

GERMANY

General Court upholds likelihood of confusion

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In *Opke Ireland Global Holdings Ltd v European Union Intellectual Property Office (EUIPO)* the General Court (case T-88/16) upheld the Board of Appeal's decision (case R 2387/2014-5) finding likelihood of confusion between pharmaceutical marks in class 5 according to Article 8 (1) (b) European Union Trade Mark Regulation 207/2009 (EUTMR), namely between the attacked EU mark application, word Alpharen, and the older national Lithuanian and Latvian trade marks, word Alpha D 3. In doing so, the Court had the opportunity to also deal with some procedural regulation rules not which are not commonly adjudicated on.

Ineos Healthcare Ltd, the predecessor in law of the applicant, filed the EU trade mark Alpharen for "pharmaceutical and veterinary preparations containing magnesium iron hydroxycarbonate or hydroxycalcite or derivatives of these compounds; pharmaceutical and veterinary preparations for use in renal dialysis and in the treatment of renal diseases and kidney ailments; phosphate binders for use in the treatment of hyperphosphataemia" in class 5. Teva Pharmaceutical Industries Ltd filed an opposition based on three national trade marks in total, including the mentioned two national marks covering "pharmaceutical preparation being a calcium regulator", with only these two being subject to the Court's decision. Eventually, the remaining goods attacked and subject to this Court's decision were "pharmaceutical and veterinary preparations containing magnesium iron hydroxycarbonate or hydroxycalcite or derivatives of these compounds" and "phosphate binders for use in the treatment of hyperphosphataemia".

The applicant tried to lift the attacked decision based on alleged infringement of Article 1 (d) (2) of Regulation 216/96 following which the Board is not to con-

sist of members who were party to the contested and remitted decision. The latter was in fact initially the case in a previous decision in these proceedings and for this reason the same Board had already revoked its prior decision for an obvious procedural error according to Article 80 EUTMR, and which then led to the further (attacked) decision by the same Board of Appeal but by different members. Therefore, the Court rightly held that in view of the reason which led to a revocation pursuant to Article 80 UMR, Article 1 (d) (2) of Regulation 216/96 is clearly not a valid ground under Article 65 UMR which allows to file an action with the Court against decisions of the Board of Appeal. This finding was also derived from Article 65 (6) UMR based on which the Board of Appeal already rightly revoked its initial decision.

On the question of likelihood of confusion the Court also confirmed the attacked decision that the addressed public consists both of doctors and pharmacists as well as end-users. Furthermore, the Court also held that the goods to be compared were intended for patients suffering from kidney disease and thus these goods serve the same purpose. Finally, the Court also agreed that while the identical word part "alpha" can be perceived both as a reference to the first letter of the Greek alphabet and as a biochemical term designating the position of functional groups within molecules, end-consumers at least will not identify the latter meaning, and the former meaning does not reflect any direct or specific link with the pharmaceuticals at issue.