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## Above-average level of attention insufficient to exclude likelihood of confusion

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**European Union** - Dr Helen Papaconstantinou, John Filias & Associates

In *Longevity Health Products Inc v Office for Harmonisation in the Internal Market* (OHIM) (Case T-161/10, May 24 2011), the General Court has upheld a decision of the Fourth Board of Appeal of OHIM to refuse the registration of E-PLEX for goods in Class 5 of the Nice Classification.

In May 2006 Longevity Health Products filed an application for the registration of the word mark E-PLEX as a Community trademark. After a restriction was made during the proceedings before OHIM, the application covered the following goods in Class 5:

*"Pharmaceutical and veterinary preparations, except medicines to combat diseases in connection with the central nervous system; sanitary preparations, dietetic substances adapted for medical use, preparations of trace elements for human and animal use, food supplements for medical purposes, mineral food supplements, vitamin preparations."*

In March 2007 Portuguese company Tecnifar - Industria Farmaceutica SA opposed the registration of E-PLEX for the aforementioned goods on the basis of its earlier Portuguese word mark EPILEX for "anti-epileptics" in Class 5. The Opposition Division of OHIM accepted the opposition for all the goods, except sanitary preparations.

Longevity appealed. In February 2010 the Fourth Board of Appeal of OHIM annulled the Opposition Division's decision in part, holding as follows:

- The attentiveness of the relevant public - namely, professionals in the pharmaceutical and medical field and end consumers in Portugal - was above average at the moment of purchase;
- "Anti-epileptics" were highly similar to "pharmaceutical and veterinary preparations, except medicines to combat diseases of the central nervous system", and were similar to the rest of the contested goods to an average or low degree;

- The two marks were visually and phonetically similar to an average degree and were not comparable conceptually; and
- The inherent distinctiveness of the earlier mark was average.

The board thus concluded that there was a likelihood of confusion between E-PLEX and EPILEX for those goods that were highly similar and annulled the contested decision in this respect.

Longevity appealed to the General Court, raising the following arguments, among others:

- As a response to the opposition, it had restricted its specification of the goods to exclude anti-epileptic medicines. Therefore, there was no longer a likelihood of confusion.
- It did not use, nor did it intend to use, E-PLEX for anti-epileptic medicines.

Interestingly, the General Court did not accept the restriction argument, stressing that the express exclusion of the goods covered by the earlier mark from the list of goods covered by the application was not sufficient to exclude any similarity and prevent any risk of confusion. The court, confirming the findings of the Board of Appeal, held that the goods at issue:

- were of the same nature;
- had the same purpose (ie, to treat human health problems);
- were aimed at the same public (ie, healthcare professionals and patients); and
- used the same distribution channels (ie, health centres and pharmacies).

Although the court found that the board had erred in stating that the degree of similarity of the goods was high (due to the difference in therapeutic indications), it nevertheless concluded that, despite the restriction, the similarities between the goods outweighed the differences and that some degree of similarity still existed.

Turning to the comparison of the marks, the court held that E-PLEX and EPILEX:

- had almost the same length;
- had the letters 'E', 'P', 'L', 'E' and 'X' in common, placed in the same order; and
- both began with the letter 'E' and shared the ending 'LEX'.

The court agreed with the board that the hyphen in E-PLEX gave the impression that the mark was composed of two elements, whereas EPILEX consisted of only one word. Thus, the visual similarity was average. Turning to the phonetic similarities, the court held that the two marks had the same first syllable ('E'), but that E-PLEX had only one other syllable, whereas EPILEX had two. However, it deemed that the different number of syllables was not sufficient to exclude a phonetic similarity between the marks. The court thus confirmed that the marks had an average degree of phonetic similarity.

The court, in line with established case law, stressed that:

- the risk that consumers might believe that the goods in question came from the same undertaking or from economically linked undertakings constituted a likelihood of confusion; and
- the likelihood of confusion must be assessed globally, according to the relevant public's perception of the signs and the related goods and services, taking into account the interdependence between the similarity of the signs and the similarity of the goods or services.

The court concluded that, since the goods were found to have some degree of similarity and the marks had an average degree of visual and phonetic similarity, there was a likelihood of confusion among the relevant public. The fact that the level of attention of the relevant public was above average was insufficient to override the risk that consumers might believe that the goods in question came from the same company or from economically linked undertakings. Finally, Longevity's argument that it did not use, and did not intend to use, the mark for anti-epileptics was ineffective since the restriction had already been made in the list of goods and had been found insufficient to prevent a likelihood of confusion.

The court thus rejected Longevity's appeal.

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