

World Trademark Review *Daily*

Air France's new logo held to lack distinctive character
European Union - Bureau DA Casalonga-Josse

Examination/opposition
International procedures

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In *Société Air France v Office for Harmonisation in the Internal Market* (OHIM) (Case T-159/10, April 13 2011), the General Court has upheld a decision of the Board of Appeal of OHIM in which the latter had found that Air France's figurative mark, as shown below, was not distinctive in connection with a wide range of goods and services in Classes 9, 14, 16, 18, 21, 24, 25, 28, 35 to 39 and 41 to 45 of the [Nice Classification](#).



Before the OHIM examiner, Air France argued that the mark applied for was its new logo, which would be perceived by consumers as the image of the company. Further, Air France highlighted its notoriety among consumers and the promotional efforts made in advertising its new logo.

The examiner rejected the application. It considered that the mark fell under Article 7(1)(b) of the [Community Trademark Regulation](#) (40/94) and that Air France had not demonstrated that the mark applied for would be recognised as an indication of origin.

On appeal, the Second Board of Appeal of OHIM upheld the refusal. The board stated that the mark applied for consisted almost exactly of a classic parallelogram shape, and that the differences between the mark and a parallelogram would not be noticed by the average consumer. The board also found that the mark would be perceived as a simple device - essentially, a full, oblique line in the shape of a parallelogram.

Further, the board rejected Air France's arguments based on the evolution of its institutional logo, pictured below:



It considered that the global impression created by the former logo was entirely different from that created by the mark applied for. Further, and despite the fact that the appeal had not been based on Article 7(3) of the regulation, the board noted that the evidence provided was insufficient to establish that the new logo had acquired a distinctive character by virtue of its use.

The General Court confirmed the board's decision, considering that the mark applied for would be perceived by the relevant consumer - the average consumer in the European Union - as a decorative element, and not as an indication of origin.

The court found that the mark had two characteristics: the parallelogram was inclined to the right, and its basis was slightly rounded and extended to the left. Further, the court considered that the slight differences between the mark and a classic parallelogram shape would not be sufficient to avoid the application of Article 7(1)(b), as those would not be perceived by the average consumer.

In addition, the court held that the fact that Air France's logo had been awarded a prize by professionals because it conveyed a strong identity was irrelevant in determining the distinctive character of the mark. The court concluded that the issue of distinctiveness had to be determined based on the perception of the relevant consumers, who would perceive the mark as a very simple device and not as a trademark.

Accordingly, the court upheld the refusal of the mark. It should be noted, however, that the same logo in red colour has been accepted as a Community trademark (CTM) (Registration 008624331) for the exact same products and services.

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Trademark owners may draw a practical lesson from this decision: applicants seeking to register a simple device in black and white should always file, at the same time, a CTM application and a Community design application. A registered Community design will provide wide protection against the reproduction of the sign, giving the mark time to acquire distinctiveness through use. Once the sign has acquired distinctiveness, and if the CTM application has been refused for lack of distinctiveness, the Community design owner may file a new CTM application based on Article 7(3).

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