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Content:

→ Law

Likelihood of confusion in trademarks and branding

Thinking of registering your brand as a trademark? Or are you currently facing the challenge of "rebranding" your company? Apart from having a great idea for the wording and design of your logo, it is vital you thoroughly research existing brands on the market so that when your new logo is ready, you are not surprised to find that someone else already owns a logo that is similar or even identical to yours. In today's Newsletter we therefore present a summary of three recent and interesting decisions of the General Court of the EU in which the General Court considers the similarity of trademarks and their possible confusion by the public. We hope that you will find these decisions useful and that they will help you avoid potential brand conflicts and that (not only) your marketing department will find them interesting.

Lucie Kianková
Rödl & Partner Prague

We have very much simplified the cases below for the purposes of this article. Should you like to know more, we are happy to provide you with a broader interpretation or the decisions themselves in full.

PUMA v PUMA-System

The objective of this dispute was to assess whether the subsequent registration of the PUMA-System trademark establishes a similarity to the previously registered well-known PUMA trademark, even if the third-party trademark registration was for very distant and remote goods and services.

On 1 June 2017, CAMäleon Produktionsautomatisierung GmbH (Germany) filed an application for an EU word mark in the form PUMA-System, for very remote goods and services, namely machines for working and processing wood and metal and the corresponding pc hardware and software and services (Classes 7, 9, 16 and 42). PUMA SE (Germany) opposed the trademark registration in the EU trade mark register. In support of its claims, PUMA SE relied on its two figurative PUMA marks (both registered on 30 June 2014 as EU trademarks under Application No 12579728 and Application No 12579694), despite the fact that those trademarks are registered with a view to sportswear, sports equipment and accessories (Classes 18, 25 and 28), i.e. goods and services which are in principle not similar to those of the third-party trademark.

The General Court of the EU rejected PUMA's action in part and gave the following reasons for its opinion. The fact that the mark applied for is found to be similar to the earlier mark and that the earlier mark has an outstanding reputation is not automatically sufficient to establish the existence of a relationship between the marks at issue. According to the General Court, in order for Article 8(5) of the Trade Mark Regulation to apply, three conditions must always be met, cumulatively: (a) the conflicting marks must be identical or similar, (b) the earlier mark must have a reputation, and (c) there must be a likelihood that use of the mark applied for will take unfair advantage of the distinctive character or the reputation of the earlier mark. In the present case, the General Court of the EU concluded that these conditions were met only in respect of certain goods and services. According to the General Court of the EU, the conflicting marks affect two completely different target groups of consumers, between which there is no relevant connecting element. While the mark applied for is essentially linked to specialised goods and services intended for professionals in the field, PUMA's earlier marks are linked to goods and services intended for the general public. For this reason, the application for the later trade mark was rejected only to the extent that the target consumer groups of the conflicting marks overlap. (Judgment of the General Court (Sixth Chamber) of 10 March 2021, Case T-71/20, ECLI:ECLI:EU:T:2021:121)

KERRYGOLD v KERRYMAID

The long-standing disputes between the Kerrygold and Kerrymaid trademarks were examined by the EU General Court in terms of the public's geographical perception of the marks. Some of the public associate the term kerry with a particular geographical area and regard the products so marked as originating in Ireland. However, another part of the public is not aware of such a geographical reference. The impact of the geographical association of the brand was considered by the General Court of the EU in its recent decision of March 2021.

The EU General Court's assessment was that the Irish connotations of the term kerry alone, as alleged by the appellant, cannot be sufficient to show that the entire relevant public (in the present case, EU public) perceives the term kerry as a geographical indication of the origin of the products covered by the earlier trade mark. That argument cannot therefore be sufficient to conclude that the KERRYGOLD trademark was not registrable. The appellant's evidence that Kerry is a well-known destination among the European public can only be considered relevant to a negligible part of the EU public and it cannot be assumed that such a connotation is obvious to all EU citizens.

In view of the above conclusions, the General Court of the EU held that the overall assessment of the likelihood of confusion between the two conflicting trademarks exists for a substantial part of the relevant public which is not aware of the geographical reference of the name kerry. It was therefore concluded that there is an average degree of visual similarity between the conflicting marks and that the name kerry, which is common to both marks, is likely to lead the public to believe that the mark applied for is related to and complementary to the earlier mark. (Judgment of the General Court (Sixth Chamber) of 10 March 2021, Case T-693/19, ECLI identifier: ECLI:EU:T:2021:124)

THE TIME v TIMEHOUSE

This dispute over the similarity of the conflicting trademarks is interesting because the EU General Court also considered it in the light of the so-called counteraction theory. When it comes to trademarks, it is typical of this theory that some similarities between marks (visual or phonetic) can be neutralised by the conceptual signs of the conflicting marks. Such neutralisation can be successfully applied in practice if at least one of the signs in question has a very clear meaning and the relevant public is able to identify it without any ambiguity.

On 18 April 2017, Chatwal Hotels & Resorts LLC (Italy; hereinafter referred to as "Chatwal") applied for an EU word mark worded THE TIME, in particular for real estate, hotel and restaurant services (Classes 36 and 43). Its registration in the EU trade mark register was opposed by Timehouse Betreiber GmbH & Co. KG (Germany; hereinafter referred to as "Timehouse"). In support of its claims, Timehouse used its word mark TIMEHOUSE (registered on 14 October 2016 as an EU trade mark under application No 15575401), identically registered for real estate, hotel and restaurant services and also for hair and skin care products (Classes 3, 36 and 43).

The General Court of the EU dealt with the parties' arguments by finding that the term time used in both signs has a clear meaning for the relevant public. The signs in question refer identically to the term time in the abstract, and even the division of the earlier mark TIMEHOUSE into the terms 'time' and 'house' does not change that fact. In the figurative sense, the earlier trademark corresponds to time sharing rather than to the literal terms 'time' and 'house'. According to the General Court of the EU, the term 'the' used in the sign ap-

plied for is also irrelevant in the present case for the distinction of the signs in question.

In view of this assessment, the General Court of the EU concluded that the conceptual similarity of the trademarks at issue was average. The application of the theory of neutralisation was rejected by the General Court of the EU, since in the present case no particularly marked (obvious) conceptual difference was found between the trademarks which would override their visual and phonetic similarity. (Judgment of the General Court (Tenth Chamber) of 17 March 2021, Case T-186/20, ECLI identifier: ECLI:EU:T:2021:147).

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→ Taxes

New income tax credit

For 2022, the amendment to the Income Tax Act introduces a new temporary tax credit for creditors of selected enforced claims (receivables). It will be possible to apply the tax discount with a view of the suspension of small receivables that have been enforced without success for a long time, where the amount of the receivable, excluding accessories, does not exceed CZK 1,500. The basis for the application of this discount will be the decision of the licensed enforcement agent on the award of compensation that can be applied in the form of a tax discount. The said decision will be part of the order suspending the enforcement proceedings. The tax discount will amount to 30 % of the claim, excluding accessories, specifically up to a maximum of CZK 450 for each claim for which the enforcement proceedings have been suspended in this way.

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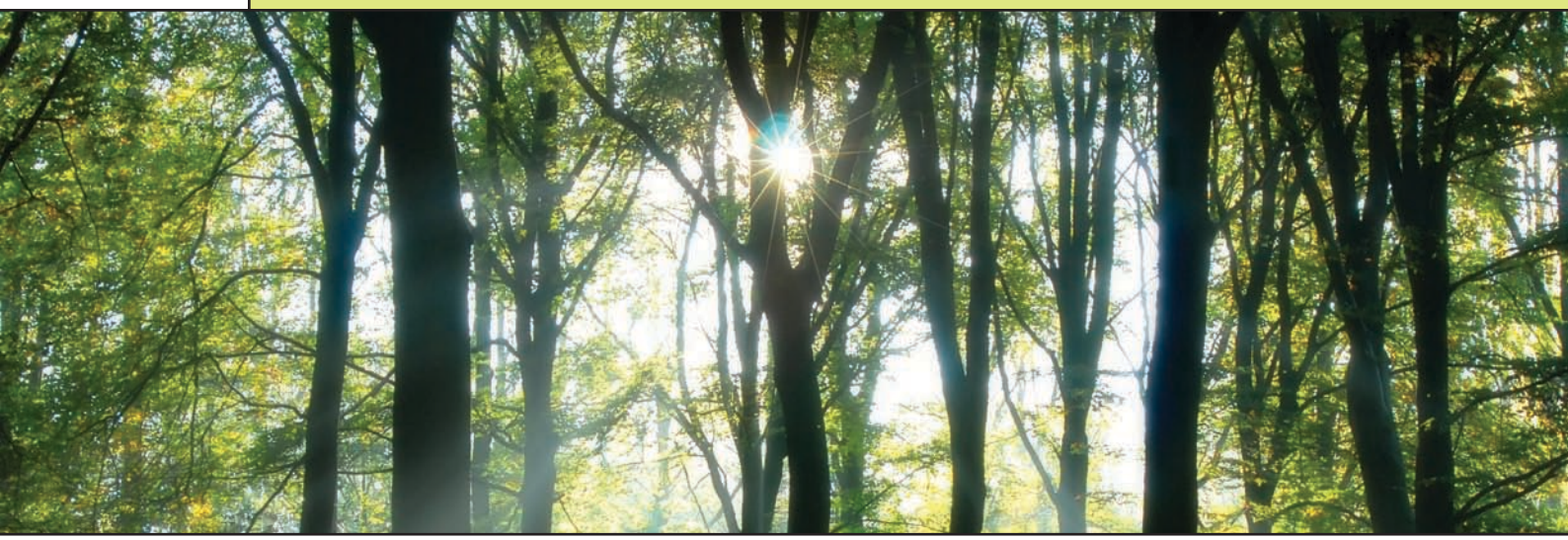

→ Taxes

The definition of a jointly managed household for the purposes of the child tax credit

At the end of July, the Supreme Administrative Court issued an interesting judgment under file number 8 Afs 155/2019-46 of 27 July 2021. It focuses on whether both parents can claim tax relief for a dependent child if the child's parents are divorced.

Martin Zeman
Rödl & Partner Prague

The essence of the dispute lay in the assessment of whether the parent who was not granted custody of the child by the court could apply a tax discount for the placement of the child pursuant to section 35bb of the Income Tax Act (ITA) and a tax benefit for a dependent child pursuant to section 35c of the ITA. The taxpayer can apply both the above tax discounts provided the child lives with the taxpayer in a jointly managed household. And so the Supreme Administrative Court (SAC) primarily dealt with the interpretation of the concept of a jointly managed household and came to the following conclusions, which in our opinion somewhat modify the established practice in the application of tax benefits for dependent children, where in the case of alternate care, for example, one parent claimed a placement discount and the other parent claimed a tax benefit for the dependent child.

- The SAC concluded that the current ITA regulation assumes that a dependent child may be a member of only one household. According to the SAC, only in this case can the rule that only one of the parents can claim the tax credit be observed.

> "... [37] While the linguistic interpretation more than not suggests that the Income Tax Act allows a child to be a member of more than one jointly managed household, the SAC has concluded, in view of the historical interpretation of section 21e(4) of the Income Tax Act and the teleological interpretation of the legislation regulating the placement discount and the tax benefit for dependent children, that a child may be a member of only one jointly managed household for the purposes of sections 35bb and 35c of the Income Tax Act ...".

- At the same time, according to the SAC, this does not allow the tax benefit [for the dependent child] to be divided between the two parents in any given taxable period as per their agreement or based on the custody ratio, or any other criteria for that matter.

> "[39] The Court adds that tax regulations may not always be entirely rational. The Court is in fact aware that in the present case it will lead, for example, to the plaintiff not being able to claim the placement discount in the relevant tax year even though the mother of the minor daughter, who has custody of the daughter, did not herself claim the placement discount. Nonetheless, it is for the legislature to adapt the Income Tax Act to reflect the diversity of life situations in the case of single-parent families. Indeed, it would be logical to allow these tax credits to be distributed at least on the basis of parental agreement between the two parents, or on the basis of the care ratio or other criteria ...".

- Furthermore, the SAC concludes that if a child lives in alternate care with both parents, it needs to be decided in which household the characteristics of a jointly managed household are fulfilled for the purposes of applying the tax credit. The SAC then sees the parents' agreement as crucial in determining one jointly managed household for the purposes of the ITA.

> "... [41] With respect to alternate care and joint custody, it must be assumed that the parents primarily agree as to which of them will claim the placement discount and which of them will claim the tax benefit, as is the case with parents living in one jointly managed household. As the child will effectively be living in both parents' households, it will be up to the parents to deter-

mine which joint household the child is a member of for the purposes of the Income Tax Act. ...".

– If the parents fail to agree, it will be up to the tax authority to determine which parent the child objectively spends more time with or, if the child spends the same amount of time with both parents, then which household qualifies more.

"... [41] If, however, both parents claim the placement discount or the tax benefit and each claims that it is with that parent that the child forms a jointly managed household, it will be for the tax authority to determine which parent the child spends objectively more time with (see previous paragraph) or, if they spend equal time together, which household qualifies more ...".

We will see how the Tax Administration reacts to this ruling. Whether it will lead to an amendment of the Income Tax Act and the establishment of clear rules for the application of the child tax benefit in the case of divorced parents, as suggested by the SAC.

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→ Taxes

Amendment to the Excise Duty Act

Excise duties, as we currently know them, apply to a relatively wide range of products, be it a wide range of mineral oils, alcohol, beer, wine or various tobacco products. Where the Czech tax system is concerned, excise duties are so-called indirect, selective taxes. Fiscally, they constitute a very important instrument for the government in its efforts to regulate the consumption of so-called risky goods. Everything around excise duties is intensely harmonised across all EU Member States, which is reflected, among other things, in a common, uniform definition of the range of products that are subject to taxation.

Following the steadily growing tendency to streamline the link between the individual customs excise duty regimes and the tax system, the Ministry of Finance recently introduced an amendment to the Excise Duty Act in implementation of the European Directive. The amendment should set uniform EU rules for excise duties and, thanks to extensive computerisation, it should also contribute to the elimination of any potential tax evasion. An important innovation is the new electronic system that has been designed to monitor the movement of excise goods in free circulation across European countries.

For taxable persons subject to excise duties, this tool will relieve them of many of the administrative burdens they currently have to deal with. Where tax authorities themselves are concerned, it should be a revolutionary instrument contributing significantly to streamlining tax administration, strengthening control mechanisms and reducing excise fraud.

The amendment, which could come into force on 1 November 2022 or 13 February 2023, is currently subject to external comment procedures and its future lies in the hands of the government and its bodies. Please keep reading our Newsletters, we will keep you informed about any further developments in the legislative process and discuss the final wording of the amendment.

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→ Taxes

Is the Chairman of the Board of Directors a taxable person?

The new judgment of the Supreme Administrative Court 3 Afs 82/2019-38 of June 2021 again delves on the governing body's office in relation to value added tax. Has there been any progress on this issue?

Klára Sauerová, Johana Cvrčková
Rödl & Partner Prague

During 2018, the draft amendment to the Value Added Tax Act for 2019 proposed a change in the definition of a taxable person, as a result of which the performance of the function of a managing director could in some cases constitute an economic activity for VAT purposes, which, for some managing directors, could mean that they would have to register for VAT and tax this income.

However, thanks to an amendment floored by the Senate, this change did not make it into the final version of the Amendment to the VAT Act (which entered into force on 1 April 2019). And so the regulation has remained unchanged and managing directors are regarded as a person with income from dependent activities under the VAT Act, i.e. a person not liable to tax for VAT purposes.

Even if the proposed amendment did not make it to the finish, it did spark off very intense discussions, which included, among other things, how to treat governing bodies other than managing directors in general. This question has now been answered in a similar judgment of the Supreme Administrative Court (SAC), which focused on the chairman of the board of directors of a joint stock company.

In the case taken up by the Supreme Administrative Court, the tax authority rejected a claim for deduction from an invoice received for the performance of the function of the chairman of the board of directors carried out on the basis of a mandate agreement. The tax authority argued that the activity was a dependent activity of an employee and therefore the chairman of the board of directors was in no way a taxable person.

In light of its previous case-law, the Supreme Administrative Court reiterated that the performance of the function of the chairman of the board of directors fulfils the criteria of an independent activity, since the chairman of the board of directors is independent in the performance of his duties, bears full responsibility for the management of the company and also bears some liability for damage caused. If those characteristics are present, it is clear that the performance of the duties of the chairman of the board of directors is an economic activity for VAT purposes and, therefore, in the present case, the claim for deduction on the invoices issued by the chairman of the board of directors was wrongly rejected.

This judgment, as well as a previous Supreme Administrative Court judgment on a similar topic from late 2016 concerning the managing director of a limited liability company, stated that the Czech VAT Act is in conflict with the VAT Directive. So, let's hope legislators re-address this topic and amend the VAT Act.

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→ Taxes

Strengthening bilateral cooperation between the Czech and Slovak Republics

On 17 September 2021, an agreement on exchange of information was signed in Prague by the General Financial Directorate of the Czech Republic and the Financial Administration of the Slovak Republic.

By signing the Agreement, both parties confirmed a growing trend, namely the strengthening of mutual relations in financial administration between the Member States of the European Union. Cooperation in the exchange of tax-related information is in principle based on the rules set by the Organisation for Economic Co-operation and Development for the automatic exchange of such data.

Historically, Slovakia has been an important trading partner for the Czech Republic, which is naturally reflected in the intensity and quantity of cross-border transactions between the two countries.

Cooperation with the Slovak tax authorities, which has been particularly good, is expected to further develop as a result of the Agreement, especially in terms of combatting tax fraud, not only locally but also across borders.

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→ Taxes

E-commerce amendment to the VAT Act approved in mid-September

The Chamber of Deputies has finally approved the amendment to the VAT Act. The amendment reflects the dynamic developments in the field of e-commerce. The Senate returned the amendment to the Chamber of Deputies at the end of July with some modifications, so the Chamber of Deputies had to discuss it again. The greater part of the amendment will come into force on the day following its publication in the Collection of Laws.

We have already informed you in more detail about the changes brought by the amendment in our Newsletters dated May, June and July. The rules for the online sale of goods and for the provision of certain services to end-consumers from other EU Member States have changed, VAT exemption for the import of small consignments up to the value of €22 from third countries has been abolished and electronic platforms facilitating trade are now subject to new obligations. VAT will be collected more in the country of consumption and the one-stop shop scheme will become more important.

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→ Taxes

CJEU: The brokerage of an extended warranty constitutes an exempt supply without deduction

In its judgment in Case C-695/19, the Court of Justice of the European Union considered the VAT treatment of the brokerage of an extended guarantee and the deductibility of the related inputs.

Michael Pleva, Paulína Kesziová
Rödl & Partner Prague

Radio Popular, a Portuguese company, sold home appliances and computer items, and also offered its customers an extended warranty on their purchases. Extended warranty means that if and when customers face an insured event, they can have the purchased goods repaired or replaced over a period of time longer than that guaranteed by the manufacturer. The service resulted from an insurance policy that an insurance company entered into with Radio Popular's customers.

At the same time, Radio Popular claimed full tax deduction on all the inputs received in connection with its activities, since it considered the extended warranty to be a supplementary financial activity which was (i) exempt from VAT and (ii) excluded from the calculation of the coefficient for determining the reduced VAT deduction.

But then came a tax audit and the tax authority argued that the brokerage of an extended warranty could simply not be excluded from the calculation of the reduction coefficient, because, in its view, it was not a supplementary financial activity but an insurance activity. It therefore denied Radio Popular full entitlement to deduct the related inputs.

In this context, the CJEU was asked whether the brokerage of insurance services could be included under supplementary financial activities that are excluded from the calculation of reduced VAT deduction.

First, the CJEU confirmed that supplementary financial activities are indeed exempt services, as they are essentially the sale of an extended warranty on the goods purchased, which takes the form of an insurance policy. Radio Popular was therefore correct in not taxing its output. On the other hand, the brokering of an extended warranty cannot constitute a financial service since it is an insurance activity. For this reason, the CJEU upheld the tax authority's view that these activities cannot be regarded as supplementary financial activities that are excluded from the calculation of reduced VAT deduction.

The CJEU's conclusions are also applicable in the Czech Republic, as the brokerage of an extended guarantee constitutes an insurance service which is exempt from VAT without deduction. Companies are therefore not entitled to deduct tax on directly attributable inputs and must also claim a reduced claim for supplies used for mixed activities.

Brokerage of an extended guarantee constitutes an insurance activity.

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→ Taxes

Czech Financial Administration modifies the rules for the format and structure of data messages

In its Instruction D-50, the Financial Administration modifies the rules for the structure and format of data messages. The tax subject (or its representative) must send communication that according to the law must be submitted in the form of a data message in line with the structure and format required by the tax authority to the same in XML format. Communication the structure and format of which is not regulated by law (e.g. holding letters, appeals) can still be sent to the tax authority in PDF format.

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