

GERMANY



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Free fluege.de for all, rules General Court

On May 14 2013 the General Court dismissed the appeal against the decision of the Board of Appeal of OHIM rejecting a trade mark application for the word fluege.de, under Article 7(1)(b) and (c) CTMR. The application was for services for “advertising, business management, business administration, office functions, transport, packaging and storage of goods, travel arrangement, services for providing foods and drink, accommodation services” in classes 35, 39 and 43.

Regarding Article 7(1)(c) CTMR the General Court agreed with the Board of Appeal that the German speaking public, both average consumers and professionals, is to be considered when examining the descriptive nature of the trade mark applied for. In this respect it was held that it is common practice to substitute special characters such as the letters ä, ü, ö and ß with groups of letters such as ae, ue, oe and ss, including for technical reasons.

Therefore, the General Court also rejected the applicant’s argument that the applied-for mark would come across as unusual (despite the fact that it has been possible to use letters such as ü in internet addresses since at least 2004) . Moreover, considering the TLD is .de, the relevant public would perceive the trade mark applied for as a reference to an internet address, and would thus pay less attention to the spelling “ue”. And when perceived as a domain name it was held that the mark would be related, at most, to an internet address and not to the commercial origin of goods or services of a specific producer or supplier.

As such, the General Court concluded, the Board of Appeal was right to hold that the trade mark applied for would spontaneously only be perceived as a domain name referring to the address of an internet page in the aviation and air-travel field. And the latter particularly also applies in relation to the contested services; while they do not expressly refer to air transport and flights they may nevertheless be offered

in relation to them.

Accordingly, the General Court also confirmed the position taken by the Board of Appeal in that the mere fact of joining two descriptive terms being devoid of any distinctive character does not in the present case confer a distinctive character to the mark fluege.de. altogether.

Finally, the General Court also rejected the applicant’s plea that it had acquired distinctive character through use according to Article 7(3) CTMR. In doing so, the General Court pointed out that this plea was first made in its action before the Court, therefore, this point was not subject to the contested decision of the Board of Appeal. As the General Court, however, is to merely review the legality of the Board of Appeal’s decision, the applicant cannot rely on this plea for the first time in the action before the General Court.