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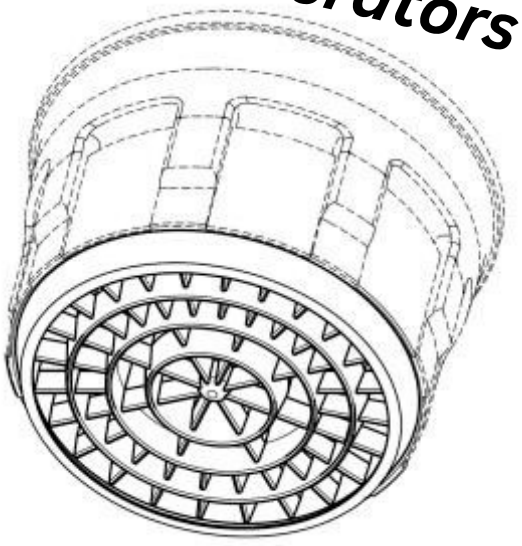
Benelux Office for Intellectual Property

1. Facts:

EUIPO

EUIPO rejected the following trademark application for registration on the ground that the application was not sufficiently precise (Article 7(1)(a) Trademark Regulation):

A tactile position mark for sanitary inserts, in particular flow regulators and flow generators (class 11)



The case: EUIPO/Neoperl AG

(ECJ 23 January 2025, C-93/23 P, ECLI:EU:C:2025:33)



Board of Appeal EUIPO
In appeal the Board of Appeal of the EUIPO found that the absolute ground for refusal referred to in Article 7(1)(b) Trademark Regulation was relevant and that the mark applied for was devoid of distinctive character.

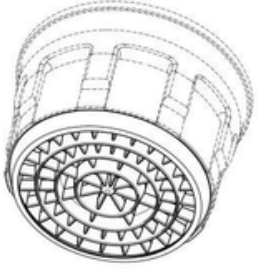
General Court EU
Neoperl brought an action for annulment of this decision before the General Court. Subsequently, the General Court ruled on its own motion that the Board of Appeal breached the law by not assessing whether the sign was caught by the absolute ground for refusal in Article 7(1)(a), before examining the absolute ground of refusal in Article 7(1)(b). The General Court held that the absolute ground for refusal in Article 7(1)(a) was applicable since the sign at issue was not shown precisely and comprehensively by the graphic representation and thus could not constitute a trade mark.

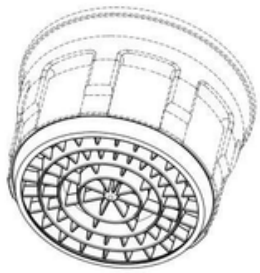
2. Procedure before the ECJ:

EUIPO lodged an appeal before the ECJ which appeal was allowed to proceed since it was found that the appeal raised an issue that is significant with respect to the unity, consistency and development of EU law. Order of 11 July 2023

It concerns one of the few appeals that was admitted under the new procedure established in 2019 that limits appeals against decisions of the General Court in IP cases.

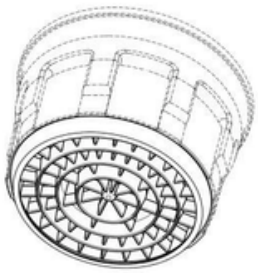
The ECJ ruled in favor of the EUIPO and made clear that the General Court exceeded the limits of its jurisdiction by ruling upon a ground of refusal which was not examined by the Board of Appeal of the EUIPO. According to the ECJ, the General Court also erred in law in criticizing the Board of Appeal for failing to examine the applicability of the absolute ground in Article 7(1)(a).





The ECJ clarified that:

- There is no order in which absolute grounds for refusal must be assessed.
- The terms “sign” and “trade mark” in Article 7(1) must be regarded as being used interchangeably and do not reflect an intention of the EU legislature to give priority to the application of the ground for refusal referred to in point (a) over the application of the other absolute grounds for refusal, including, in particular, the absolute ground for refusal referred to in that point (b).



Thus, according to the ECJ the Board of Appeal could rule that the sign was devoid of distinctive character as mentioned in Article 7(1)(b) without first examining the applicability of the absolute ground in Article 7(1)(a).

The ECJ annulled the decision of the General Court and referred the case back to assess the pleas put forward by Neoperl.

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