

## Summary

The General Court has upheld an OHIM Board of Appeal decision rejecting the OHIM designation of an international registration of the word mark RELY-ABLE for services in classes 38, 41 and 42, mainly relating to clinical trials. The mark was found to be non-distinctive and laudatory.

## Background

In April 2010, Boehringer Ingelheim International GmbH (BII) filed an international application, designating OHIM, for the word mark RELY-ABLE for the following services:

Class 38: Provision of access via the Internet to medical and pharmaceutical information concerning pharmaceutical preparations;

Class 41: Publication of printed matter (except for promotion purposes) with the results of clinical trials for pharmaceutical preparations (also in electronic form);

Class 42: Conducting clinical trials for pharmaceutical products.

In August 2010 OHIM examined and rejected the application. BII appealed, but the appeal was dismissed by the Fourth Board of Appeal on the basis that the mark was not distinctive, would not be perceived as a trade mark and was promotional. In addition, the Appeal Board had found that the relevant public would explicitly recognise the mark RELY-ABLE as a deliberate misspelling of the English word 'reliable', but would not perceive that spelling as particularly fanciful or arbitrary. It found that the relevant public would perceive the mark as a commonplace laudatory message relating to an important characteristic of clinical trial services for pharmaceutical products, namely their reliability. The obvious promotional meaning of the mark RELY-ABLE prevented it from indicating commercial origin. According to the Board of Appeal, misspellings had become a frequent feature of promotional messages.

BII appealed to the General Court, alleging infringement of Article 7(1) (b) of Regulation No 207/2009. It claimed that the Board of Appeal had failed to consider that the relevant public were professionals, the precise services concerned and the distinctiveness of the mark.

The Court found that the Board of Appeal had taken into account the relevant public and the specific services. The Court found it interesting that BII had not contested the Board of Appeal's view that the word 'reliable' was laudatory, but instead contested the decision that the mark RELY-ABLE was laudatory. Nonetheless, the Court was unconvinced by its arguments.

BII alleged that marks relating to clinical trials were not perceived phonetically, but only visually. The Court challenged this argument and found it irrelevant, as the Board of Appeal had made a point of the visual aspect of the mark RELY-ABLE and its misspelling of the word 'reliable'.

Regarding BII's argument that the mark was distinctive and fanciful, the Court disagreed and referred to prior case law to explain that misspellings do not normally overcome registration refusals when they are laudatory. In addition, the Court cited *T-331/99 Mitsubishi HiTec Paper Bielefeld v OHIM (Giroform)* [2001] ECR II-433, paragraph 25, to reiterate that a misspelling does not usually result in a mark being capable of indicating trade origin. (see, to that effect, Case *T-331/99 Mitsubishi HiTec Paper Bielefeld v OHIM (Giroform)* [2001] ECR II-433, paragraph 25).

The Court found that the misspelling of the word 'reliable' could only be apparent visually, rather than aurally, and therefore that there was no conceptual uncertainty for the relevant public. As the misspelling was deliberate and obvious, the relevant public would immediately understand it to mean 'reliable'. In addition, the Court noted that it was common knowledge that reliability was one of the main features of clinical trials.

Therefore, the Court held that the Board of Appeal was correct in its initial assessment of the mark and its promotional nature. It found that the Board of Appeal had considered the relevant public, who would easily conclude the mark was a persuasive reference to the 'reliable' nature of the services concerned, in particular clinical trials.

BII claimed that the mark RELY-ABLE was a grammatically incorrect juxtaposition of the words 'rely' and 'able', and that the use of a hyphen made the mark more striking. Both of these arguments were dismissed by the Court. In addition, BII referred to other CTMs it owned, for example RE-LY and requested the mark applied for should also be accepted. Unsurprisingly, the Court dismissed this request, as the Board of Appeal had already pointed out that the legality of its decisions must be assessed solely on the basis of Regulation No 207/2009, irrespective of OHIM's prior decisions. In addition, the Court noted that each CTM application has to be examined strictly and in full, with specific case law being applied as appropriate.

In conclusion, BII's arguments were rejected, the mark was found to be non-distinctive and the case was dismissed in its entirety.

## Comment

This case emphasises the importance of the originality of a mark. Even if a mark is not wholly descriptive of the goods or services, a deliberate misspelling is not likely to be sufficient to make it distinctive.

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