# No likelihood of confusion between ELONTRIL and CLONOTRIL

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**European Union** - Dr Helen G Papaconstantinou and Partners Law Firm

- **SmithKline Beecham opposed CLONOTRIL mark for likelihood of confusion with its ELONTRIL mark for pharmaceuticals**
- **EUIPO Cancellation Division found little visual, oral and conceptual similarity between the marks**
- **Declaration of invalidity against the CLONOTRIL mark was therefore rejected**

In SmithKline Beecham Ltd v Remedica Ltd the EU Intellectual Property Office Cancellation Division rejected SmithKline Beecham's cancellation application based on its earlier EU trademark ELONTRIL against EU trademark CLONOTRIL owned by Remedica.

The ELONTRIL mark was registered for pharmaceutical and medicinal preparations and substances, whereas the CLONOTRIL mark covered an anti-epileptic product, both in Class 5. The applicant argued that there was a likelihood of confusion as the two marks were similar and the goods covered were identical or highly similar. Remedica partially surrendered the CLONOTRIL mark and requested proof of use of the earlier mark.

Although the ELONTRIL mark was registered for a broader category of goods, the evidence produced by the owner of the mark demonstrated genuine use for pharmaceuticals used in the treatment of depression only. The Cancellation Division, applying established case law, held that pharmaceuticals for such treatments constituted a sufficiently coherent and independent subcategory of the broader category that the mark had been registered for.

On comparing the goods covered by the two marks, the Cancellation Division found that they were similar to a low degree, since despite their distribution through the same channels and originating from the pharmaceutical industry, their purpose was different.

Before examining the visual, oral and conceptual similarity of the marks, the Cancellation Division remarked that while the earlier ELONTRIL mark was meaningless, the contested CLONOTRIL mark could be considered as meaningless to the general public but recognisable by the professional public, due to the fact that its initial part could be associated with the Greek word clonus, used in medicine to indicate a series of involuntary muscular contractions and relaxations. According to the Cancellation Division, since the goods covered by the contested mark were pharmaceuticals for the treatment of epilepsy, the mark could be considered as referring to the clonic seizures that are connected with this disease. Therefore, the mark could have been considered as of a lesser degree of distinctiveness as far as this part of the public was concerned. Consequently, the Cancellation Division concluded that there was no conceptual similarity between the marks.

Turning to the visual and aural comparison of ELONTRIL and CLONOTRIL, the Cancellation Division held that despite the fact that they shared the ending 'tril', having initial parts that contained the same string of letters ('lon') was not sufficient to attribute to them a high degree of visual and aural similarity, in particular because the syllables and surrounding letters differ (ie, 'e-lon' versus 'clo-no').

The Cancellation Division also looked into the applicant's allegation that its earlier mark

enjoyed a high degree of distinctiveness. After having taken the evidence into consideration, the Cancellation Division did not find that the sales values and advertisement spending figures were high enough to establish that the ELONTRIL mark was sufficiently recognisable by the relevant public to prove it enjoyed an enhanced level of distinctive character. Consequently, by limiting the assessment to distinctiveness per se, this was not considered to be above normal.

In the light of the above, the Cancellation Division found that there was no likelihood of confusion between the marks under comparison and rejected the application of declaration of invalidity against the CLONOTRIL mark.

Maria Athanassiadou, Dr Helen G Papaconstantinou and Partners, Athens