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Advertising slogan held to be distinctive for Class 41 services
United Kingdom - McDermott Will & Emery UK LLP

Examination/opposition
National procedures

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The appointed person has [allowed](#) an appeal against a decision of the hearing officer in which the latter had rejected [The Coca-Cola Company's](#) application for the registration of the trademark NO HALF MEASURES for education and entertainment services and sporting and cultural activities in Class 41 of the [Nice Classification](#) (Case BL O-079-10, February 28 2010).

Coca-Cola's application for NO HALF MEASURES was refused by the hearing officer on the grounds that the sign was a slogan which sent a message and, as such, was devoid of any distinctive character. Coca-Cola appealed to the appointed person.

The appointed person relied on the decision on the Court of Justice of the European Union (ECJ) in [Audi AG v OHIM](#) (Case C-398/08 P, January 21 2010), which involved the mark VORSPRUNG DURCH TECHNIK (for further details please see "[VORSPRUNG DURCH TECHNIK springs to victory](#)").

Applying *Audi*, the appointed person found that the hearing officer's basis for his decision (ie, that 'no half measures' was a well-known expression) was irrelevant to the question of distinctive character. A trademark is not devoid of distinctive character merely because it is a well-known word or expression. In addition, the promotional nature of the slogan was insufficient *per se* to support a finding of non-distinctiveness. Following *Audi*, a mark could be both a promotional formula and an indicator of the commercial origin of goods or services. In other words, the promotional formula of the mark had no bearing on its distinctive character.

The hearing officer had found that the mark NO HALF MEASURES had several meanings and that it should be refused registration if just one of those possible meanings designated a characteristic of the goods or services concerned. The appointed person found that this was clearly wrong, as the incorrect public interest test was applied. The absolute ground of refusal being invoked was Section 3(1)(b) of the [Trademarks Act 1994](#) and the public interest behind that provision was to guarantee the identity of the origin of the goods or services concerned. The hearing officer had in fact applied the public interest objective behind Section 3(1)(c), which is that descriptive signs or indications may be freely available for use by all. Further, in *Audi*, the ECJ had found that the fact that a mark can convey a number of meanings might actually signify in itself that the mark possesses distinctive character.

The appointed person also found that, due to the dual functions of a sign that is also an advertising slogan or promotional statement, it would always be possible to envisage instances of the mark being used in a non-trademark sense. However, that does not mean that it inherently lacks distinctive character. After all, distinctive character has to be assessed directly in relation to the goods or services concerned. The mark was thus said to be distinctive of the services applied for in Class 41.

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