



## General Court: Board of Appeal erred in finding that Class 12 goods and Class 35 services are similar

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### EUROPEAN UNION

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- The Board of Appeal found that there was a likelihood of confusion between HYPERCORE for goods in Class 12 and HIPERCOR for services in Class 35
- The General Court found that the board had wrongly concluded that the goods and services were similar
- The board had erred in finding that the services were offered in the same points of sale and were aimed at the same public as the goods at issue

In [Future Motion Inc v European Union Intellectual Property Office](#) (EUIPO) (Case T-356/21), the General Court has held that the Board of Appeal of the EUIPO was wrong in finding that there was a certain degree of similarity between the (rather) general services “retail of apparatus and instruments for accumulating electricity” and the (very) specific goods “electronically motorised skateboards” and “electric motors for land vehicles”.

### Background

Future Motion Inc sought protection in the European Union of the international registration for the word mark HYPERCORE for the following goods in Class 12: “vehicles, namely, electronically motorised skateboards; motors for electronically motorised skateboards; electric motors for land vehicles; electric motors for electric vehicles”.

El Corte Inglés SA filed an opposition based on the earlier EU figurative mark HIPERCOR (depicted below), covering, among other things, the “retail of apparatus and instruments for accumulating electricity” in Class 35:



The opposition was rejected in its entirety by the Opposition Division of the EUIPO on the grounds that:

1. the goods and services covered by the marks at issue were dissimilar; and
2. El Corte Inglés had not demonstrated that the earlier mark had a reputation.

El Corte Inglés' appeal was upheld by the Board of Appeal and the decision of the Opposition Division was annulled.

### Appeal to the General Court

Future Motion invoked pleas in law which were broken down into three parts. The first part sought to establish that the Board of Appeal had made an incorrect assessment of the similarity of the goods and services covered by the marks at issue. Only this part of the pleas was examined by the General Court, as it deemed it unnecessary to examine the second and third parts.

### General Court decision

The General Court upheld the first part of the pleas, finding that the Board of Appeal had erred in finding that the services at issue, namely the "retail of apparatus and instruments for accumulating electricity", were offered in the same points of sale and, in essence, were aimed at the same public as the goods at issue.

A decisive factor was that the court found that rechargeable batteries produced as spare, replacement or emergency parts for specific electronically motorised skateboards were ancillary goods, the sole use of which was to ensure the functioning of the electric land vehicle to which they were strictly complementary. According to the General Court, those batteries are generally produced either directly by the producer of the electronically motorised skateboards or by an undertaking closely linked to it. They are aimed at a specific public, made up of the producers and purchasers of the electronically motorised skateboards. The court found that services for the retail of that type of battery are closely linked to sales and advice services or after-sales services relating to specific electronically motorised skateboards.

In contrast, the General Court found that apparatuses and instruments for accumulating electricity were standalone goods (ie, not ancillary goods). These goods were intended to operate any type of electrical apparatus, rather than only a specific (type of) device, and may thus serve for multiple uses. Thus, there was too weak a link between the goods applied for and the retail services in relation to apparatuses and instruments for accumulating electricity. The General Court thus concluded that the goods were dissimilar, upheld the action by Future Motion and annulled the decision of the Board of Appeal.

### Comment

Whether the opposition will now be rejected, or whether another chapter will be added to this dispute in the form of an appeal to the CJEU, remains to be seen. At time of writing, according to the EUIPO register, opposition proceedings in relation to the HYPERCORE mark were still pending.

It seems like a good development that trademark applications covering very specific goods cannot be successfully opposed based on trademarks with a much broader goods and services description. This may be an incentive for trademark applicants to register their trademarks for goods and services for which they *actually* intend to use their marks, in line with the [IP TRANSLATOR](#) judgment of the CJEU.

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