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The Black Soup: a Hell of a Coffee

Aron Laszlo (Oppenheim Legal) · Tuesday, April 27th, 2021

Can coffee be hell? Of course, bad coffee, we knew that. On the other hand, the General Court (GC) has recently confirmed that the sign “HELL” can be protected for coffee-related products as an EU trademark (Hell Energy v EUIPO, T-323/20, available in [French](#) and, for the adventurous ones, in [Hungarian](#)).

The applicant, Hell Energy Magyarország Kft., is a manufacturer of soft drinks. Hell Energy has recently extended its product portfolio with canned coffee products and file a trademark application with the EUIPO for the sign “HELL” for coffee-related goods: *“Coffee; Coffee flavourings; Coffee-based beverages; Coffee extracts; Coffee essences; Coffee concentrates; Coffee beverages with milk; Decaffeinated coffee; Flavoured coffee; Coffee in brewed form; Malt coffee extracts; Iced coffee.”*



(Picture (c) Hell Energy)

EUIPO refused the application for all goods except for “*Malt coffee extracts*” claiming that “HELL” in German means “light”, which can be understood by the average consumer as a reference to “light roast” coffee. The sign “HELL” bears obvious and direct information for the average consumer relating to the goods to be protected. Therefore “HELL” is devoid of distinctive character (Art. 7(1)(b) EUTMR) and is descriptive (Art. 7(1)(c) EUTMR) for coffee-related products except for malt coffee, which is made of malt sugar and is not roasted at all.

The Boards of Appeal confirmed the decision and established that the German speaking public of Germany, Austria, Luxemburg and Belgium will understand “HELL” in relation to coffee products as an obvious and direct reference to “helle Röstung” (“light roast”) even without the actual indication of “Röstung”.

The General Court’s decision had a very different flavour. The GC highlighted that ‘characteristic’ in Art. 7(1)(c) EUTMR should be understood as merely those features which serve to designate a property, easily recognisable by the relevant class of persons, of the goods in respect of which registration is sought. A sign can be refused registration on the basis of Art. 7(1)(c) EUTMR only if it is reasonable to believe that it will actually be recognised by the relevant class of persons as a description of one of those characteristics, which must be ‘objective’ and ‘inherent to the nature of that product’, ‘intrinsic and permanent’.

The Boards of Appeal failed to examine whether the light nature of the goods, as suggested by the German meaning of “HELL”, shall be seen as a characteristic of coffee, and whether the relevant public actually uses the adjective “light” for coffees. The GC’s key statement is as succinct as a key statement should be: *“On the other hand, it shall be established that, as the plaintiff claims, these goods are rather dark”*.

Furthermore, even if the (light) roast of the coffee beans used to manufacture the goods in question, shall be seen as a characteristic of the goods, the German word “Röstung” does not figure in the sign. The association between “HELL” and “coffee” via “helle Röstung” needs intellectual effort, which means that there is no obvious and direct link between the goods and the sign. Therefore, “HELL” does not enable the relevant public to immediately perceive in the sign, without further thought, as a description of coffee or one of its characteristics.

This is confirmed by the fact that the term “hell Kaffee” is incorrect in German, the correct term being “heller Kaffee”. Furthermore, evidence filed by EUIPO shows that light roast coffee is popular in a certain “Third Wave” movement, which suggests that light roast coffee is a niche product. Thus, what EUIPO has proven is an indirect and unobvious link between “HELL” and coffee. For these reasons, GC annulled the decision of the Boards of Appeal.

The black soup is still to come! – we say in Hungarian meaning that the worst part is still to be expected. This is how in 1541 Ottoman officers made the Hungarian envoys stay longer after lunch, to have coffee. And to give the Ottomans troops more time to meanwhile infiltrate and take the castle of Buda in without a siege... Well, this coffee definitely tasted better for the applicant!



(Picture (c) Fortepan/Fófotó)

[The decision is not final yet. EUIPO has the right to file an appeal and turn sweet into sour for the applicant, however, the CJEU has not been keen in accepting appeals in 2020 and this approach is not expected to change in 2021.]

[The author has represented the applicant before the EUIPO and the GC.]

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