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Marks that use Swiss flag ruled invalid

On September 5 2012 the Court of Gravenhage in the Netherlands issued its decision in a procedure between amongst others Recticel, a Swiss manufacturer of beds and mattresses, and Swiss Sense, a Dutch company in the same sector.

Swiss  Sense®

Swiss  Sense®

Recticel opposed the registration of several trade marks and trade mark applications by Sense (shown above). It argued that Sense misled the public as to geographical origin of its products by using trade marks and a trade name which contain the verbal element Swiss and/or the Swiss flag. Recticel also argued that by using similar trade marks for (almost) identical goods, there would be confusion in the relevant public's mind.

Based on Article 6ter of the Paris Convention, Recticel claimed the invalidity of Sense's trade marks, containing a figurative element identical or similar to the Swiss flag.

In its decision, the Court referred to case law from the Court of Justice of the EU which states:

The prohibition of the imitation of an emblem applies only to imitations of it from a heraldic perspective... Thus, the protection against any imitation from a heraldic point of view refers not to the image as such, but to its heraldic expression. It is therefore necessary...to consider the heraldic description of the emblem at issue....

A trade mark which does not exactly reproduce a State emblem can nevertheless be covered...where it is perceived by the relevant public...as imitating such an emblem.

A difference detected by a specialist in heraldic art between the trademark applied for and the State emblem will not necessarily be perceived by the average consumer

Based on this decision, the Gravenhage Court declared Sense's

trade marks containing a shield with a white cross on a red background invalid. However, trade marks merely containing a cross which thickens where the legs cross should not be declared invalid, since the relevant public would not perceive those figurative elements as referring to the Swiss flag.

Applicants should be less afraid of applying for trade marks that contain emblems, flags or armorial bearings given this decision. Indeed in the light of free trade, a broad interpretation of what was considered to fall within the applicability scope of Article 6ter in the past had made trade mark law - which generally aims at stimulating trade - more a burden than a virtue.