
Bayer fails to prevent registration of SALOSPIR and device based on ASPIRIN marks

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European Union - Dr Helen G Papaconstantinou and Partners

In *Bayer Aktiengesellschaft v Uni – Pharma Kleon Tsetis Pharmaceutical Laboratories Industrial and Commercial SA, trading as UNI-Pharma SA* (October 29 2015, Opposition No 002337726), the Opposition Division of the Office for Harmonisation of the Internal Market has rejected in its entirety the opposition against the registration of the mark SALOSPIR and device (No 012351458).

Uni-Pharma SA applied for the registration of the mark SALOSPIR and device for “pharmaceutical preparations” in Class 5 of the Nice Classification:



The opposition was based on three earlier national ASPIRIN marks (with or without device):

- the word mark ASPIRIN;
- the same word written in a rather standard font:

Aspirin

- the shape of white, green and yellow packaging bearing the wording 'ASPIRIN-C' and a device element consisting of two tablets:



Bayer Aktiengesellschaft, the opponent, argued that the mark applied for was confusingly similar to these marks, which had a reputation, invoking Articles 8(1)b and 8(5) of the Community Trademark Regulation (207/2009).

The opponent also invoked Article 8(4) in relation to a non-registered sign (depicted below) used in the course of trade within the meaning of that article:



The Opposition Division, assuming that the earlier marks have a reputation for pharmaceuticals and related products, found that, although the signs under comparison are similar to a certain extent (in particular taking into account that they all include the letters 'S-P-I-R'), they had significant differences and, because of this, the relevant public was unlikely to make a mental connection between the signs in dispute - that is, to establish a “link” between them. In particular, the Opposition Division stressed that the signs differed in their initial letters, on which consumers tend to focus, and also in their figurative elements. Consequently, it was unlikely that either detriment or unfair advantage would occur.

The Opposition Division also pointed out that the level of attention in relation to pharmaceuticals is relatively high, irrespective of whether they are issued on prescription or not. Medical professionals exercise a high degree of attention when prescribing medicines, while non-professionals are also more observant in the case of pharmaceuticals, since such goods may affect their state of health.

In the context of the reputation claim, the opponent also invoked a number of purely figurative Community trademarks, consisting of a combination of colours (white and green). The Opposition Division held that these were even less similar to the contested sign, which includes the verbal element 'SALOSPIR'; that element had no counterpart in the earlier marks. Arguably, the Opposition Division missed the opportunity to comment on a very interesting argument by the applicant - namely, that the only common element between the figurative marks invoked by the opponent and the contested sign was the use of the white and green colours (in two parallel, horizontal stripes). These colours are of limited distinctiveness since said colours are either functional (white) or commonly used in this field (green), so that they have extremely low distinctive character in respect of pharmaceuticals and, therefore, no likelihood of confusion or dilution could be established.

As expected, since the Opposition Division came to the conclusion that the marks under comparison were not sufficiently similar for consumers to establish a link between them, it found that no likelihood of confusion existed.

As far as Article 8(4) was concerned (German law being applicable), the Opposition Division found - interestingly - that, although the word mark ASPIRIN had an “outstanding reputation and recognition in the German market”, as proved by extensive evidence (eg, market surveys, case studies, court and other decisions), this did not automatically mean that the earlier sign consisting of the ASPIRIN packaging had also acquired a reputation through use in Germany.

Further, according to the decision, the similarities of the marks under comparison were not sufficient to cause confusion on the part of the German public, even in respect of identical goods, particularly taking into account the higher degree of attentiveness of consumers in relation to the goods in question.

As a result, the Opposition Division found that the opposition was not well founded under Article 8(4), and rejected the opposition in its entirety.

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