Good news for Novartis in PASCOE v PASCELMO opposition

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- **The Board of Appeal found that that there was no likelihood of confusion between the mark PASCELMO and the earlier mark PASCOE, both in Class 5**
- **The General Court dismissed the argument that the board had defined the level of attention of the relevant public in a contradictory manner**
- **While consumers generally pay greater attention to the beginning of a mark, this does not mean that they will systematically disregard the second part**

In ***Pascoe pharmazeutische Präparate GmbH v European Union Intellectual Property Office*** (EUIPO) (Case T-435/22, 11 October 2023), the First Chamber of the General Court has dismissed an action seeking annulment of the decision of the Second Board of Appeal of the EUIPO dated 4 May 2022 (Case R 1890/2021-2).

Background

In December 2019 Swiss company Novartis Pharma AG obtained International Registration No 1516387 designating the European Union, among others. The registration consisted of the word mark PASCELMO and covered "pharmaceutical preparations" in Class 5.

In June 2020 German company Pascoe pharmazeutische Präparate GmbH opposed the registration on the basis of its earlier EU word mark PASCOE (No 16 638 611), also covering goods in Class 5.

The opposition was rejected in its entirety by the Opposition Division of the EUIPO, on the ground that there was no likelihood of confusion between the two marks. Pascoe appealed, but the Board of Appeal dismissed the appeal on the following grounds:

- The goods in Class 5 were aimed at the general public and at a public of professionals in the field of healthcare. As a result, the assessment of the likelihood of confusion should take into account the point of view of the end consumer with a higher-than-average level of attention.
- The covered goods were identical and the signs under comparison were distinctive as they were meaningless for the majority of relevant consumers.
- The degree of visual similarity between the marks was low, and the degree of phonetical similarity was low or very low.
- A conceptual comparison of the signs was impossible, as they had no meaning for most of the public and they were dissimilar for the part of the public for which PASCOE had a meaning.
- In view of the high level of attention of the relevant public, there was no likelihood of confusion.

Appeal to the General Court

Pascoe appealed to the General Court, claiming that the Board of Appeal had:

- infringed Article 8(1)(b) of **Regulation 2017/1001**, in that it had made errors in the assessment of the level of attention of the relevant public and the similarity of the signs, as well as in the global assessment of the likelihood of confusion; and
- infringed the first sentence of Article 94(1) of the regulation in that it had made a contradictory finding, first stating that the relevant public's attention was "higher-than-average" but concluding that it was "particularly high", the former being lower than the latter.

General Court decision

The General Court deemed it appropriate to examine the second plea first. Analysing the terms 'high' and 'heightened' and the expression 'higher-than-average' in the light of established case law, it stated that they are used as synonyms, and added that a 'high level of attention' and a 'higher-than-average level of attention' both suggest a heightened level of attention of the relevant public. In examining the Board of Appeal's reasoning in this respect, the General Court held that its assessment that the end consumer or the non-professional public has a higher-than-average level of attention should not be read in isolation. The finding that the level of attention of the end consumer was heightened meant that it was higher than an average level of attention, and thus at least higher than average. The General Court then stressed that a particularly high level of attention is necessarily higher than an average one and, thus, by definition, is higher than average. The court thus dismissed the second plea, concluding that the board's finding was not contradictory.

Turning to the first plea, the General Court held as follows:

- In the light of established case law, medicinal products, irrespective of whether they are issued on prescription, can be regarded as receiving a heightened level of attention of the part of consumers, who are reasonably well informed, observant and circumspect. This also applies to medicinal products that are available to consumers over the counter, dietetic products and dietary supplements, as well as lozenges. Thus, the board had not erred in this respect.

- While the case law establishes that consumers generally pay greater attention to the beginning of a mark than to its end, and that the beginning tends to have a greater impact - both visually and phonetically - than the final part, this consideration cannot apply in every case and does not mean that the average consumer, who is reasonably well informed, observant and circumspect, will systematically disregard the second part of the mark, remembering only its beginning. Consequently, the Board of Appeal had not erred in its global assessment and correctly spotted the different lengths, the different endings and the different position of the letters 'o' and 'e' in the marks, as well as the additional letters 'l' and 'm' in the central part of the contested mark - differences which influenced the overall impression created by the marks.

- The different number of syllables (with only the first being identical in the two marks) and the different way of pronouncing the rest of the syllables resulted in a different rhythm and intonation, which was decisive in the phonetical comparison. Thus, the Board of Appeal was correct in finding that the degree of phonetic similarity was low for the English and German-speaking publics.

Taking into consideration all the above, the General Court agreed that, although the goods covered by the marks were identical, the marks were sufficiently different so as to exclude a likelihood of confusion among the relevant public. The court thus upheld the board's decision in its entirety.

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