General Court: BRENT INDEX is descriptive of goods and services linked to financial sector

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In Intercontinental Exchange Holdings Inc v EU Intellectual Property Office (EUIPO) (Case T-430/16, March 22 2017), the General Court has upheld a decision of the Fourth Board of Appeal of the EUIPO in which the latter had found that the word sign BRENT INDEX was descriptive and devoid of distinctive character with respect to goods and services in Classes 9, 36 and 42 of the Nice Classification.

In June 2015 US company Intercontinental Exchange Holdings Inc filed an EU trademark application for the word sign BRENT INDEX to cover several goods and services in Classes 9, 36 and 42. In November 2015 the examiner rejected the application on the grounds that it was descriptive and devoid of distinctive character.

Upon the applicant's appeal, the Fourth Board of Appeal of the EUIPO rejected the action, pointing out that:

- despite the fact that the term 'brent' referred to a type of crude oil, it was a term used by professionals in the financial sector; and
- the term 'index' denoted a system applied in stock markets to compare the values and prices of shares.

The Board of Appeal concluded that the combination of the two terms would be perceived by the relevant public directly and automatically as being linked to finance, stressing that all of the goods and services for which protection was sought were explicitly linked to the financial sector. Thus, according to the Board of Appeal, the mark applied for was descriptive of the goods and services in question and was devoid of any distinctive character.

The applicant brought an action before the General Court, requesting the annulment of the decision and arguing as follows:

- The terms 'brent' and 'index' were not directly and automatically linked to finance. Although 'brent' might have a certain significance for the financial sector, it was not a financial term per se; and while 'index' was indeed used in certain parts of the financial sector, its use together with the name of a frequently traded commodity did not necessarily lead the relevant public to associate it with financial services.
- Not all of the services in Class 36 were connected to crude oil or to indexing services. Thus, the Board of Appeal had erred in refusing all of the services in the list as relating to the financial sector.
- The EUIPO had already accepted the registration of the trademark BRENT for certain goods and services.

The General Court first commented that marks consisting of neologisms, or of words composed of elements which are in themselves descriptive of the covered goods, are not to be considered as descriptive only if they create an impression that differs substantially from that of its constituent elements. It then proceeded to assess the applicant's arguments.

As regards the first argument, the General Court held that, although the term 'brent' is the name of a certain type of crude oil and not in itself a financial term, it was commonly used by professionals in the financial sector - a fact that was also demonstrated by the entry of the

term in the Finance Glossary Online. Moreover, the price of Brent was used as a value against which the prices of many internationally traded crude oils were fixed. On the other hand, the term 'index' is a term used in stock markets as a basis for the comparison of values and prices of shares. The General Court thus confirmed the examiner's finding that the mere juxtaposition of the two terms referred to a scale corresponding to the average value of prices of a crude oil deriving from the Brent field in the North Sea, which was also used as a benchmark for other crude oils. Consequently, the court concluded that 'brent index' did not contain any unusual element which would give any originality to the mere combination of the two words, which was consistent with English lexical and grammatical rules.

As regards the second argument, the General Court found that the Board of Appeal had not erred in finding that all goods and services in Classes 9, 36 and 42 were linked to the financial sector. The court did not consider it indispensable for a competent authority to state reasons for each of the goods or services concerned, if the same ground of refusal applies to a category or group of goods or services which are interlinked in such a way that they form a homogenous category or group. This was, according to the General Court, the case here, where all goods and services were of a financial nature, despite the applicant's opinion to the contrary, which overlooked the fact that the word 'finance' was repeated nine times in the relevant list. The court added that the term 'index' was part of the financial sector and the absence of any reference thereto was immaterial in the light of the financial nature of the services in question.

Coming to the applicant's third argument, the General Court, despite the fact that the applicant had not explained in which way the earlier registration of the trademark BRENT was connected with this particular case, stated that the Board of Appeal had not breached the principles of equal treatment: although earlier decisions should be taken into consideration in similar cases, the principles should be consistent with the respect for legality. In this regard, an applicant should not rely on a possibly unlawful act committed for the benefit of someone else, to his advantage and in order to secure an identical decision.

Consequently, the General Court concluded that the Board of Appeal had been correct in all its findings and dismissed the applicant's action.

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