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**Communication to the international holder of observations of third parties pursuant to Article 40 of the Community Trade Mark Regulation**

	<i>Ludmila Dmitrievna Buteyko</i> <i>kv. 21, 51, ul. Perovskaya</i> <i>RU-111141 Moscow</i>

Alicante, 24/08/2010

<i>Your reference:</i>	
<i>International registration number:</i>	1009432
<i>Name of the Holder:</i>	<b>Ludmila Dmitrievna Buteyko</b>
<i>Date of notification to OHIM:</i>	<b>de</b>
<i>Trade mark:</i>	<b>BUTEYKO</b>

On further examination of your application, and having received observations from third parties<sup>1</sup>, the Office has revised its initial decision to accept this mark for publication and now finds that it is partially ineligible for registration under Article 7.1(b) and 7.1(d) of Council Regulation (EC) No 207/2009 of 26 February 2009 on the Community trade mark (CTMR).

The mark applied for consists of the word 'BUTEYKO' for the following services:

- 41 *Academies (education); publication of books; health club services; providing on-line electronic publications (not downloadable); providing of training; correspondence courses; practical training (demonstration); arranging and conducting of congresses; arranging and conducting of conferences; arranging and conducting of workshops (training); arranging and conducting of seminars; arranging and conducting of symposiums; vocational guidance (education or training advice); educational examination; electronic desktop publishing; publication of electronic books and journals on-line; publication of texts (other than publicity texts); educational services; instruction services; teaching; tuition; writing of texts, other than publicity texts.*
- 44 *Medical services; veterinary services; hygienic and beauty care for human beings or animals; convalescent homes; rest homes; nursing homes; hospitals; medical assistance; sanatoriums; physical therapy; physiotherapy; telemedicine services.*

The Office objects to the following:

- 41 *Academies (education); publication of books; health club services; providing on-line electronic publications (not downloadable); providing of training; correspondence courses; practical training (demonstration); arranging and conducting of congresses; arranging and conducting of conferences; arranging and conducting of workshops (training); arranging and conducting of seminars; arranging and conducting of symposiums; vocational guidance*

<sup>1</sup> A physical copy of these observations is enclosed with this communication, posted on 24<sup>th</sup> August, 2010.



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*(education or training advice); educational examination; electronic desktop publishing; publication of electronic books and journals on-line; publication of texts (other than publicity texts); educational services; instruction services; teaching; tuition; writing of texts, other than publicity texts.*

44 *Medical services; medical assistance; physical therapy; physiotherapy; telemedicine services.*

Article 7(1)(d) CTMR must be interpreted as precluding registration of a trade mark only where the signs or indications of which the mark is exclusively composed have become customary in the current language or in the *bona fide* and established practices of the trade to designate the goods or services in respect of which registration of that mark is sought (see, by analogy, Judgment of 4 October 2001, Case C-517/99, *Merz & Krell* ECR I-6959, paragraph 31, and Judgment of 5 March 2003, Case T-237/01, *Alcon Inc. v OHIM* (BSS) ECR II-411, paragraph 37).

With regard to the target public, the question whether a sign is customary must be assessed by taking account of the expectations which the average consumer, who is deemed to be reasonably well informed and reasonably observant and circumspect, is presumed to have in respect of the type of goods or services in question (BSS, *op.cit.*, paragraph 38).

Accordingly, whether a mark is customary can only be assessed, firstly, by reference to the goods or services in respect of which registration is sought, even though the sign in question does not explicitly refer to those goods or services and, secondly, on the basis of the target public's perception of the mark (BSS, *op.cit.*, paragraph 37).

In the present case, an Internet search has revealed that the sign BUTEYKO has become customary in the current language or in the *bona fide* and established practices of the trade to designate the contested services<sup>2</sup>. Indeed, according to the information found, the trade mark at issue will be interpreted by consumers worldwide as being the standard name for a particular kind of breathing method, primarily aimed at alleviating the symptoms caused by asthma, but also as a relaxation technique used in yoga and similar therapeutic disciplines.

Given the generic nature of the use of the term BUTEYKO in the context of the contested services, it is inconceivable that the relevant consumers would identify the sign as being an indicator of a particular trade origin. It would be seen simply as the standard way of referring to a particular type of therapy which would, in turn, be provided via the services offered by the applicant.

Therefore, the trade mark, BUTEYKO, falls foul of the prohibition laid down by Article 7(1)(d) CTMR.

Finally, signs or indications constituting a trade mark which have become customary in the current language or in the *bona fide* and established practices of the trade to designate the goods or services covered by that mark are not capable of distinguishing the goods or services of one undertaking from those of other undertakings and do not therefore fulfil the essential function of a trade mark (see, by analogy, *Merz & Krell*, *op.cit.*, paragraph 37, and BSS, *op.cit.*, paragraph 40).

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<sup>2</sup> See Annex One



OFFICE FOR HARMONIZATION IN THE INTERNAL MARKET  
(TRADE MARKS AND DESIGNS)

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Consequently, the mark applied for is devoid of any distinctive character to distinguish the contested services within the meaning of Article 7.1(b) CTMR.

Therefore, the sign BUTEYKO is partially ineligible for registration under Article 7.1(b) and 7.1(d) of Council Regulation (EC) No 207/2009 of 26 February 2009 on the Community trade mark (CTMR).

If you have any observations, they should be submitted within two months of this communication, failing which the application will be rejected for the contested services listed above.

The Office raises no objection to the registration of the sign for the remainder of the services applied for.

**Mark Kennedy**

Trade Mark Examiner – OHIM

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