

29 Oct 2021 General Court confirms distinctiveness of lobster logo for confectionary

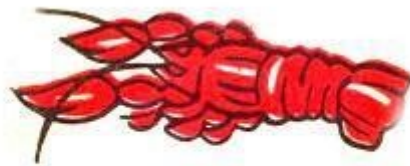
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- The EUIPO rejected Roshen's action for the cancellation of a lobster logo in relation to confectionery under Articles 7(1)(b) and (c)
- The court agreed that there was nothing to prevent consumers from perceiving the mark as an indication of origin
- Roshen's evidence and arguments lacked any probative value

In its judgment of 6 October 2021 in [Case T-254/20](#), the General Court has upheld a decision of the Fourth Board of Appeal of the EUIPO, which confirmed the decision of the Cancellation Division refusing to cancel a figurative mark representing a lobster in relation to confectionary.

Background

An application for registration of an EUTM was filed in the name of Russian company PAO Moscow Confectionery Factory 'Krasnyj Ocityabr' for the following mark, covering a long list of confectionary goods in Class 30:



The EUIPO accepted and published the mark. No opposition was lodged, so the mark was registered in July 2017.

In November 2017 Ukrainian company Dochirnie pidpriemstvo Kondyterska korporatsiia 'Roshen' lodged a cancellation action based on the grounds set out in Article 59(1)(a) of Regulation 2017/1001, read in conjunction with Article 7(1)(b) and (c) of that regulation - namely, that the mark was devoid of distinctiveness and descriptive. Roshen claimed that the mark RAKOVYE SHEJKI, which is understood by Russian-speaking consumers as meaning 'red lobsters necks', has been used continuously in various compositions since the 19th century. Roshen demonstrated the use of the word element 'Rakovye Shejki' combined with the image of a red lobster on wrapping paper by various confectionery manufacturers in the USSR, including Roshen itself, during the period between 1925 and 1989. The territories of Russia, Belarus and Ukraine have a link with the relevant territories since that evidence referred to the time of the USSR, and Lithuania, Latvia, Bulgaria and Poland had close links with those countries because of a common economy. The goods were sold throughout the USSR and those related countries. Roshen therefore claimed that it had submitted sufficient evidence to demonstrate use of the image of a red lobster in the relevant territory at the relevant date, which included extracts from websites showing the use of the image of a red lobster in various styles for confectionery goods in Poland, Lithuania, Latvia and Ukraine.

The Cancellation Division of the EUIPO rejected the cancellation action, and Roshen appealed.

The Fourth Board of Appeal of the EUIPO rejected the appeal, holding that because the declaration of invalidity was based solely on the bases claimed (lack of distinctiveness and descriptiveness), the arguments and evidence submitted in order to establish that the contested mark was devoid of any distinctive character because of its common and long-lasting use was irrelevant. There was no additional evidence establishing the link between the perception of the relevant public at the relevant date (the filing date of the mark in 2016), and the evidence relating to Russia, Ukraine and Belarus did not concern any of the relevant territories (ie, the European Union). As regards the issue of descriptiveness, the board held that there was nothing to prevent the consumer from perceiving that mark as an indicator of commercial origin since it does not depict a simple geometrical shape, does not correspond to the appearance of the goods in question and does not allude to their composition or taste.

Roshen appealed to the General Court, but did not fare better.

Decision

The General Court held that the Board of Appeal was correct in finding that lobster was a type of seafood which did not correspond to the composition or taste of the goods at issue and that there was, as a matter of course, nothing to prevent consumers from perceiving its image as an indication of the origin of those goods. The court also declared that the board was correct in determining that Roshen's evidence and arguments lacked any probative value as the content of the documents provided was largely unrelated to the relevant date and territory. Accordingly, the General Court rejected the appeal.

Comment

This case is interesting for several reasons (besides the obvious geopolitical ones). It could well have had a different outcome had it not been based solely on Article 7(1)(b) and (c) (lack of distinctiveness and descriptiveness), in that Article 7(1)(d) prohibits registration of marks which “consist exclusively of signs or indications which have become customary in the current language or in the *bona fide* and established practices of the trade”. Further, the case demonstrates that the evidence must be connected to the relevant public in order for it to be persuasive.

Peter Gustav Olson

NJORD

TAGS

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