presented in upper case. There are other elements that contribute to the overall impression of the marks.

50. Crypto's Crypto mark is a word mark of 'Q CRYPTO' presented in upper case. The Money mark is a word mark of the word 'Q MONEY' presented in upper case. The Coin mark is a word mark of the word 'Q COIN' presented in upper case. In my view, these words will be viewed as a unit by the average consumer and read as 'Q CRYPTO', 'Q MONEY' and 'Q COIN' respectively. I am of the view that the words 'CRYPTO', 'COIN' and 'MONEY' have little trade mark significance, as they are descriptive/allusive of the goods and services. As a

result, I consider the letter 'Q' to be the word with the greater impact on the overall impression of the marks with the words 'CRYPTO', 'MONEY' and 'COIN' respectively playing lesser roles.

#### *Q Solus vs Arquia's mark*

##### Visual comparison

51. Visually, the Q solus mark and Arquia's mark share the letter 'Q'. This is the only element of Crypto's first mark and I have found that this plays a greater role in Arquia's mark. The stylisation of Arquia's mark is not present in Crypto's mark. While the stylisation and colour play a lesser role, they are all points of visual difference. Having said that, I note that Crypto's mark is a word only mark which, if registered, it is the word mark itself that is protected. Taking all of this into account, I am of the view that the marks are visually similar to a high degree.

##### Aural comparison

52. The stylisation and colour cannot be pronounced. As a result, 'Q' is the only aural element of both marks. 'Q' will be articulated the same way across both marks and I find them to be aurally identical.

##### Conceptual comparison

53. Both Crypto's and Arquia's mark contains the recognisable element of the letter 'Q', which carries no obvious meaning in relation to the [goods and] services at issue. As a result, neither Crypto's nor Arquia's marks carry any obvious concept that is capable of being grasped by the average consumer. Therefore, I consider the marks to be conceptually neutral.

#### *The Crypto mark vs Arquia's mark*

##### Visual comparison

54. As Crypto's 'Q Crypto' mark contains the same common element 'Q', the comparison above in relation to this element applies to this mark. Crypto submits that the marks are visually dissimilar. In particular Crypto submits that the 'Q' element in Arquia's mark is highly stylised, the 'Q' is not easily recognisable or legible and there is an additional word element in Crypto's mark. As discussed above, it is my view that the stylisation and colour in Arquia's mark play a lesser role with the 'Q' element playing a greater role. The discussion of the Q element in the Q solus mark discussed above in paragraph 51 applies here. In addition, as mentioned above Arquia's mark will be identified by the average consumer as the letter 'Q'.

Further, I recognise that the points of visual difference between marks are the second word 'CRYPTO' in Crypto's mark. As a general rule, the beginning of the marks tends to make more of an impact than the endings,<sup>2</sup> especially as the words are read from left to right. Therefore, taking all the above into account, I consider the mark to be visually similar to a medium degree to Arquia's mark.

#### Aural comparison

55. Aurally, the marks coincide in the pronunciation of the element 'Q', but they differ in the additional word in Crypto's mark, which will be articulated as 'CRIP-TOE'. Arquia's mark will be pronounced as one syllable, whereas Crypto's will be pronounced as three syllables. These are points of aural difference. Consequently, I consider that Crypto's and Arquia's marks are aurally similar to a medium degree.

#### Conceptual comparison

56. As above in paragraph 53, the conceptual comparison in relation to Arquia's mark applies and the mark will carry no obvious concept that is capable of being grasped by the average consumer.

57. In relation to Crypto's mark, it is my view that the 'Q' element in the mark will carry no obvious concept that is capable of being grasped by the average consumer. However, despite this, the addition of the word 'CRYPTO' conveys a concept in the mark as a whole that the undertaking has something to do with the financial sector. Whilst I note these differences, the word Crypto is descriptive or allusive of the services for which it is used in that they are services relating to finance. It is my view that the average consumer will make this association in any event. As a result of the overall concept conveyed by Crypto's mark as a whole, I am of the view that it is conceptually dissimilar to Arquia's mark, despite their shared use of the 'Q' element.

#### *The Money mark v Arquia's mark*

#### Visual comparison

58. As Crypto's 'Q MONEY' mark contains the same common element 'Q', the comparison above in relation to the 'Q' element applies here. In addition, I recognise that the points of visual difference between marks are the second word 'MONEY' in Crypto's mark. As a general rule, the beginning of the marks tends to make more of an impact than the endings, especially

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<sup>2</sup> *El Corte Ingles, SA v OHIM*, Cases T-184/02

as the words are read from left to right. Therefore, taking all the above into account, I consider the mark to be visually similar to a medium degree to Arquia's mark.

#### Aural comparison

59. Aurally, the marks coincide in the pronunciation of the element 'Q', but they differ in the additional word in Crypto's mark, which will be articulated as 'MON-NEE'. Arquia's mark will be pronounced as one syllable, whereas Crypto's will be pronounced as three syllables. These are points of aural difference. Consequently, I consider that Crypto's and Arquia's marks are aurally similar to a medium degree.

#### Conceptual comparison

60. As above in paragraph 51, the conceptual comparison in relation to Arquia's mark applies and the mark will carry no obvious concept that is capable of being grasped by the average consumer.

61. In relation to Crypto's mark, it is my view that the 'Q' element in the mark will carry no obvious concept that is capable of being grasped by the average consumer. However, despite this, the addition of the word 'MONEY' conveys a concept in the mark as a whole that the undertaking has something to do with the financial sector. As mentioned above in paragraph 57 concerning the Crypto mark, the words are descriptive/allusive for the services and the average consumer will associate the services are relating to finance. As a result of the overall concepts conveyed by Crypto's mark as a whole, I am of the view that it is conceptually dissimilar to Arquia's mark, despite their shared use of the 'Q' element.

#### *The Coin mark vs Arquia's mark*

#### Visual comparison

62. As Crypto's 'Q COIN' mark shares the same common element 'Q', the comparison above in relation to the 'Q' element applies here. In addition, I recognise that the points of visual difference between the marks are the second word 'COIN' in Crypto's mark. As a general rule, the beginning of the marks tends to make more of an impact than the endings, especially as the words are read from left to right. Therefore, taking all the above into account, I consider the marks to be visually similar to a medium degree.

#### Aural comparison

63. Aurally, the marks coincide in the pronunciation of the element 'Q', but they differ in the additional word in Crypto's mark, which will be articulated as 'KOYN'. Arquia's mark will be

pronounced as one syllable, whereas Crypto's mark will be pronounced as two syllables. These are points of aural difference. Consequently, I consider that Crypto's and Arquia's marks are aurally similar to a medium degree.

#### Conceptual comparison

64. As above in paragraph 51, the conceptual comparison in relation to Arquia's mark applies and the mark will carry no obvious concept that is capable of being grasped by the average consumer.

65. In relation to Crypto's mark, it is my view that the 'Q' element in the mark will carry no obvious concept that is capable of being grasped by the average consumer. However, despite this, the addition of the word 'COIN' conveys a concept in the marks as a whole that the undertaking has something to do with the financial sector. Whilst I note these differences, the words are descriptive or allusive of the services for which it is used in that they are services relating to finance. It is my view that the average consumer will make this association in any event. As a result of the overall concept conveyed by Crypto's mark as a whole, I am of the view that it is conceptually dissimilar to Arquia's mark, despite their shared use of the 'Q' element.

#### **Distinctive character of the earlier mark**

66. 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-2779, 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).”

67. Registered trade marks possess varying degrees of inherent distinctive character, ranging from the very low, because they are suggestive or allusive of a characteristic of the goods or services, to those with a high inherent distinctive character, such as invented words which have no allusive qualities. Arquia has not pleaded that its marks have obtained enhanced levels of distinctiveness, nor has it filed any evidence to that effect, therefore, I have only the inherent position to consider.

68. Crypto has filed evidence that purports to show that ‘Q’ is used in the financial services market in the UK, however, I note that all the evidence was accessed after the relevant date. There is nothing to tell me what the position was at the date of the application for the contested marks.

69. Arquia’s mark consists of the letter ‘Q’ presented in slightly stylised orange text. ‘Q’ has no meaning and is not descriptive of the services at issue. I do not consider that the addition of the colour orange or slight stylisation of the mark is particularly remarkable. While it will no doubt contribute to the distinctiveness of the character of the mark, I find that it is only to a minimal degree and not enough to elevate the distinctiveness of the marks to any higher than a medium degree. Consequently, I find Arquia’s mark enjoys a medium degree of inherent distinctive character.

## **LIKELIHOOD OF CONFUSION**

70. 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 mark, 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.

71. I have found Crypto's Q solus and Arquia's mark to be visually similar to a high degree, aurally identical and conceptually neutral. I have found Crypto's Crypto, Money and Coin marks and Arquia's mark to be visually and aurally similar to a medium degree and conceptually dissimilar. I have found Arquia's mark to be inherently distinctive to a medium degree. I have found the average consumer to be a member of the general public or business users, who will select the goods and services at issue via visual means (although I do not discount an aural component). I have concluded that the average consumer's degree of attention for the services at issue will vary from a higher than medium (but not the highest) to a high level of attention. I have concluded that the average consumer's degree of attention for the goods at issue will vary from at least a medium to a high degree of attention. I have found the services at issue to vary in similarity from similar to a medium degree to identical. I have found the goods at issue to be similar to a low to medium degree.

#### *Q Solus*

72. Given the high visual similarity and aural identity, I am of the view that when confronted with both marks, the average consumer will be directly confused and is likely to misremember or mistakenly recall one for the other, even for the services that are similar to a medium degree. This is particularly the case given the high visual similarity and aural identity between the marks. Consequently, I consider there to be a likelihood of direct confusion between these marks. I consider this to be the case notwithstanding that the average consumer's degree of attention will vary from high to a higher than medium (but not the highest) degree of attention during the purchasing process.

#### *The Crypto mark*

73. Taking all of the above into account, I consider that the differences between the marks are insufficient to avoid confusion, particularly when the principle of imperfect recollection is considered. In my view, it is plausible that the average consumer will overlook the word 'CRYPTO' given the descriptive/ allusive nature of that element. I consider it likely that the mark will be misremembered or mistakenly recalled as each other. Consequently, I consider there to be a likelihood of direct confusion, even on those services that I have found to be

similar to a medium degree. I consider this to be the case notwithstanding that the average consumer's degree of attention will vary from higher than medium (but not the highest degree of attention) to a high degree of attention during the purchasing process. In the event that I am wrong in my finding of direct confusion, I will proceed to consider indirect confusion.

74. Indirect confusion involves recognition by the average consumer of the difference between the marks. Mr Purvis QC in the *L.A Sugar Limited* case sets out that there are three main categories of indirect confusion and that indirect confusion 'tends' to fall in one of them.<sup>3</sup> The three categories are as follows:

"(a) where the common element is so strikingly distinctive (either inherently or through use) that the average consumer would assume that no-one else but the brand owner would be using it in a trade mark at all. This may apply even where the other elements of the later mark are quite distinctive in their own right ("26 RED TESCO" would no doubt be such a case).

(b) where the later mark simply adds a non-distinctive element to the earlier mark, of the kind which one would expect to find in a sub-brand or brand extension (terms such as "LITE", "EXPRESS", "WORLDWIDE", "MINI", etc.).

(c) where the earlier mark comprises a number of elements, and a change of one element appears entirely logical and consistent with a brand extension ("FAT FACE" to "BRAT FACE" for example)."<sup>4</sup>

75. Even if the differences are taken into account, I consider the presence of the identical 'Q' element will lead the average consumer to think that the marks came from the same or related undertaking. I make this finding on the basis that 'Q' plays a greater role in both parties' marks. Further, I am of the view that the word 'CRYPTO' in Crypto's mark will be put down to a form of brand variation or alternative mark, particularly given their descriptive/allusive nature in relation to the services at issue. Finally, in the event that the differences in stylisation and colour are noticed, I am of the view that they will be seen as indicative of an alternative mark being used by the same or economically linked undertakings and consistent with a re-branding. Consequently, I find that there is a likelihood of indirect confusion, even on those services that I have found to be similar to a medium degree. I consider this to be the case

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<sup>3</sup> Paragraphs 16 & 17 of *L.A Sugar Limited v Back Beat Inc*, Case BL-O/375/10

<sup>4</sup> *Ibid*, Paragraph 17

notwithstanding that the average consumer's degree of attention will vary from higher than medium (but not the highest) to a high degree of attention during the purchasing process.

#### *The Money mark*

76. Applying the reasoning above in paragraph 73, I consider that the differences between the marks are insufficient to avoid confusion. In my view, the average consumer will overlook the word 'MONEY' given the descriptive/allusive nature of that element. It is likely that the mark will be misremembered or mistakenly recalled as each other. This finding also applies to the services that I have found to be similar to a medium degree. I consider this to be the case notwithstanding that the average consumer's degree of attention will vary from higher than medium (but not the highest degree of attention) to a high degree of attention during the purchasing process.

77. The reasoning provided for a finding of an indirect likelihood of confusion in paragraph 75 applies here in relation to the Money mark. However, in this instance, I am of the view that the word 'MONEY' in Crypto's mark will be put down to a form of brand variation or alternative mark, particularly given their descriptive/allusive nature in relation to the services at issue. Consequently, I find that there is a likelihood of indirect confusion, even on those services that I have found to be similar to a medium degree. I consider this to be the case notwithstanding that the average consumer's degree of attention will vary from higher than medium (but not the highest) to a high degree of attention during the purchasing process.

#### *The Coin mark*

78. Applying the reasoning above in paragraph 73, I consider that the differences between the marks are insufficient to avoid confusion. In my view, the average consumer will overlook the word 'COIN' given the descriptive/allusive nature of that element. It is likely that the mark will be misremembered or mistakenly recalled as each other. This finding also applies to the goods that I have found to be similar to a low to medium degree and the services that I have found to be similar to a medium degree. I consider this to be the case notwithstanding that the average consumer's degree of attention will vary from a medium to a high degree of attention during the purchasing process in relation to the goods and services at issue.

79. The reasoning provided for a finding of an indirect likelihood of confusion in paragraph 75 applies here in relation to the Coin mark. However, in this instance, I am of the view that the word 'COIN' in Crypto's mark will be put down to a form of brand variation or alternative mark, particularly given their descriptive/allusive nature in relation to the goods and services at issue. Consequently, I find that there is a likelihood of indirect confusion, even on those services that I have found to be similar to a medium degree and the goods that I have found to be similar to a low to medium degree. I consider this to be the case notwithstanding that the average consumer's degree of attention will vary from medium (but not the highest) to a high degree of attention during the purchasing process in relation to the goods and services at issue.

### **OUTCOME OF THE OPPOSITIONS**

#### *Q solus*

80. The opposition has succeeded in full.

#### *The Crypto mark*

81. The opposition has succeeded in full.

#### *The Money mark*

82. The opposition has succeeded in full.

#### *The Coin mark*

83. The opposition has partially succeeded.

### **ARQUIA'S INVALIDATION APPLICATION**

84. Section 5(2)(b) of the Act have application in invalidation proceedings because of the provisions of section 47 of the Act, which states as follows:

"47. (1) [...]"

(2) Subject to subsections (2A) and (2G), the registration of a trade mark may be declared invalid on the ground-

(a) that there is an earlier trade mark in relation to which the conditions set out in section 5(1), (2) or (3) obtain, or

(b) that there is an earlier right in relation to which the condition set out in section 5(4) is satisfied, unless the proprietor of that earlier trade mark or other earlier right has consented to the registration.

(2ZA) The registration of a trade mark may be declared invalid on the ground that the trade mark was registered in breach of section 5(6).

(2A) The registration of a trade mark may not be declared invalid on the ground that there is an earlier trade mark unless –

(a) the registration procedure for the earlier trade mark was completed within the period of five years ending with the date of the application for the declaration,

(b) the registration procedure for the earlier trade mark was not completed before that date, or

(c) the use conditions are met.

(2B) The use conditions are met if –

(a) the earlier trade mark has been put to genuine use in the United Kingdom by the proprietor or with their consent in relation to the goods or services for which it is registered-

(i) within the period of 5 years ending with the date of application for the declaration, and

(ii) within the period of 5 years ending with the date of filing of the application for registration of the later trade mark or (where applicable) the date of the priority claimed in respect of that application where, at that date, the five year period within which the earlier trade mark should

have been put to genuine use as provided in section 46(1)(a) has expired, or

(b) it has not been so used, but there are proper reasons for non-use.

(2C) For these purposes –

(a) 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

(b) 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.

(2D)-(2DA) [Repealed]

(2E) Where an earlier trade mark satisfies the use conditions in respect of some only of the goods or services for which it is registered, it shall be treated for the purposes of this section as if it were registered only in respect of those goods or services.

(2F) Subsection (2A) does not apply where the earlier trade mark is a trade mark within section 6(1)(c)

(2G) An application for a declaration of invalidity on the basis of an earlier trade mark must be refused if it would have been refused, for any of the reasons set out in subsection (2H), had the application for the declaration been made on the date of filing of the application for registration of the later trade mark or (where applicable) the date of the priority claimed in respect of that application.

(2H) The reasons referred to in subsection (2G) are-

(a) that on the date in question the earlier trade mark was liable to be declared invalid by virtue of section 3(1)(b), (c) or (d), (and had not yet acquired a distinctive character as mentioned in the words after paragraph (d) in section 3(1));

(b) that the application for a declaration of invalidity is based on section 5(2) and the earlier trade mark had not yet become sufficiently distinctive to support a finding of likelihood of confusion within the meaning of section 5(2);

(c) that the application for a declaration of invalidity is based on section 5(3)(a) and the earlier trade mark had not yet acquired a reputation within the meaning of section 5(3).

(3) [...]

(4) [...]

(5) Where the grounds of invalidity exist in respect of only some of the goods or services for which the trade mark is registered, the trade mark shall be declared invalid as regards those goods or services only.

(5A) An application for a declaration of invalidity may be filed on the basis of one or more earlier trade marks or other earlier rights provided they all belong to the same proprietor.

(6) Where the registration of a trade mark is declared invalid to any extent, the registration shall to that extent be deemed never to have been made: Provided that this shall not affect transactions past and closed.”

85. I do not intend to repeat the legislation and case law here, however, the legislation and case law above in paragraphs 14, 15 and 17 apply here in relation to sections 5(2)(b) and 5A of the Act and the relevant principles associated with 5(2)(b).

86. Arquia’s mark qualifies as an earlier trade mark under section 6(1) of the Act. This mark had not completed its registration process more than five years before the filing date of Crypto’s mark and is, therefore, not subject to proof of use pursuant to the above provisions. Consequently, Arquia can rely upon all of the services listed in its application.

## **COMPARISON OF THE SERVICES**

87. As discussed above in paragraph 3, I note that the specifications for the Q solus, Crypto and Money marks and Cash mark, which is subject to the invalidation proceedings, are

identical. These services are set out in **Annex 1** to this decision. Taking this into account, the findings that I have made above in paragraphs 25 to 30 in relation to the similarity of the services in class 36 of Crypto's specification at issue apply here.

## **THE AVERAGE CONSUMER AND THE PURCHASING ACT**

88. As discussed above the findings that I have made above in paragraphs 42 to 44, in relation to the services in class 36 at issue apply here.

## **COMPARISON OF THE MARKS**

### Overall impression

89. Arquia's mark consists of a word mark of the letter 'Q' which appears stylised and in orange. The letter 'Q' has a greater impact on the overall impression of the mark with the stylisation and colour playing a lesser role. Crypto's Cash mark is a word mark of 'Q CASH' presented in upper case. I am of the view that the word 'CASH' has little trade mark significance as the words are descriptive or allusive of the services for which it is used, in that they are services relating to finance. As a result, I consider the letter 'Q' to be the word with the greater impact on the overall impression of the marks with the word 'CASH' playing a lesser role.

### Visual comparison

90. Visually, Crypto and Arquia's marks share the letter 'Q' in both marks. The stylisation and colour of Arquia's mark are not present in Crypto's mark. While the stylisation and colour play a lesser role, they are points of visual difference. Having said that, I note that Crypto's mark is a word only mark which, if registered, it is the word mark itself that is protected. A further point of visual difference between Crypto's and Arquia's marks is the second word 'CASH' in Crypto's mark. As a general rule, the beginning of the marks tends to make more of an impact than the endings,<sup>5</sup> especially as the words are read from left to right. Therefore, I consider the marks to be visually similar to a medium degree.

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<sup>5</sup> *El Corte Ingles, SA v OHIM*, Cases T-184/02

### Aural comparison

91. Aurally, the stylisation and colour of the marks cannot be pronounced. The marks coincide in the pronunciation of the element 'Q', but they differ in the additional word 'CASH' in Crypto's mark, which will be articulated as 'KASH'. Arquia's mark will be pronounced as one syllable and Crypto's mark will be pronounced as two syllables. These are points of aural difference. Consequently, I consider that Crypto's and Arquia's marks are aurally similar to a medium degree.

### Conceptual comparison

92. Arquia's mark contains the recognisable element of the letter 'Q', which carries no obvious meaning. In relation to Crypto's marks, it is my view that the 'Q' elements in the mark will carry no obvious concept that is capable of being grasped by the average consumer. However, despite this, the addition of the word 'CASH' conveys a concept in the mark as a whole that the undertaking has something to do with the financial sector. Whilst I note these differences, the word is descriptive or allusive of the services for which it is used, in that they are services relating to finance. It is my view that the average consumer will make this association. As a result of the overall concept conveyed by Crypto's mark as a whole, I am of the view that it is conceptually dissimilar to Arquia's mark, despite their shared use of the 'Q' element.

## **DISTINCTIVE CHARACTER OF THE EARLIER MARK**

93. Arquia relies on the same mark in this invalidation as it did in its opposition. Therefore, the findings that I have made above, in paragraphs 68 to 69, concerning the distinctive character of Arquia's mark applies here.

## **LIKELIHOOD OF CONFUSION**

94. I have found the marks to be visually and aurally similar to a medium degree and conceptually dissimilar. I have found Arquia's mark to be inherently distinctive to a medium degree. I have found the average consumer to be a member of the general public or business users, who will select the services at issue via visual means (although I do not discount an aural component). I have concluded that the average consumer's degree of attention will vary

from a higher than medium (but not the highest) to a high level of attention. I have found the services at issue to vary in similarity from a medium degree of similarity to identical.

95. Taking all of the above into account, I consider that the differences between the marks are insufficient to avoid confusion, particularly when the principle of imperfect recollection is considered. In my view, it is plausible that the average consumer will overlook the word 'CASH' given the descriptive/ allusive nature of that word. I consider it likely that the marks will be misremembered or mistakenly recalled as each other. Consequently, I consider there to be a likelihood of direct confusion, even on those services that I have found similar to a medium degree. I consider this to be the case notwithstanding that the average consumer's degree of attention will vary from a higher than medium (but not the highest) to a high degree of attention during the purchasing process. In the event that I am wrong in my finding of direct confusion, I will proceed to consider indirect confusion.

96. The reasoning provided for a finding of an indirect likelihood of confusion in paragraph 75 applies here in relation to the CASH mark. However, in this instance, I am of the view that the word 'CASH' in Crypto's mark will be put down to a form of brand variation or alternative mark, particularly given their descriptive/allusive nature in relation to the services at issue. Consequently, I find that there is a likelihood of indirect confusion, even on those services that I have found to be similar to a medium degree. I consider this to be the case notwithstanding that the average consumer's degree of attention will vary from higher than medium (but not the highest) to a high degree of attention during the purchasing process in relation to the services at issue.

## **OUTCOME OF THE INVALIDATION**

97. The invalidation has succeeded.

## **CONCLUSION**

*Q Solus*

98. The opposition has succeeded. The application will not proceed to registration.

*The Crypto mark*

99. The opposition has succeeded. The application will not proceed to registration.

*The Money mark*

100. The opposition has succeeded. The application will not proceed to registration.

*The Coin mark*

101. The opposition has succeeded for the following goods and services:

*Class 9: Computer software for use in electronic payment services; computer software that enables users to make payments and transactions direct through use of mobile phone numbers; computer software for facilitating payment transactions by electronic means and recording financial operations; software for facilitating secure payment transactions by electronic means; computer software for currency trading and exchange services; computer communications software to enable and facilitate the use of block chain or distributed ledgers; computer hardware and software for facilitating payment transactions by electronic means over wireless networks, global computer networks and/or mobile telecommunications devices; computer software for financial services; computer software for enabling and facilitating online financial services; computer software for securities brokerage and trading services; computer software for currency brokerage services; software for enabling electronic and online identity verification and fraud prevention; computer hardware modules for delivering secure cryptographic services in the field of cryptocurrency.*

*Class 36: Financial services; currency trading and exchange services; securities brokerage and trading services; currency brokerage services; financial analysis; financial services, namely, providing a virtual currency for use by members of an on-line community via a global computer network; financial services, namely, electronic transfer of a virtual currency for use by members of an on-line community via a global computer network; cash management, namely, facilitating and tracking transfers of electronic cash equivalents; financial services, in particular trading of virtual and digital currency; crypto currency exchange services; providing financial information; provision of information relating to digital and crypto currencies; provision of financial information relating to stock exchanges; virtual currency exchange transaction services for transferrable electronic cash equivalent units having a specified cash value.*

102. The opposition has failed for the following goods and services, which will proceed to registration:

*Class 9: Computer software for enabling the searching of electronic data.*

*Class 42: Software as a service (saas) featuring computer software for services to enable the secure exchange of funds and information in electronic payment transactions; software as a service (saas) featuring computer software for services to enable transactions in currency trading and exchange services; software as a service (saas) featuring computer software for securities brokerage and trading services; software as a service (saas) featuring computer software for currency brokerage services.*

### *Invalidation*

103. The invalidation under section 47(2) of the Act based on section 5(2)(b) has succeeded in full. Under section 47(6) UK trade mark 917805599 is deemed never to have been made.

### **COSTS**

104. Both sides have achieved a measure of success. In the circumstances, Arquia has enjoyed a greater degree of success in both the invalidation and the opposition and is entitled to a contribution towards its costs, based upon the scale published in Tribunal Practice Notice 2/2016. I will make an appropriate reduction in the award of its costs made to reflect Arquia's partial success in relation to Crypto's Coin mark. In the circumstances, I award Arquia the sum of £1250 as a contribution towards the costs of the proceedings. The sum is calculated as follows:

Preparing statements and considering Crypto's statements (x2)	£200
Preparing and filing written submissions	£200
Considering Crypto's evidence	£350
Official fee for invalidation	£100
Official fee for oppositions (x4)	£400
<b>Total</b>	<b>£1250</b>

105. I therefore order Crypto Investments Limited to pay Arquia Bank, S.A. the sum of £1250. The sum is to 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 3<sup>rd</sup> day of March 2023**

**A KLASS**

**For the Registrar**

## **Annexes**

### **Annex 1**

#### *Crypto's Q solus, Crypto, Money and Cash marks*

*Class 36: Financial services; currency trading and exchange services; securities brokerage and trading services; currency brokerage services; financial analysis; financial services, namely, providing a virtual currency for use by members of an on-line community via a global computer network; financial services, namely, electronic transfer of a virtual currency for use by members of an on-line community via a global computer network; cash management, namely, facilitating and tracking transfers of electronic cash equivalents; financial services, in particular trading of virtual and digital currency; crypto currency exchange services; providing financial information; provision of information relating to digital and crypto currencies; provision of financial information relating to stock exchanges; virtual currency exchange transaction services for transferrable electronic cash equivalent units having a specified cash value; all of the aforesaid in relation to cryptocurrency.*

### **Annex 2**

#### *Crypto's Coin mark*

*Class 9: Computer software for use in electronic payment services; computer software that enables users to make payments and transactions direct through use of mobile phone numbers; computer software for facilitating payment transactions by electronic means and recording financial operations; computer software for enabling the searching of electronic data; software for facilitating secure payment transactions by electronic means; software for enabling electronic and online identity verification and fraud prevention; computer software for currency trading and exchange services; computer software for securities brokerage and trading services; computer software for currency brokerage services; computer software for financial services; computer hardware and software for facilitating payment transactions by electronic means over wireless networks, global computer networks and/or mobile telecommunications devices; computer hardware modules for delivering secure cryptographic services in the field of cryptocurrency; computer communications software to enable and facilitate the use of block chain or distributed ledgers; computer software for enabling and facilitating online financial services.*

*Class 36: Financial services; currency trading and exchange services; securities brokerage and trading services; currency brokerage services; financial analysis; financial services, namely, providing a virtual currency for use by members of an on-line community via a global computer network; financial services, namely, electronic transfer of a virtual currency for use by members of an on-line community via a global computer network; cash management, namely, facilitating and tracking transfers of electronic cash equivalents; financial services, in particular trading of virtual and digital currency; crypto currency exchange services; providing financial information; provision of information relating to digital and crypto currencies; provision of financial information relating to stock exchanges; virtual currency exchange transaction services for transferrable electronic cash equivalent units having a specified cash value.*

*Class 42: Software as a Service (SaaS) featuring computer software for services to enable the secure exchange of funds and information in electronic payment transactions; software as a Service (SaaS) featuring computer software for services to enable transactions in currency trading and exchange services; software as a Service (SaaS) featuring computer software for securities brokerage and trading services; software as a Service (SaaS) featuring computer software for currency brokerage services.*

### **Annex 3**

*Arquia's mark*

*Class 16: Paper cardboard; Printed matter; binding articles; Photographs; Stationery; Glue for stationery or household purposes; Artists' materials; Paint brushes; Typewriters and office requisites (except furniture); Instructional and teaching material (except apparatus); Plastic material for packaging (not included in other classes); Printers' type; Printing blocks; Printed publications.*

*Class 36: Insurance; Financial affairs; Monetary affairs; Real estate affairs; Administration of savings accounts; Financial services relating to savings; Savings scheme services; Management of investment funds; Financial advice relating to investment; Financial investment brokerage; Investment fund management; Financing services; Pension fund administration services; Pension consultancy; Planning services relating to pensions; Provision of information relating to stock broking; Consultancy services relating to credit.*