

# Teva's headache over slogan trade marks

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## Weniger Migräne. Mehr vom Leben

We've been seeing a lot more interest from life sciences companies in applying for slogans recently. After all, advertising campaigns are increasingly a fierce battlefield for IP litigation. However, slogan marks often run at but rarely manage to take the hurdle of distinctiveness applied by the EUIPO and usually confirmed by the European Courts.

Two applications by Teva Pharmaceutical Industries have now suffered that fate again. In cases T-696/19 and T-697/19 - Teva v EUIPO, the General Court confirmed that EU trade mark applications for *Moins de migraine pour vivre mieux* and *Weniger Migräne. Mehr vom Leben* (which can be translated as *Fewer migraines for a better life* or *Less migraine. More life*) for printed materials and services such as providing information relating to the treatment of migraines had to be refused for lack of distinctive character. The relevant public would perceive both slogans as mere promotional statements rather than source indicators.

The Court confirmed that the relevant public, in this case, was both the general and the specialist public. This means that the "average consumer" consisted of both uninformed consumers and those that were specifically targeted by the goods and services - migraine treatments, and whose degree of specialization was high. Therefore both signs would be understood as promotional slogans, indicating a

promise to live better with fewer migraines and as such giving hope to improve daily life. This also corresponds with the pharmaceutical market reality, where the information originates from both professionals and patients.

The existence of Teva's prior EU trade mark "Less migraine, more moments" did not convince the Court either. It reiterated its case law whereby prior decisions are never binding and the principle of equality does not apply where the later mark would be registered contrary to the grounds for refusal in the law. In addition, that earlier mark was found to be "vague and unusual", contrary to the German and French slogans at stake. The English tagline *Less migraine, more moments* was considered to have a "vague and unusual character". This message required further interpretation, thought or analysis on the part of the general public. In turn, the signs at issue this time were immediately associated with a promotional message, and the connection with the goods and services was easy to grasp. Thus, the overall impression and message of the previously registered mark in relation to its goods and services was different.

Many attempts to register phrases as trade marks that are used as advertising slogans or taglines have gone up in smoke in recent times. Some other cases that made it to the General Court and suffered the same fate were: Feeling home or Du bist, was du erlebst (you are what you experience).

Applicants still try to rely on the so-called Audi test. In a judgment that received a lot of attention, the CJEU held that Audi's slogan "Vorsprung durch Technik" (advantage through technology) was inherently (!) distinctive for a wide range of goods. This judgment, however, must be seen as exceptional. Generally speaking advertising slogans are normally denied distinctiveness, and proving acquired distinctiveness is also very hard. The public needs to perceive a trade mark as an indication of commercial origin, irrespective of whether the trade mark also has other functions. Since the general public is not very attentive, if a trade mark does not immediately indicate the origin or intended use of the goods or services, but instead gives just purely promotional, abstract information, the public will not take the time to enquire into the sign's possible functions or associate it mentally as a trade mark. The 'resonance' of 'Vorsprung durch Technik' that being "imaginative" is not the proper criterion for judging the distinctiveness of slogans must not be understood as suggesting that any promotional phrase, however descriptive or banal, can be registered as a trade mark. The threshold rather remains high, and if anything, is moving even higher.