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No monopoly on blue and silver for Red Bull

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On 29 July 2019, the European Court of Justice (CJEU) handed down a ruling that ended a six-year battle over the validity of trademark rights in the name of Red Bull to the combination of the colours blue and silver (EUTM nos. 9417668 and 2534774) (C-124/18 P). The CJEU dismissed Red Bull's appeal and confirmed the decisions of the General Court, which in turn maintained the declaration of invalidity by the EUIPO. Red Bull's argument that the requirements for clarity and precision of colour combination marks ultimately resulted in abolishing these and only allowing figurative or position marks did not succeed, despite MARQUES siding with Red Bull and intervening before both the General Court and the CJEU. The trademarks were invalidated on request of Optimum Mark, a Polish entity.

The graphical representation of the two-colour trademarks was:



They were accompanied by descriptions that the ratio of each of the two colours was 'approximately 50% — 50%' and that the two colours were juxtaposed to each other and would be applied in equal proportion.

The CJEU agreed with Optimum Mark that the graphical representation did not systematically arrange the colours by associating them in a predetermined and uniform manner and that the verbal description was not sufficiently clear, self-contained and precise ([Heidelberger Bauchemie](#)). The description did not indicate the type of arrangement in which the two colours would be applied to the goods. A verbal description of the sign must clarify the subject matter and scope of the protection and cannot be inconsistent with the graphic representation or give rise to doubt. The mere indication of the ratio of the two colours allowed for the arrangement of those colours in numerous different combinations. The description indicating only the proportions of the two colours is not sufficiently precise.

Interestingly, in a decision handed down on 2.02.2017, **the Polish Supreme Court** had also found that Red Bull's registration of its combination of blue and silver did not mean that every form without contour or shape comprising combination of colours could be protected by trademark rights (I CSK 778/15).

Red Bull has had a bad run as the General Court also sustained the EUIPO Board of Appeal

decision of 26.01.2017 to dismiss the figurative trademark registration application for a device of a parallelogram composed of 2 fields in different colours (T-305/17).

Comment

The judgment specifies the requirements for the registration of colour combination marks in the light of EU law. The CJEU confirmed that the graphical representation for colour combinations must be precise and sustained so that trademarks are defined in a predetermined and uniform manner. Colour combinations represented abstractly and without shape or contours need a sustained and stable description of the junction of colours.

The scope of protection under a colour combination trademark is not limited to mere reproduction but covers also imitation (like other types of trademarks). The challenge is to represent them in a precise way without turning them into figurative or position trademarks. The consumer should perceive and recall a particular combination, while making purchases. Also the competent authorities and economic operators should be aware of the scope of the protection. In line with the basic trademark function of a sign, an indication of the origin of the product or service designated must be immediate and certain. The exercise of this function requires that the two-colour trademarks can be easily and immediately memorized by the relevant public as a distinctive sign.

This ruling will shape the practice relating to colour combination marks in the EU. It appears that applications for such trademarks must be extremely precise. It would be interesting to see CJEU ruling on an issue: whether the same standard applies to single colour (per se) registration. While unfortunate for Red Bull and effectively blurring the lines to figurative and position marks, the practical impact of the judgment must not overrated, in that colour combination marks play less of a role in enforcement even than single colour marks. In any event all are hard to get given requirements of acquired distinctiveness.

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