



Notification of ex officio provisional total refusal of protection pursuant to Article 5 of the Madrid Protocol, Rule 17(1) and (2) of the Common Regulations under the Madrid Agreement and Protocol, and to Rule 113 CTMIR

Alicante, 21/11/2012

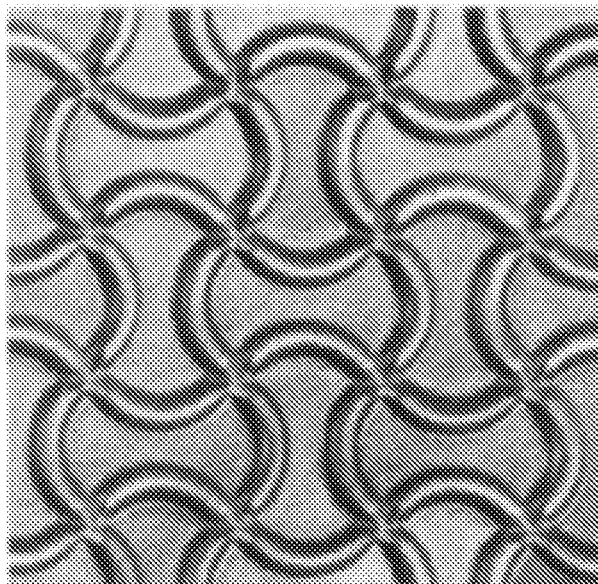
International registration number: **1132742**
Name of the Holder: **Birkenstock Orthopädie GmbH & Co. KG**
Date of notification to OHIM: **25-10-2012**
Trade Mark:

Protection of the above-mentioned mark is provisionally refused for the European Community for all the goods and services covered by the designation of the European Community.

I. Grounds:

On examination of your application it has been found that the trade mark applied for is not eligible for registration under Article 7(1)(b) CTMR.

The mark applied for consists of the following figurative representation for goods/services in the following classes:



10 Surgical, medical, dental and veterinary apparatus and instruments; artificial limbs, eyes and teeth; orthopaedic articles; suture materials; suture materials for operations; orthopaedic footwear, including orthopaedic footwear for rehabilitation, foot physiotherapy, therapy and other medical purposes, and parts therefor,

including orthopaedic shoes, including orthopaedic shoes with footbeds or with orthopaedic foot supports and foot and shoe inserts, including orthopaedic foot supports and shoe inserts and parts therefor, including in the form of rigid thermoplastic inserts; shoe components and shoe fittings for orthopaedic shoe adaptation, in particular fittings, wedges, pads, inner soles, foam padding, foam pads and moulded shoe soles, including in the form of fully plastic inserts with orthopaedic footbeds of natural cork, thermal cork, plastic, latex or foamed plastic materials, including being elastic compounds of cork latex mixtures or plastic cork mixtures; orthopaedic foot and shoe inserts; orthopaedic foot and shoe supports; orthopaedic footwear, in particular orthopaedic sandals and slippers; orthopaedic insoles, inserts, including inserts of plastic, latex or foamed plastic materials, including being elastic compounds of cork latex mixtures or plastic cork mixtures.

18 Leather and imitations of leather, and goods made of these materials and included in this class; animal skins, hides; trunks and travelling bags; umbrellas, parasols and walking sticks; whips, harness and saddlery; change purses; bags; handbags; document cases; waist pouches; garment bags for travel; key cases (leatherwear); beauty cases; toilet bags, vanity cases; travelling bags; rucksacks.

25 Clothing, headgear, footwear, including comfort footwear and footwear for work, leisure, health and sports, including sandals, gymnastic sandals, flip-flops, slippers, clogs, including with footbeds, in particular with anatomically moulded deep footbeds, foot supports and foot and shoe inserts, protective inserts; parts and fittings for the aforesaid footwear, namely footwear uppers, heel pieces, outsoles, inner soles, shoe bottom parts, including footbeds, foot supports; foot and shoe inserts, in particular with anatomically moulded deep footbeds, in particular of natural cork, thermal cork, plastic, latex or foamed plastic materials, including of elastic compounds of cork latex mixtures or plastic cork mixtures; inner soles; footwear, namely shoes and sandals, boots, and parts and fittings for all the aforesaid goods, included in this class; belts; shawls; neckerchiefs.

Signs which are objectionable under Article 7(1)(b) CTMR are incapable of performing the essential function of a trade mark, namely that of identifying the origin of the goods or services, thus enabling the consumer who acquired them to repeat the experience, if it proves to be positive, or to avoid it, if it proves to be negative, on the occasion of a subsequent acquisition (judgment of 30/04/2003, joined cases T-324/01 and T-110/02, 'Axions and Belce', paragraph 29).

Accordingly, the distinctive character of a trade mark must be assessed, first, by reference to the goods or services in respect of which registration of the sign is sought and, second, by reference to the perception of the section of the public targeted, which is composed of the consumers of those goods or services (judgment of 27/11/2003, T-348/02, 'Quick', paragraph 29).

In the present case, the goods/services covered by the mark applied for are for everyday consumption/mass consumption products/services and/or specialized products/services and are mainly aimed at average consumers and professional public. In the light of the nature of the goods/services in question, the awareness of the relevant public will be that of the average consumer and professional public who is reasonably well-informed and reasonably observant and circumspect.

The way in which the relevant public, in this case both average consumer and

professional public, perceives a trade mark is influenced by that person's level of attention, which is likely to vary according to the category of goods or services in question. In the present case the level of attention given by the average/specialized consumer to the appearance of the goods/services claimed is not high since many of the products/services are relative low cost products.

In order to ascertain whether the representation claimed may be perceived by members of the public as an indication of origin, the overall impression produced by that representation must be analysed. That is not incompatible with an examination of each of the individual features making up the representation in turn (judgment of 19/09/2001, T-337/99, 'Henkel', paragraph 49). The features of the shape of the mark applied for, taken alone or combined with each other, are not distinctive: the graphic representation depicts a pattern.

Taken as a whole the mark applied for consists of no more than a combination of presentational features in the shape of a pattern. These features are not markedly different from other types of shapes/patterns applied for the goods at issue which are commonly used in trade, but is simply a variation on those shapes/patterns. It follows that the shape/pattern in question cannot be sufficiently distinguished from other patterns/shapes commonly used for these goods/services and it will not enable the relevant public immediately and with certainty to distinguish the applicant/holder's goods from those of another commercial origin.

Therefore, the figurative trade mark applied for is devoid of any distinctive character to distinguish the goods/services for which registration is sought within the meaning of Article 7(1) (b) CTMR.

The holder of the international registration is obliged to be represented before the OHIM by a legal practitioner or professional representative who is entitled to represent third parties before the OHIM (Article 92(2), Article 93(1) CTMR). Protection of the international registration for the European Community will be refused in whole if a representative is not appointed within the time limit indicated under II.

II.

The holder of the international registration is hereby given a time limit of two months to overcome the ground for refusing protection indicated or to comply with the requirements indicated above. Failure to do so will mean that after expiry of the time limit, the OHIM will render a decision in which it refuses the protection in whole or in part. Said decision may be appealed. The time limit of two months to reply to the present refusal shall start on the day the present notification was issued by the OHIM (Rule 112(1) CTMIR). Any such reply of the holder of the international registration shall be addressed to the OHIM only.

PAGELS, Kim