

In *BrandGroup GmbH v Office for Harmonisation in the Internal Market (OHIM) and Brauerei S Riegele, Inh Riegele KG* (Case T-557/14), the EU General Court has upheld a decision of the OHIM Board of Appeal which had found that there was a likelihood of confusion between the signs SPEZOOMIX and SPEZI.

In April 2011 BrandGroup filed an application to register the word mark SPEZOOMIX as a Community trademark in Class 32 for “Beers; mineral and aerated waters and other non-alcoholic drinks; fruit drinks and fruit juices; syrups and other preparations for making beverages; powders for effervescing beverages” and Class 33 for “Alcoholic beverages (except beers)”. Riegele **opposed** the mark on the grounds of various earlier marks containing the word element SPEZI - including the word mark SPEZI - for identical or highly similar goods, citing, among others, Article 8(1)(b) of the EU Community Trademark Regulation. The Opposition Division rejected Riegele’s opposition on the basis that there was no likelihood of confusion between the compared signs. Riegele appealed to the OHIM Board of Appeal, which granted the appeal. BrandGroup then appealed to the General Court, but lost.

In comparing the signs, the General Court first considered the distinctive and dominant elements of the mark SPEZOOMIX, applying the legal principle that a descriptive element of a sign cannot be regarded by the public as being dominant in its overall impression. It found that the OHIM Board of Appeal was correct in that the average consumer in the European Union, with at least a basic knowledge of English, would understand the term ‘mix’ as a descriptor of certain characteristics of the applied goods, namely syrups and other preparations for making beverages and powders for effervescing beverages which can be mixed with mineral water or aerated water to produce a beverage. Beers are also often mixed with syrups, and non-alcoholic beverages are mixed with fruit drinks and fruit juice. If, as in the present case, the descriptive element appears at the end of the mark and is thus unlikely to make an impression, then the General Court argued that the above principle is even more relevant.

As regards BrandGroup’s claim that the attention of the consumer is equally drawn to the commonly used words ‘zoo’ or ‘zoomix’, the General Court reiterated that for a term to be descriptive, it is sufficient that it designates, under at least one of its possible meanings, a characteristic of the goods covered by that term. While neither the element ‘zoo’ nor the joint component ‘zoomix’ had a descriptive meaning in relation to the applied goods, the consumer would recognise the term ‘mix’ as such.

In relation to BrandGroup’s claim that the isolated analysis of the term ‘mix’ was arbitrary, the General Court agreed with the OHIM Board of Appeal’s view in that consumers would view the descriptive term ‘mix’ separately because, although the average consumer normally perceives a sign as a whole and does not proceed to analyse its various details, the fact remains that when perceiving a sign, the consumer will break its verbal parts down into elements which suggest a concrete meaning or which resemble words known to him or her.

From the visual and phonetic point of view, the General Court then agreed with the OHIM Board of Appeal that the signs presented a clear degree of similarity, to the extent that they were both word marks that shared the same first four letters. Although the difference in length, syllabic structure and sound rhythm would be reflected in the pronunciation, both the General Court and the OHIM Board of Appeal considered that this difference was not sufficient to offset the prevailing similarities. The attention drawn to the common element ‘spez’ at the beginning of both signs was increased by the fact that consumers would recognise the descriptiveness of the last element ‘mix’. The relevant public was therefore likely to notice and retain the common sequence of letters, and could well assume that SPEZOOMIX was a variance of SPEZI, originating from the same undertaking or economically connected undertakings.

In relation to BrandGroup’s complaint that the OHIM Board of Appeal had disregarded the generic use of the earlier mark SPEZI in the German-speaking countries of the European Union, the General Court argued that if the term ‘spezi’ were considered generic in one language, this interpretation could not be transferred to other languages, without sufficient proof. The OHIM Board of Appeal was therefore correct to disregard the potential descriptive nature of the term ‘spezi’ pertaining to the German-speaking public. In addition, a potential weak distinctiveness of the earlier mark was only one factor among others involved in the assessment, but it did not prevent a finding that there was a likelihood of confusion.

This is one of the rare occasions in which both the OHIM Board of Appeal and the General Court interpreted the relevant issue of descriptiveness in only one of the 24 official languages spoken in the European Union; but at least the descriptive element ‘mix’ in English has the same meaning in German (eg, Online-Lexikon Wikipedia, *DUDEN Deutsches Universalwörterbuch* and Online-Dictionary *Deutsch-Englisch/Englisch-Deutsch* dict.cc.).

The decision is also illustrative of the potential long-term risks of a sign which is occasionally used to identify the goods themselves rather than their source. Even though the issue in this case was not whether Riegele's trademark for SPEZI had become generic over time in German-speaking countries, it could have been one factor among others involved in assessing confusion if the assessment had been based on a German interpretation of 'mix'.

Incidentally, SPEZOOMIX appears to be a hybrid between SPEZI and MEZZO MIX. The latter mark designates a similar mixed drink originating from The Coca-Cola Company.

Shortly after the Second World War, Riegele started to sell a beer under the name 'spezi' which was registered as a German trademark in 1956. In 1977, Riegele created a new ready-mixed drink, after observing a rapidly growing phenomenon in restaurants where cola was mixed with orange soda. 'Spezi' is now sold in Germany, Austria and Switzerland. However, if you order a 'spezi' in Switzerland, it could be confused with a special beer brewed in the Pilsen style, which is frequently sold under the name 'spezli'.

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