

# Kluwer Trademark Blog

## Nowhere to go for the General Court: Court of Justice allows APE TEES appeal to proceed (C 337/22 P)

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As expected, [frankly wished for](#), and previously reported on this blog (see [here](#)), the EUIPO appealed the General Court's Ape Tees decision (T-281/21) to the Court of Justice. The Court allowed this appeal to proceed on 16 November 2022, recognising that the appeal raises issues relating to the fundamental principles of "*unity, consistency and development of EU law*" (C-337/22 P).

This appeal is a timely one, to say the least. The General Court seems to dash off in all directions in a post-Brexit world with conflicting rulings. There was the BASMATI case (T-342/20, 6 October 2021), followed by the APE TEES case (T-281/21, 16 March 2022), and just recently, the SHOPPI decision (T-222/21, 12 October 2022, as reported on this blog [here](#)).

The BASMATI case is closely related to the APE TEES case, with the difference that the contested Board of Appeal decision in the BASMATI case (T-342/20) was taken *before* the end of the Brexit transition period. Starting from the principle that the sole purpose of actions before the General Court was to review the legality of Board of Appeal decisions, the General Court concluded that its review could not be influenced by new circumstances that occurred after the Board of Appeal issued its decision. Therefore, the General Court found itself entirely foreign to the fact that the UK rights ceased to have effect in the EU after the Board of Appeal but before its own decision. The BASMATI appeal has been allowed to proceed and is pending under C-801/21.

For recollection, in its APE TEES decision (T-281/21), the General Court stated that the existence of a relative ground for refusal must be assessed solely as at the time of filing of the opposed EUTM application and not at the time the decision on the opposition is adopted. This came as a surprise to many observers as it was contrary to a number of well-established principles in case law.

The EUIPO came down quite hard on the General Court and argued that the latter's interpretations in APE TEES raised significant issues, which are not confined to Brexit, but extend to more situations where an earlier right ceases, *ex nunc*, to exist during administrative or judicial proceedings, in particular in the event of a revocation, limitation, or expiry of that right. The CJEU particularly noted the General Court's reliance on its BASMATI decision, which was then already pending before the CJEU, and its failure to address contradictory case-law of the General Court in the identification of the relevant time period for assessing likelihood of confusion. These were sufficient reasons for the CJEU to step in and endeavour to provide clarity.

Meanwhile, the General Court has issued its SHOPPI decision directly contradicting APE TEES and recognising that the prior right must still be valid and enforceable at the time of the decision of the Board of Appeal. As was discussed on this blog [here](#), this was so-to-say middle ground between APE TEES (relevant point in time = application date) and the EUIPO's position in BASMATI (relevant point in time = date of the last decision on the ground for refusal). From a practitioner's perspective the BASMATI position seems to be the most equitable and sensible and it probably corresponds to the position in the majority of the EU Member States.

Since the change of the CJEU's rules back in May 2019, it has been really hard to get appeals to be allowed to proceed: in total three (two trade mark appeals and one design case) have been allowed, out of more than 150 attempts. However, considering that the General Court's APE TEES decision raised a hue and cry by the entire IP community given its potentially wide-ranging impact, and bearing in mind that the BASMATI appeal was allowed to proceed earlier this year, the CJEU's consent to shed light on APE TEES does not come entirely as a surprise — but it does come as a truly welcome news.

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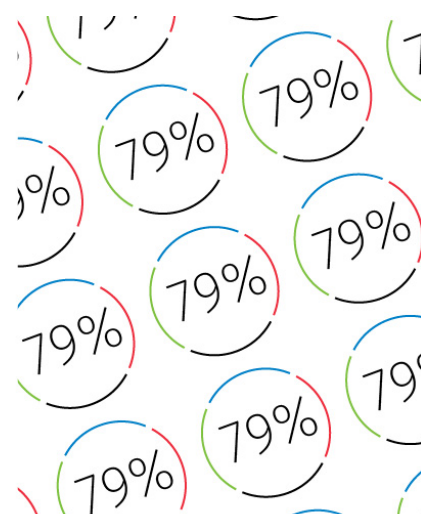
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“>General Court

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