Norway

“Purple Haze”

Decision of the Supreme Court

11 December 2017 – Case No. HR-2017-2356-A (2017/1062)

*GlaxoSmithKline AS v. Sandoz A/S and
Novartis Norge AS*

Trade Mark Act, Secs. 3(3), 14(2a)

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Keywords Colour mark · Shades of purple · Pharmaceutical drug · Colour code system · Distinctiveness · Establishment by use

1. A colour as such can be registered as a trade mark, but it will normally lack the required distinctiveness. Like all descriptive marks, the threshold for acquiring protection through registration is high.
2. A general need for availability applies for colours.
3. Although the colour code system is not publicly regulated or otherwise formally recognised, there is an extensive use of colour codes to indicate active ingredients in the pharmaceutical industry and among patients. Colour codes may thus serve as important user guidance, which strengthens the need for availability of colours in the relevant area. Consequently, the threshold for the possible protection of a colour is extremely high.
4. The circle of trade of pharmaceutical drugs is not used to perceiving a colour as an indication of commercial origin but rather as a decorative element or as an indication of function and thus not as a sign.
5. To determine whether a colour has established itself as a mark through use, the level of establishment required should be identified first, subject to the special need for availability for a colour, as well as the need to continue, strengthen and/or extend the established colour code. Next, the groups comprising the circle of trade as well as market surveys and any methodical objections thereto must be considered.