

# Red Bull's Colour Combination Mark Refused

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- Validity challenge to trade marks owned by Red Bull
- Consideration by EU General Court of marks consisting of a combination of colours
- Uncertainty over when colour combination marks can be validly registered

## What's it about?

Red Bull GmbH had secured registration of two EU trade marks, dated 15 January 2002, and 1 October 2010, consisting of a combination of colours. The registrations consisted of a square, divided in two down the middle. The left hand half was blue and the right hand half was silver. For the 2002 registration, the mark was accompanied by the description "*Protection is claimed for the colours blue and silver. The ratio of colours is approximately 50% - 50%*". For the 2010 trade mark, the accompanying description read "*The two colours will be applied in equal proportion and juxtaposed to each other*". Both registrations had been accepted on the basis of evidence of acquired distinctiveness.

Optimum Mark sp. z.o.o. filed applications for a declaration of invalidity on the basis that the trade marks did not meet the requirements of Article 7(1)(a) of the Community Trade Mark Regulation, which states that a trade mark must be represented in the form of a graphic representation which must be clear, precise, self-contained, easily accessible, intelligible, durable and objective. In the case of the 2002 registration, the wording of the description allows for numerous different combinations of colours that would fall with the description of a ratio of approximately 50% - 50%. In the case of the 2010 registration, the word "*juxtaposed*" did not indicate with any certainty the precise layout of the protection that was being claimed.

In October 2013, the Cancellation Division declared the two registrations invalid. The descriptions filed were not sufficiently precise, as they could potentially cover various different combinations of blue and silver. It was not clear exactly what the scope of protection was that was being claimed. Red Bull GmbH appealed these decisions but the First Board of Appeal rejected the Appeals.

## Why does it matter?

Red Bull GmbH appealed. The General Court upheld the decisions on invalidity, in what can be seen as a policy decision. The descriptions used for each mark were not sufficiently precise and did not constitute "*a systematic arrangement associating the colours in a predetermined and uniform way, producing a very different overall impression and preventing consumers from repeating with certainty a purchase experience*".

The key points made by the General Court:

- The public need to be able to understand the scope of protection of the trade mark in question. A sign has to be unambiguous and uniform.
- When it comes to combinations of colours, they must be presented in a systematic arrangement in a predetermined and uniform way.
- The mere juxtaposition of two colours as in the two trade marks, was not sufficiently precise, because it would allow different combinations to fall within the description. The General Court did not give any guidance as to what would be acceptable.
- If descriptions of the mark are included it will become an "*integral part*" of the trade mark, and so must also be sufficiently clear.
- Combinations of colours must be represented in a specific arrangement or layout, which clearly shows the specific spatial position of the colours in relation to each other and their relative proportions. This is to prevent numerous different combinations being covered by the same description. The representation and/or description has to make it clear what the specific systematic special arrangement of colours would be.

## Now what?

The decision appears to rule out the possibility of registering colour combinations in the abstract that are not limited to any specific format. It is frustrating as the General Court did not take the opportunity to give guidance on what would be acceptable. There are very few colour combination marks that have been registered, and there is a now a question over whether these remain valid. For example, "The housing of a hair cutting machine is in two colours, the upper part of the housing is dark red, and the lower part of the housing is light grey. The ratio of the red to grey is 43%-57%". This would now seem to be invalid.

[Red Bull GmbH v EUIPO \(Cases T-101/15 and T-102/15\) EU:T:2017:852](#)

For further information on this or any other IP related matter please contact [Tim Carter](#) on 0161 934 6197

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