

Level of attention of end consumers who buy pharmaceutical products held to be above average
European Union - NJORD Law Firm

**Examination/opposition
International procedures**

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In *Boehringer Ingelheim Pharma GmbH & Co KG v Office for Harmonisation in the Internal Market* (OHIM) (Case T-75/13, December 2 2014), the General Court has upheld in part a decision of the Fourth Board of Appeal of OHIM in which the latter had partially overturned a decision of the Opposition Division of OHIM finding the marks LONARID and MOMARID to be confusingly similar for identical and similar goods in Class 5 of the [Nice Classification](#).

In June 2010 *Nepentes Pharma sp zoo* filed an application for the registration of the word mark MOMARID for goods and services in Classes 3, 5 and 44. The description of the goods in Class 5 was very long and broadly worded.

Boehringer Ingelheim GmbH lodged an opposition under Article 8(1)(b) of the [Community Trademark Regulation](#) (207/2009) on the basis of its prior Community trademark (CTM) LONARID, registered for "pharmaceutical and sanitary preparations" in Class 5. The opposition was directed at the following goods in Class 5 (grouped and numbered here for the sake of explanation):

1. broadly worded pharmaceutical items: "pharmaceutical and veterinary preparations; medicinal products; pharmaceutical products; pharmaceutical and medicinal preparations and substances; topical pharmaceutical compositions; preparations for medical purposes; chemical preparations for medical purposes";
2. other pharmaceutical, sanitary, dermatological and medical preparations for specific uses: "substances and products for protecting, maintaining, treating or conditioning for the skin, body, face, mouth, lips, eyes, hair, hands and nails; pharmaceutical and medical preparations and substances for the care and appearance of the skin, body, face, mouth, lips, eyes, hair, hands and nails; pharmaceutical and medical products and preparations for slimming purposes; medicinal products; pharmaceutical products; pharmaceutical and medicinal preparations and substances; dermatological pharmaceutical products, preparations and substances; dermatological preparations for the prevention and treatment of skin disorders; dermatological preparations (medicated); pharmaceutical preparations for the treatment of dermatological disorders; pharmaceutical preparations for the topical treatment of dermatological disorders; dermatological medicinal products; veterinary pharmaceutical preparations for dermatological use; veterinary medicinal products for treatment of hormonal disorders; hormones for medical purposes; hormone preparations for veterinary use; hormones; steroid products, hormone preparations for pharmaceutical and medical use; hygiene products and preparations for medical purposes; topical pharmaceutical compositions; chemical preparations for medical purposes"; and
3. "chemicals for pharmaceutical use".

The Opposition Division upheld the opposition in its entirety and rejected the CTM application for all the contested goods in Class 5. After the opponent submitted documents to demonstrate the genuine use of the earlier mark, the Opposition Division found that the mark had been used only for "pharmaceutical preparations". Further, it held that:

- all the contested goods were either identical or similar to the opponent's "pharmaceutical preparations";
- the two marks were visually and aurally similar;
- the conceptual comparison was neutral since neither of the two marks mean anything in the relevant languages;
- the distinctiveness of the earlier mark was normal;
- the identity or similarity of the goods in question outweighed the visual differences between the marks; and
- the level of attention of the relevant public ranged from low to high.

The CTM applicant appealed this decision, and the Fourth Board of Appeal of OHIM upheld the appeal only in part. The board held as follows:

- Proof of use - in the light of the evidence of genuine use provided by the opponent, the opponent's

mark was deemed to be protected for “pharmaceutical preparations for the reduction of pain and fever” and not, as the OHIM Opposition Division had held, for the broader category of “pharmaceutical preparations”.

- Relevant public - the level of attention was above average and the relevant territory was the European Union.
- Comparison of the goods and services - some of the goods were considered to be identical to the goods covered by the earlier mark (ie, group 1 above), others were found to be similar to a low degree to the opponent’s goods because they had different therapeutic indications (ie, group 2 above), and others were found to be dissimilar (ie, group 3 above).
- Comparison of the signs - the applicant argued that the suffix 'RID' had a low degree of distinctiveness on the basis that other CTMs with this suffix are registered for goods in Class 5. However, the board found that the fact that some trademarks with this suffix have been registered did not prove that they are used on the market, and the applicant had failed to establish that 'RID' had a meaning for goods in Class 5. Further, the board found that the degree of visual and aural similarity was slightly above average and that the conceptual comparison was neutral. The fact that both signs had different beginnings did not alter these findings.
- Overall assessment of likelihood of confusion - there was a likelihood of confusion with regard to the identical goods, but not with respect to the dissimilar goods or those goods that were similar to a low degree.

In other words, while the Opposition Division had upheld the opposition for all groups of goods, the Board of Appeal took into account the therapeutic indications of the goods as used, and rejected the application only for group 1.

The opponent appealed to the General Court, claiming that the board's decision should be annulled insofar as it allowed the registration of MOMARID for some of the goods in Class 5.

The General Court upheld the decision in part:

- The opponent’s argument that the level of attention of the relevant public was low could not be accepted. The opponent was referring only to the end consumer’s level of attention; however, according to case law, medical products sold without prescription will be of concern to consumers, who are deemed to be reasonably well informed and reasonably observant and circumspect where those goods affect their state of health, even if the goods in question are just painkillers. Further, according to case law, the level of attention in respect of dietetic products and supplements is high, as the goods are health-related. Consequently, the Board of Appeal was correct in finding that the level of attention of the end consumers for the goods in question was above average.
- The Board of Appeal was right to find that the therapeutic indications of the goods at issue were different, leading to the conclusion that the goods applied for were similar only to a low degree to the goods covered by the earlier mark.
- However, the Board of Appeal had erred in finding that the “chemicals for pharmaceutical use” (group 3) covered by the mark applied for were dissimilar to the goods covered by the earlier mark, especially since this expression is rather vague and may lead to different interpretations.
- With regard to the global assessment of the likelihood of confusion, the Board of Appeal was correct in finding that there was no likelihood of confusion between the marks in respect of the goods which were considered to be similar to a low degree. However, the Board of Appeal had erred in ruling out the existence of a likelihood of confusion with regard to “chemical for pharmaceutical use”.

Accordingly, the General Court upheld the Board of Appeals decision for the most part, but annulled the decision as regards "chemicals for pharmaceutical use" (group 3).

This case is interesting in that it effectively does away with a line of decisions which had found use of a single pharmaceutical preparation to be use of “pharmaceutical preparations” as such. Together with the remarks that even consumers of non-prescription drugs can have an above-average level of attention due to the fact that such substances can affect their health and bodies, this indicates a shift towards finding less likelihood of confusion in Class 5, at least with regard to the determination of the similarity of goods.

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