

General Court: Board of Appeal erred in assessing distinctiveness of ULTRA for beer

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- The case involved a request filed by Amstel for a declaration of invalidity of Anheuser-Busch's mark ULTRA for Class 32 goods
- The court found that the board had erred in concluding that 'ultra' could not, without being combined with other words be considered a purely laudatory or promotional expression
- The case law related to the term 'extra' should have been applied, by analogy, to the term 'ultra'

In [Amstel Brouwerij BV v European Union Intellectual Property Office](#) (EUIPO) (Case T-170/23), the Third Chamber of the General Court has annulled a decision of the Fifth Board of Appeal of the EUIPO dated 24 January 2023.

Background

In January 2005 US company Anheuser-Busch LLC obtained registration of the EU figurative mark depicted below, covering beers in Class 32:

ULTRA

In June 2020 Dutch company Amstel Brouwerij BV filed a request for a declaration of invalidity against said mark for lack of distinctive character, based on Article 51(1)(a) of [Regulation 40/94](#), as amended, replaced by [Regulation 2017/1001](#), in conjunction with Article 7(1)(b) and (c). In October 2021 the Cancellation Division of the EUIPO rejected the request in its entirety.

Upon Amstel's appeal, the Board of Appeal stated that Amstel had not demonstrated that the contested mark lacked distinctive character or was descriptive, noting that, according to established case law of the General Court, there was a clear distinction between the meaning of the element 'ultra' when used alone and when combined with another indication. Accordingly, the board

asserted that the term 'ultra', when used as a prefix, needed to be accompanied by a noun to specify in what sense the goods or services exceeded the usual or ordinary standards or were considered excellent and that, on its own, it had no meaning related to the goods. Therefore, it was distinctive.

Amstel turned to the General Court with a request for annulment of the board's decision, mainly alleging infringement of Article 7(1)(b).

Decision

The General Court first noted that the Board of Appeal had referenced several online dictionaries, but the exact dates on which the relevant definitions were posted online could not be verified. According to the court, these definitions, which are well-known facts accessible to the general public, were relevant evidence, even if they were added after the material date, as they helped infer the meaning of the term 'ultra' at that time and how it would have been perceived by the relevant public. Various dictionary extracts indicated that the term 'ultra' can be used both as a prefix and on its own, functioning as an adjective or a noun. This was further corroborated by an annex to the application, which showed that, in English, 'ultra' can also be used as an adjective meaning 'going beyond the usual limit', 'excessive' or 'extreme'. The court also held that the term 'ultra', used alone, means 'which goes beyond what is usual or ordinary', 'excessive', 'extreme' or 'immoderate', and that it was synonymous with 'beyond something' or 'extra'.

According to the evidence presented, the term 'ultra' was understood at the relevant date to mean 'beyond what is ordinary', 'excessive', 'extreme' or 'immoderate'. This common and generic term held the same meaning for English-speaking or Latin-language-speaking audiences, whether used as a prefix or alone, and was perceived as referring to a quality or characteristic of the product in question.

The court went on to point out that the term 'ultra' is synonymous with 'extra', a superlative indicating a high and intense quality, frequently used in advertising language. Therefore, the Board of Appeal had erred in concluding that the word 'ultra' could not, without being combined with other words, be considered a purely laudatory or promotional expression. Consequently, according to the court, the case law related to the term 'extra' should have been applied, by analogy, to the term 'ultra'. The court explained that it had previously determined that the term 'extra' lacked distinctive character, primarily because it was laudatory and intended to emphasise the abstract qualities of the goods or services it described, suggesting that these goods and services possessed qualities beyond the norm. Essentially, the generic meaning of the term 'ultra', synonymous with 'extra', tended to praise the nature, function, quality or other attribute of any product in an unspecified way. Its common use in everyday language and in trade as a generic laudatory term underscored the laudatory nature of the mark applied for.

The General Court thus held that, contrary to Anheuser-Busch's allegations and the Board of Appeal's findings, the evidence submitted by Amstel clearly showed that the term 'ultra', alone or combined with other terms, was employed in a generic and common manner in trade for a wide range of everyday consumer goods, particularly beers. The court stressed that the term 'ultra' clearly and immediately informed the relevant public of the superior quality of the goods compared to those of the competition. Under these circumstances, at the relevant date, it could be perceived by that public as evoking an idea of excellence, superiority, or a certain taste or alcohol content of beers in Class 32. Thus, the court concluded that 'ultra' was a generic laudatory term which could not be regarded as capable of differentiating the commercial origin of the goods it designates.

The court finally commented that the stylisation of the figurative element 'ultra', which was simple and banal and gave the word element a slightly two-dimensional aspect, did not distract consumers from the clear message conveyed by that word. As a whole, the contested mark would be perceived by the relevant public merely as a promotional and laudatory message, rather than as an indication of the commercial origin of the goods.

The court concluded that the term 'ultra' was devoid of distinctive character for beers in Class 32. Given the need for the term 'ultra' to remain available for use by other providers, this term, irrespective of its use, had a laudatory and promotional character and, therefore, could not be registered as an EU trademark under Article 7(1)(b).

Thus, the court found that the Board of Appeal had erred in its findings and annulled its decision, as the contested mark fell under an absolute ground for refusal.

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