

European Court of Justice, 29 April 2004, Henkel II

TRADEMARK LAW

Distinctive character

- [the more closely the shape for which registration is sought resembles the shape most likely to be taken by the product in question, the greater the likelihood of the shape being devoid of any distinctive character](#)

In those circumstances, the more closely the shape for which registration is sought resembles the shape most likely to be taken by the product in question, the greater the likelihood of the shape being devoid of any distinctive character for the purposes of Article 7(1)(b) of Regulation No 40/94. Only a trade mark which departs significantly from the norm or customs of the sector and thereby fulfils its essential function of indicating origin, is not devoid of any distinctive character for the purposes of that provision.

It follows that, in holding that the trade marks for which registration is sought are devoid of any distinctive character for the purposes of Article 7(1)(b) of Regulation No 40/94, the Court of First Instance did not make an error of law in relation to either that provision or the relevant case-law of the Court of Justice.

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European Court of Justice, 29 April 2004

(V. Skouris, J.N. Cunha Rodrigues, J.-P. Puissochet, R. Schintgen and F. Macken)

JUDGMENT OF THE COURT (Sixth Chamber)

29 April 2004 (1)

(Appeal – Community trade mark – Article 7(1)(b) of Regulation (EC) No 40/94 – Three-dimensional tablets for washing machines or dishwashers – Absolute ground for refusal to register – Distinctive character)

In Joined Cases C-456/01 P and C-457/01 P, Henkel KGaA, established in Düsseldorf (Germany), represented by C. Osterrieth, Rechtsanwalt, appellant,

TWO APPEALS against the judgments of the Court of First Instance of the European Communities (Second Chamber) of 19 September 2001 in Case T-335/99 Henkel v OHIM (rectangular tablet, red and white) [2001] ECR II-2581 and Case T-336/99 Henkel v OHIM (rectangular tablet, green and white) [2001] ECR II-2589, seeking to have those judgments set aside,

the other party to the proceedings being:

Office for Harmonisation in the Internal Market (Trade Marks and Designs) (OHIM), represented by D. Schennen and S. Laitinen, acting as Agents, defendant at first instance,

THE COURT (Sixth Chamber),

composed of: V. Skouris, acting as the President of the Sixth Chamber, J.N. Cunha Rodrigues, J.-P. Puissochet, R. Schintgen and F. Macken (Rapporteur), Judges,

Advocate General: D. Ruiz-Jarabo Colomer,
Registrar: M. Múgica Arzamendi, Principal Administrator,

having regard to the Report for the Hearing, after hearing oral argument from the parties at the hearing on 2 October 2003, at which Henkel KGaA was represented by C. Osterrieth and the Office for Harmonisation in the Internal Market (Trade Marks and Designs) (OHIM), by D. Schennen and A. von Mühlendahl, acting as Agent, after hearing the [Opinion of the Advocate General](#) at the sitting on 6 November 2003, gives the following

Judgment

1 By applications lodged at the Court Registry on 26 November 2001, Henkel KGaA ('Henkel') appealed pursuant to Article 49 of the EC Statute of the Court of Justice against the judgments of the Court of First Instance of 19 September 2001 in Case T-335/99 Henkel v OHIM (rectangular tablet, red and white) [2001] ECR II-2581 ('Case T-335/99') and Case T-336/99 Henkel v OHIM (rectangular tablet, green and white) [2001] ECR II-2589 ('Case T-336/99') (together hereinafter referred to as 'the judgments under appeal'), by which the Court of First Instance dismissed its actions for annulment of the decisions of the Third Board of Appeal of the Office for Harmonisation in the Internal Market (Trade Marks and Designs) ('OHIM') of 21 September 1999 (Cases R 70/1999-3 and R 71/1999-3), which had rejected its appeals against the refusal to register as Community trade marks three-dimensional tablets for various classes of products, including in particular products for washing machines or dishwashers ('the contested decisions').

2 By order of the President of the Sixth Chamber of 2 June 2003, Cases C-456/01 P and C-457/01 P were joined for the purposes of the oral procedure and the judgment.

Legal background

3 Article 4 of Council Regulation (EC) No 40/94 of 20 December 1993 on the Community trade mark (OJ 1994 L 11, p. 1) provides:

'A Community trade mark may consist of any signs capable of being represented graphically, particularly words, including personal names, designs, letters, numerals, the shape of goods or of their packaging, provided that such signs are capable of distinguishing the goods or services of one undertaking from those of other undertakings.'

4 Article 7 of the regulation provides:

'1.

The following shall not be registered:

(a) signs which do not conform to the requirements of Article 4;

(b) trade marks which are devoid of any distinctive character;

(c) trade marks which consist exclusively of signs or indications which may serve, in trade, to designate the kind, quality, quantity, intended purpose, value, geographical origin or the time of production of the goods or of rendering of the service, or other characteristics of

the goods or service; trade marks which consist exclusively of signs or indications which have become customary in the current language or in the bona fide and established practices of the trade;

...

3. Paragraph 1(b), (c) and (d) shall not apply if the trade mark has become distinctive in relation to the goods or services for which registration is requested in consequence of the use which has been made of it.'

Facts of the case

5 On 15 December 1997 and 8 January 1998, Henkel applied to OHIM for registration as Community trade marks of two three-dimensional tablets, the first consisting of a white layer and a red layer superposed (Case T-335/99) and the second consisting of a white layer and a green layer superposed (Case T-336/99).

6 The products in respect of which registration of the mark is sought are in class 3 of the Nice Agreement concerning the International Classification of Goods and Services for the Purpose of the Registration of Marks of 15 June 1957, as revised and amended, and correspond to the description: 'washing or dishwashing preparations in tablet form'.

7 By decisions of 3 February 1999, the OHIM examiner refused the applications on the ground that the trade marks for which registration was sought were devoid of distinctive character and for that reason could not be registered on account of Article 7(1)(b) of Regulation No 40/94.

8 By the contested decisions, the Third Board of Appeal of OHIM upheld the examiner's decisions finding that each of the trade marks for which registration was sought was devoid of distinctive character for the purposes of Article 7(1)(b) of Regulation No 40/94, since its actual shape did not, with regard to the consumer or end buyer, serve to identify the origin of the products to which the trade mark would be affixed. The Board of Appeal stated that a three-dimensional shape had to be sufficiently unique to imprint itself easily on the mind and to stand out from whatever is normal in trade.

Procedure before the Court of First Instance and the judgments under appeal

9 By applications lodged at the Registry of the Court of First Instance on 26 November 1999, Henkel brought two actions for annulment of the contested decisions.

10 In Case T-335/99, the Court of First Instance held that the Board of Appeal of OHIM had rightly found that the three-dimensional trade mark for which registration is sought was devoid of any distinctive character within the meaning of Article 7(1)(b) of Regulation No 40/94, and did so on the following grounds:

'41 The mark in respect of which registration is sought in the present case consists of the shape and the colour arrangement of a washing machine or dishwasher tablet, that is, of the design of the product itself.

42 It is clear from Article 4 of Regulation No 40/94 that both a product's shape and its colours fall among the signs which may constitute a Community trade mark. However, the fact that a category of signs is, in general, capable of constituting a trade mark does not mean that signs belonging to that category necessarily

have distinctive character for the purposes of Article 7(1)(b) of Regulation No 40/94 in relation to a specific product or service.

43 According to Article 7(1)(b) of Regulation No 40/94, "trade marks which are devoid of any distinctive character" are not to be registered. A mark which enables the goods or services in respect of which registration of the mark has been sought to be distinguished as to their origin is to be considered as having distinctive character. It is not necessary for that purpose for the mark to convey exact information about the identity of the manufacturer of the product or the supplier of the services. It is sufficient that the mark enables members of the public concerned to distinguish the product or service that it designates from those which have a different trade origin and to conclude that all the products or services that it designates have been manufactured, marketed or supplied under the control of the owner of the mark and that the owner is responsible for their quality (see, to that effect, [Case C-39/97 Canon \[1998\] ECR I-5507](#), paragraph 28).

44 It is clear from the wording of Article 7(1)(b) of Regulation No 40/94 that a minimum degree of distinctive character is sufficient to render the ground for refusal set out in that article inapplicable. It is therefore appropriate to ascertain – in an a priori examination not involving any consideration of the use made of the sign within the meaning of Article 7(3) of Regulation No 40/94 – whether the mark applied for will enable the members of the public targeted to distinguish the products concerned from those having a different trade origin when they come to select a product for purchase.

45 Article 7(1)(b) of Regulation No 40/94 does not distinguish between different categories of trade marks. The criteria for assessing the distinctive character of three-dimensional trade marks consisting of the shape of the product itself are therefore no different from those applicable to other categories of trade marks.

46 Nevertheless, when those criteria are applied, account must be taken of the fact that the perception of the relevant section of the public is not necessarily the same in relation to a three-dimensional mark consisting of the shape and the colours of the product itself as it is in relation to a word mark, a figurative mark or a three-dimensional mark not consisting of the shape of the product. Whilst the public is used to recognising the latter marks instantly as signs identifying the product, this is not necessarily so where the sign is indistinguishable from the appearance of the product itself.

47 The Board of Appeal rightly points out that, as regards the perception of the public concerned, the products for which trade-mark registration was sought in the present case, namely washing machine and dishwasher products in tablet form, are widely used consumer goods. The public concerned, in the case of these products, is all consumers. Therefore, in any assessment of the distinctive character of the mark for which registration is sought, account must be taken of the presumed expectations of an average consumer who is reasonably well informed and reasonably observant and circumspect (see, by analogy, [Case C-210/96 Gut](#)

[Springenheide and Tusky \[1998\] ECR I-4657](#), paragraphs 30 to 32).

48 The way in which the public concerned perceives a trade mark is influenced by the average consumer's level of attention, which is likely to vary according to the category of goods or services in question (see [Case C-342/97 Lloyd Schuhfabrik Meyer \[1999\] ECR I-3819](#), paragraph 26). In that regard, the Board of Appeal rightly held that the level of attention given by the average consumer to the shape and colours of washing machine and dishwasher tablets, being everyday goods, is not high.

49 In order to ascertain whether the combination of the tablet's shape and the arrangement of its colours may be perceived by members of the public as an indication of origin, the overall impression produced by that combination must be analysed (see, by analogy, [Case C-251/95 SABEL \[1997\] ECR I-6191](#), paragraph 23). That is not incompatible with an examination of each of the product's individual features in turn.

50 The three-dimensional shape for which registration has been sought ... is one of the basic geometrical shapes and is an obvious one for a product intended for use in washing machines or dishwashers. ...

51 As to the tablet's two layers ... , the public concerned is used to seeing different colour features in detergent preparations. ... The coloured particles thus suggest certain qualities, although that does not mean that they can be regarded as a descriptive indication in terms of Article 7(1)(c) of Regulation No 40/94. However, it does not follow from the fact that that ground for refusal is inapplicable that the coloured elements necessarily confer a distinctive character on the mark applied for. Where, as in the present case, the target sector of the public sees the presence of coloured elements as a suggestion that the product has certain qualities, and not as an indication of its origin, there is no distinctive character. The fact that consumers may nevertheless get into the habit of recognising the product from its colours is not enough, in itself, to preclude the ground for refusal based on Article 7(1)(b) of Regulation No 40/94. Such a development in the public's perception of the sign, if proved, may be taken into account only for the purposes of Article 7(3) of Regulation No 40/94.

...

53 ... The use of basic colours, such as blue or green, is commonplace and is even typical of detergents. The use of other basic colours, such as red or yellow, is one of the most obvious variations on the typical design of these products.

54 It follows that the three-dimensional mark applied for consists of a combination of obvious features typical of the product concerned.

...

56 Given the overall impression created by the shape of the tablet in question and the arrangement of its colours, the mark applied for will not enable consumers to distinguish the products concerned from those having a different trade origin when they come to select a product for purchase.

57 It should be added that the inability of the mark applied for to indicate, a priori and irrespective of the use made of it within the meaning of Article 7(3) of Regulation No 40/94, the product's origin, is not affected by how many similar tablets are already on the market. Consequently, it is not necessary to decide here whether the distinctive character of the mark should be assessed by reference to the date on which the application for registration is filed or the date of actual registration.

...

59 It follows that the Board of Appeal was right to hold that the three-dimensional mark applied for is devoid of any distinctive character.

60 The fact that the criteria applied to assess distinctive character, in the case of a three-dimensional mark consisting of the shape of the product itself, are not more rigorous than those applying to other categories of trade marks does not alter that conclusion.

61 The factors which led the Board of Appeal to find that the mark applied for was devoid of any distinctive character constitute valid reasons for drawing the same conclusion with regard to the criteria for the assessment of distinctive character applying to all trade marks, whether they are word marks, figurative marks or three-dimensional marks.'

11 Court of First Instance reached the same conclusion in Case T-336/99. Paragraphs 38 to 58 of the judgment in that case are couched in essentially the same terms as paragraphs 40 to 52 and 54 to 61 of the judgment in Case T-335/99, set out in the preceding paragraph.

12 Therefore, by the judgments under appeal, the Court of First Instance dismissed the actions brought by Henkel against the contested decisions.

The appeals

13 Henkel claims that the judgments under appeal should be set aside, that the contested decisions should be annulled and that OHIM should be ordered to pay the costs.

14 OHIM contends that the appeals should be dismissed and that Henkel should be ordered to pay the costs.

15 By order of 9 January 2003, the President of the Court dismissed the application made by Reckitt Benckiser NV, lodged at the Court Registry on 6 May 2002, for leave to intervene in support of Henkel's claims.

16 In support of its appeals, Henkel maintains that the Court of First Instance made an error of law in its interpretation of Article 7(1)(b) of Regulation No 40/94. That single plea in law is subdivided, in essence, into three parts relating to:

- the distinctive character of the trade marks for which registration is sought;
- the assessment of the average consumer's level of attention; and
- the date by reference to which the distinctive character of the trade marks should be assessed.

17 OHIM contends that in the judgments under appeal the Court of First Instance did not make an error of law

in its interpretation and application of Article 7(1)(b) of Regulation No 40/94.

The first part of the plea: the distinctive character of a trade mark

Arguments of the parties

18 First, Henkel maintains that, in finding the rectangular shapes used for the tablets in question to be obvious shapes, the Court of First Instance used the wrong test for assessing whether a trade mark has distinctive character. In these cases, it should have confined itself to ascertaining whether the features of these tablets were different from those which are customary for such products or whether they had to be used because of technical requirements.

19 Henkel also disputes the Court of First Instance's statement that the various colours used in a detergent product are not perceived as an indication of the product's origin but merely suggest to the consumer that the product contains various active ingredients. In its submission, the public perceives the arrangement of colours as an individual feature of the get-up of a particular detergent product.

20 Henkel adds, with reference to Case C-456/01 P, that in its assessment of the distinctive character of the trade mark for which registration is sought the Court of First Instance should not have disregarded the fact that Henkel was the only undertaking to use the colour red for detergent products. It is important for the purpose of assessing whether that mark has distinctive character that the public is able to associate the product with the owner of the trade mark purely on that basis, Henkel being alone in using red for such products.

21 Second, Henkel submits that the fact that the Court of First Instance relied principally on the premiss that the shapes and colours of the tablets at issue consist of basic geometric shapes or basic colours suggests that it included in its assessment of the distinctive character of the trade mark considerations relating to the need to preserve the availability of a sign, contrary to what was decided in [Joined Cases C-108/97 and C-109/97 Windsurfing Chiemsee \[1999\] ECR I-2779](#).

22 Henkel adds that, in any event, the requirement of availability does not preclude use of the combination of a shape and colours such as those for which registration as trade marks is sought in this instance. As regards, first, the shape chosen, it is the manufacturer which, subject to compliance with certain technical requirements, determines freely what the shape is to be. From a technical point of view, it does not seem that competitors are not able to manufacture tablets for consumer use unless they select the shape for which registration is sought in this instance. Further, there is no need to preserve the availability of the specific arrangement of colours. If the consumer comes across an arrangement of colours, he will not perceive it as indicative of a technical requirement but as the free and imaginative expression of the product's individuality. Finally, it follows that no requirement of availability precludes registration of a particular combination of shapes and colours, such as that at issue here.

23 OHIM contends, first, that the Court of First Instance rightly found that the trade marks for which registration is sought are not eligible for protection pursuant to Article 7(1)(b) of Regulation No 40/94, on the ground that these are three-dimensional trade marks consisting of a combination of obvious features typical of the product concerned, which do not allow the relevant public to distinguish the products concerned from those having a different commercial origin.

24 OHIM submits that if a three-dimensional shape-of-product mark is to have distinctive character for the purposes of Article 7(1)(b), the trade mark must be original, unusual or arbitrary. Commonplace, unremarkable or obvious shapes and/or combinations of shapes and colours are devoid of any distinctive character.

25 A washing machine or dishwasher tablet is primarily functional and, for the consumer, a rectangle or any other such basic shape is obvious and usual for that type of product. The consumer does not ask himself any questions about the exact composition and effect of the tablet's colouring agents but, at the most, will assume that the colours are indicative of two ingredients with different properties, not that they are a means of identifying the product's origin. The shape of the product itself does not serve to indicate the product's origin save in exceptional cases. That does not derive from distinct, more stringent, legal rules. Rather, it arises as the result of a factual situation, namely the way in which consumers perceive the products concerned.

26 OHIM also submits that, in the judgments under appeal, the Court of First Instance rightly based its assessment of the distinctive character of the trade marks for which registration is sought on the overall impression produced by the trade mark, such an approach not precluding the various features from being considered separately and perhaps even requiring that to be the case. That approach is consistent with OHIM's practice when examining trade-mark applications, in particular in the case of three-dimensional trade marks.

27 OHIM concludes that filing a trade-mark application in relation to such basic and commonplace shapes of products cannot allow the applicant to be afforded the priority of a Community trade mark and that tablets of this kind, for washing machines or dishwashers, are eligible for protection only if and when, following extremely widespread use, they have managed to establish themselves as signs of a particular manufacturer, in accordance with Article 7(3) of Regulation No 40/94.

28 Second, regarding the need for certain signs to remain available, OHIM contends that Henkel's interpretation of that notion, which is based on the earlier case-law of the German courts, has been categorically rejected by the Court of Justice in its judgment in *Windsurfing Chiemsee*.

29 It adds that Henkel's description of how washing products and the market for those products has developed suggests that there actually is a need for certain signs to remain available (although not, however,

within the meaning of the abovementioned case-law), since that development shows the extent to which the various competing undertakings have, from the outset, used both rectangular and circular shapes and a second coloured layer for washing machine or dishwasher tablets.

Findings of the Court

30 Under Article 4 of Regulation No 40/94 a Community trade mark may consist of any signs capable of being represented graphically, provided that such signs are capable of distinguishing the products or services of one undertaking from those of other undertakings.

31 It is clear from Article 4 that both a product's shape and its colours fall among the signs which may constitute a Community trade mark. Therefore, a sign consisting of the three-dimensional shape of a tablet for washing machines or dishwashers, in combination with the tablet's arrangement of colours may, in principle, constitute a trade mark, provided that the two conditions mentioned in the preceding paragraph are met.

32 However, as the Court of First Instance rightly pointed out in paragraph 42 of the judgment in Case T-335/99 and in paragraph 40 of the judgment in Case T-336/99, the fact that a sign is, in general, capable of constituting a trade mark within the meaning of Article 4 of Regulation No 40/94 does not mean that the sign necessarily has distinctive character for the purposes of Article 7(1)(b) of the regulation in relation to a specific product or service.

33 Under the last-mentioned provision, trade marks which are devoid of any distinctive character are not to be registered.

34 For a trade mark to possess distinctive character for the purposes of Article 7(1)(b) of Regulation No 40/94, it must serve to identify the product in respect of which registration is applied for as originating from a particular undertaking, and thus to distinguish that product from those of other undertakings (see, in relation to Article 3(1)(b) of First Council Directive 89/104/EEC of 21 December 1988 to approximate the laws of the Member States relating to trade marks (OJ 1989 L 40, p. 1), a provision which is identical to Article 7(1)(b), [Joined Cases C-53/01 to C-55/01 Linde and Others \[2003\] ECR I-3161](#), paragraph 40).

35 That distinctive character must be assessed, first, by reference to the products or services in respect of which registration has been applied for and, second, by reference to the perception of the relevant public, which consists of average consumers of the products or services in question, who are reasonably well informed and reasonably observant and circumspect (see, inter alia, Linde, paragraph 41, and Case C-363/99 Koninklijke KPN Nederland [2004] ECR I-0000, paragraph 34).

36 It is apparent from the grounds of the judgments under appeal that the Court of First Instance did not err in law in its interpretation of Article 7(1)(b) of Regulation No 40/94.

37 The Court of First Instance, in accordance with the settled case-law of the Court of Justice, assessed whether the trade marks at issue were devoid of any

distinctive character by reference, first, to the products or services in respect of which their registration was sought, and, second, by reference to the perception of the relevant public, which consists, in this case, of all consumers.

38 The Court of First Instance was also correct in stating that the criteria for assessing the distinctive character of three-dimensional shape-of-products marks are no different from those applicable to other categories of trade mark. It none the less observed that, for the purpose of applying those criteria, the relevant public's perception is not necessarily the same in relation to a three-dimensional mark consisting of the shape and colours of the product itself as it is in relation to a word or figurative mark consisting of a sign which is independent from the appearance of the products it denotes. Average consumers are not in the habit of making assumptions about the origin of products on the basis of their shape or the shape of their packaging in the absence of any graphic or word element and it could therefore prove more difficult to establish distinctiveness in relation to such a three-dimensional mark than in relation to a word or figurative mark (see, to that effect, Linde, paragraph 48, and Case C-218/01 Henkel [2004] ECR I-0000, paragraph 52).

39 In those circumstances, the more closely the shape for which registration is sought resembles the shape most likely to be taken by the product in question, the greater the likelihood of the shape being devoid of any distinctive character for the purposes of Article 7(1)(b) of Regulation No 40/94. Only a trade mark which departs significantly from the norm or customs of the sector and thereby fulfils its essential function of indicating origin, is not devoid of any distinctive character for the purposes of that provision (see, in relation to the identical provision in Article 3(1)(b) of First Directive 89/104, Henkel, paragraph 49).

40 It follows that, in holding that the trade marks for which registration is sought are devoid of any distinctive character for the purposes of Article 7(1)(b) of Regulation No 40/94, the Court of First Instance did not make an error of law in relation to either that provision or the relevant case-law of the Court of Justice.

41 The actual application by the Court of First Instance of those criteria to this case involves findings of a factual nature. The Court of First Instance has exclusive jurisdiction to make findings of fact, save where a substantive inaccuracy in its findings is attributable to the documents submitted to it, and to appraise those facts. That appraisal thus does not, save where the clear sense of the evidence produced to it has been distorted, constitute a point of law which is subject, as such, to review by the Court of Justice on appeal (see Case C-104/00 P DKV v OHIM [2002] ECR I-7561, paragraph 22).

42 In this instance, there is nothing in the findings made by the Court of First Instance to suggest that the evidence produced to it was distorted.

43 As regards Henkel's allegation that the Court of First Instance relied on the requirement of availability, it must be stated that the Court of First Instance took as

its basis the fact that the shape and colours of the tablets in question were devoid of distinctive character.

44 In any event, even on the assumption that the Court of First Instance did include considerations pertaining to the public interest in its assessment of distinctive character, it did not make an error of law in that regard.

45 Each of the grounds for refusal to register listed in Article 7(1)(b) of Regulation No 40/94 is independent of the others and calls for separate examination. Furthermore, the various grounds for refusal must be interpreted in the light of the public interest underlying each of them (see, to that effect, [Case C-299/99 Philips \[2002\] ECR I-5475](#), paragraph 77, and [Linde](#), paragraphs 67 and 71).

46 The public interest taken into account in the examination of each of those grounds for refusal may, or even must, reflect different considerations, depending upon which ground for refusal is at issue.

47 In relation to the registration as a trade mark of a colour per se, not spatially defined, the Court held in [Case C-104/01 Libertel \[2003\] ECR I-3793](#), paragraph 60, that the public interest underlying Article 3(1)(b) of First Directive 89/104, a provision which is identical to Article 7(1)(b) of Regulation No 40/94, is directed at the need not to restrict unduly the availability of colours for the other traders who offer for sale goods or services of the same type as those in respect of which registration is sought.

48 It should also be stated that there is no public interest in conferring the benefit of the full protection envisaged by Regulation No 40/94 on a trade mark which does not fulfil its essential function, namely that of ensuring that the consumer or the end user can identify the origin of the product or service concerned by allowing him to distinguish that product or service from those emanating from a different origin, without any risk of confusion.

49 Finally, as regards Henkel's argument that OHIM has already accepted that trade marks consisting of the shape of washing machine or dishwasher tablets comparable to those for which registration is sought in this instance have distinctive character, it must be stated that that argument was not raised before the Court of First Instance.

50 To allow a party to put forward for the first time before the Court of Justice a plea in law which it has not raised before the Court of First Instance would be to allow it to bring before the Court, whose jurisdiction in an appeal is limited, a case of wider ambit than that which came before the Court of First Instance. In an appeal the Court's jurisdiction is thus confined to review of the findings of law on the pleas argued before the Court of First Instance (see the judgment in Case C-136/92 P Commission v Brazzelli Lualdi and Others [1994] ECR I-1981, paragraph 59, and the order of 28 June 2001 in Case C-352/99 P Eridania and Others v Council [2001] ECR I-5037, paragraph 53).

51 That argument must therefore be rejected as inadmissible.

52 In view of all of the foregoing considerations, the first part of the plea, which relates to the distinctive

character of a trade mark, must be rejected as unfounded.

The second part of the plea: assessment of the average consumer's level of attention

Arguments of the parties

53 Henkel acknowledges that, as a general rule, the average consumer's level of attention may vary depending on the type of product concerned. However, it submits that, contrary to the Court of First Instance's assessment, there is nothing to suggest that the consumer's level of attention is inherently not very high for everyday consumer products. In its submission, in relation to everyday consumer items such as those at issue here, the consumer should instead be regarded as having a particular interest in knowing not only in which category the product concerned belongs but also the exact nature of the product.

54 Furthermore, the manufacturers of washing machine and dishwasher products clearly emphasise in their advertising the quality of their various products. Consequently, the average consumer, who is reasonably well informed and reasonably observant and circumspect, associates certain requirements as to quality with certain products and attempts to distinguish products by reference to their appearance.

55 OHIM contends that the judgments under appeal found that the relevant public consisted of all consumers, since washing machine and dishwasher products put up in tablet form are widely-used consumer products. If the average consumer pays only scant attention to the exact shape and colour of the tablets, it is precisely because they are not sold loose but in packaging, from which it is sufficient to take only the number of tablets necessary for each use. The consumer holds the tablet for only a few seconds and has no reason to raise any questions concerning the tablet which he proposes to use.

Findings of the Court

56 On this point, the finding made by the Court of First Instance in paragraph 48 of the judgment in Case T-335/99 and paragraph 46 of that in Case T-336/99 that, since washing machine and dishwasher tablets are everyday consumer products, the level of attention paid by the average consumer to their shape and colours is not high is a finding of fact, which, as has been recalled in paragraph 41 of this judgment, is not subject to review by the Court of Justice on appeal, where, as in this instance, it does not entail a distortion of the factual evidence produced to the Court of First Instance.

57 In those circumstances, the second part of the plea, which relates to the average consumer's level of attention, must also be rejected.

The third part of the plea: the date by reference to which the distinctive character of a trade mark should be assessed

Arguments of the parties

58 In Henkel's submission, the Court of First Instance did not adjudicate on the question concerning the date by reference to which it is appropriate to assess whether the trade marks for which registration is sought are devoid of distinctive character. That assessment

must, in its submission, be carried out by reference to the facts as they exist at the date on which the trade-mark application is filed. The applicant can decide whether or not to file a trade-mark application only on the basis of the facts of which he is aware at that time. In order to determine whether a sign possesses features which stand out from those which are typical of a product or which are dictated by technical requirements, account may be taken only of products known at the time when the application is filed and of features typical of them.

59 Henkel maintains, with reference to the market situation at the date on which it filed its trade-mark applications, that the condition relating to distinctive character was met at that date. Typically washing machine and dishwasher products were presented in powder form at that time, so that the mere idea of tablets sufficed to confer a distinctive feature on those products which went beyond powder form, which was then customary and made necessary by technical constraints. The trade marks for which registration is sought, with their arbitrary features, which are neither dictated by technical requirements nor inherent in the product, possess distinctive features in comparison with the products on the market at the material time.

60 OHIM argues that in the judgments under appeal, the Court of First Instance did not find it necessary to adjudicate on this point because, even at the date on which the applications for registration were filed, the trade marks in question lacked distinctiveness. The conditions for registration of a Community trade mark must be met both at the date of filing and at the date of registration. In this instance, registration was precluded in particular by the fact that the combination of the shape and colours of the tablets had become customary.

Findings of the Court

61 As is clear from paragraph 34 of this judgment, a trade mark has distinctive character for the purposes of Article 7(1)(b) of Regulation No 40/94 if it serves to distinguish the products or services in respect of which registration is applied for from those of other undertakings.

62 In this case, the Court of First Instance was correct in finding, in paragraph 57 of the judgment in Case T-335/99 and the corresponding paragraph of the judgment in Case T-336/99, that it was not necessary to decide which was the relevant date for the assessment of whether the trade marks had distinctive character for the purposes of that provision, since it had found that the marks for which registration was sought were not capable of identifying the origin of the products concerned and that that finding was not affected by how many similar tablets were already on the market.

63 In those circumstances, the Court of First Instance did not make an error of law in finding that there was no need for it to decide by reference to which of the two dates the assessment of the distinctive character of the trade marks in question should be carried out.

64 The third part of the plea, which relates to the date by reference to which the distinctive character of a

trade mark should be assessed, must therefore also be rejected as unfounded.

65 It follows from all of the foregoing considerations that the appeals are unfounded and must therefore be dismissed.

Costs

66 Under Article 69(2) of the Rules of Procedure, which applies to the appeal procedure by virtue of Article 118 of those rules, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. As OHIM has applied for costs and Procter & Gamble has been unsuccessful, it must be ordered to pay the costs.

On those grounds,

THE COURT (Sixth Chamber)

hereby:

1. Dismisses the appeals;
2. Orders Henkel KGaA to pay the costs.

OPINION OF ADVOCATE GENERAL RUIZ-JARABO COLOMER

delivered on 6 November 2003 (1)

Joined Cases C-456/01 P and C-457/01 P

Henkel KGaA

v

Office for Harmonisation in the Internal Market (Trade Marks and Designs) (OHIM)

and Joined Cases C-468/01 P to C-472/01 P

Procter & Gamble

v

Office for Harmonisation in the Internal Market (Trade Marks and Designs) (OHIM)

and Joined Cases C-473/01 P and C-474/01 P

Procter & Gamble

v

Office for Harmonisation in the Internal Market (Trade Marks and Designs) (OHIM)

(Appeal – Community trade mark – Multicoloured detergent tablets – Absolute ground for refusal – Distinctive character)

Introduction

1. These appeals raise the question whether the small blocks of compressed detergent with different coloured layers and coloured speckles, which are intended for use in washing machines or dishwashers and which are currently widely available for sale, are to be registered, given the effects of Article 7(1)(b) of the Regulation on the Community trade mark. (2)

2. Therefore, the question is whether tablets with these particular features actually have the distinctive character required by the European legislation and are thus capable of fulfilling the essential function of a trade mark, namely that of identification.

3. The Court of Justice must further refine the main elements of the trade mark registration procedure, stating precisely the time with reference to which the distinctive character of a sign must be assessed (i.e. the time when the application is filed or the time when the mark is registered), and must modify its case-law in

relation to three-dimensional shape of goods signs, which need to be dealt with in a particular way and differently from other registrable signs.

4. In particular, these cases serve to highlight the difficulties in applying to such three-dimensional trade marks the criteria relating to the absolute grounds for refusal or invalidity, which have been evolved – inadequately – in respect of word marks or figurative marks. My concern is to point out that in this area it is hard to separate lack of distinctive character from descriptiveness.

Relevant legislation

The regulation on the Community trade mark

5. Regulation No 40/94 contains the provisions which must be applied in order to reach a decision in these appeals.

6. Under Article 4, ‘Community trade mark[s] may consist of any signs capable of being represented graphically, particularly words, including personal names, designs, letters, numerals, the shape of goods or of their packaging, provided that such signs are capable of distinguishing the goods or services of one undertaking from those of other undertakings’.

7. Among the absolute grounds for refusal are those mentioned in Article 7:

‘1. The following shall not be registered:

(a) signs which do not conform to the requirements of Article 4;

(b) trade marks which are devoid of any distinctive character;

(c) trade marks which consist exclusively of signs or indications which may serve, in trade, to designate the kind, quality, quantity, intended purpose, value, geographical origin or the time of production of the goods or of rendering of the service, or other characteristics of the goods or service;

(d) trade marks which consist exclusively of signs or indications which have become customary in the current language or in the bona fide and established practices of the trade;

(e) signs which consist exclusively of:

(i) the shape which results from the nature of the goods themselves; or

(ii) the shape of goods which is necessary to obtain a technical result; or

(iii) the shape which gives substantial value to the goods;

...

2. Paragraph 1 shall apply notwithstanding that the grounds of non-registrability obtain in only part of the Community.

3. Paragraph 1(b), (c) and (d) shall not apply if the trade mark has become distinctive in relation to the goods or services for which registration is requested in consequence of the use which has been made of it.’

8. Article 51(1)(a) states as one of the grounds for invalidity, the fact that a Community trade mark has been registered in breach of the provisions of Article 5 or of Article 7. Invalidity may be declared on an application to the Office for Harmonisation in the Internal Market (Trade Marks and Designs) (‘the Office’) or on

the basis of a counterclaim in infringement proceedings.

9. Pursuant to Article 54(2), the consequence of a declaration of invalidity, total or partial, is that the trade mark is deemed to have had, from the outset, none of its effects.

Background to the appeals

10. As described in the judgments under appeal, the background to these proceedings may be summarised as follows.

Joined Cases C-456/01 P and C-457/01 P (Henkel v OHIM)

11. On 15 December 1997 Henkel KGaA (‘Henkel’), a company which manufactures chemical derivatives, established in Düsseldorf (Germany) filed two applications for a Community trade mark at the Office under Regulation No 40/94.

12. The three-dimensional marks for which registration was sought both consisted of rectangular tablets, each composed of two layers, white and red (Case C-456/01 P), and white and green (Case C-457/01 P).

13. The products in respect of which registration was sought are in Class 3 of the Nice Agreement, (3) which includes ‘washing or dishwashing preparations in tablet form’.

14. Following the necessary procedures, the Examiner, by decisions of 26 January and 15 February 1999, refused the applications essentially on the ground that the signs in question were devoid of the distinctive character required by Article 7(1)(b) of Regulation No 40/94.

15. The appeals against the Examiner’s decisions were dismissed by decisions of 21 September 1999. The Board of Appeal found that Article 7(1)(b) of the Regulation prevented registration of the trade marks sought, since, in order to be registered, a trade mark had to enable the products in respect of which it was filed to be distinguished by reference to their origin and not by reference to their nature: in the case of a three-dimensional mark which was simply a reproduction of the product, that meant that the shape of the product had to be sufficiently unique to imprint itself easily on the mind and to stand out from whatever is normal in the trade. Given the fact that protecting the shape of the product entailed a risk that the owner of the mark would be granted a monopoly on it and the need to bear in mind the difference between trade mark law and the law of utility models and designs, the standard for assessing distinctive character was higher. In the Board of Appeal’s view, in the instant case, the trade marks applied for did not meet those enhanced requirements, given that the shapes claimed by the applicant were neither particularly special nor unusual but were among the basic shapes typical of the relevant market. Nor did the arrangement of the colours add any kind of distinctive feature to the shape.

16. Henkel brought a number of actions for annulment before the Court of First Instance, in which it put forward as its main plea in law infringement of Article 7(1)(b) of Regulation No 40/94, maintaining that the

Board of Appeal had overlooked the fact that the mark applied for had distinctive character.

17. In its judgments of 19 September 2001, (4) the Court of First Instance reiterated the following general principles of trade-mark law in relation to the case before it: pursuant to Article 7(1)(b) of Regulation No 40/94, a mark has distinctive character if it enables the goods or services in respect of which registration of the mark has been sought to be distinguished as to their origin. For that purpose a minimum degree of distinctive character is sufficient to render the ground for refusal set out in Article 7(1)(b) inapplicable; Article 7(1)(b) does not distinguish between different categories of trade marks: the criteria for assessing the distinctive character of three-dimensional trade marks consisting of the shape of the product itself are therefore no different from those applicable to other categories of trade marks; nevertheless, account must be taken of the fact that, in contrast to other categories of trade marks, the public is not necessarily used to recognising three-dimensional trade marks consisting of the shape and colours of the product itself as signs identifying the product's commercial origin.

18. For the purpose of identifying the person by reference to which the designated products are assessed, the Court of First Instance started from the premiss that washing machine and dishwasher tablets were widely available on the market and that the relevant public therefore consisted of all consumers. From that it concluded that the distinctive character of the mark should be assessed from the point of view of an average consumer who was reasonably well informed and reasonably observant and circumspect. Since the goods were everyday consumer goods, it could be presumed that the level of attention given by the average consumer to the shape and colours of detergent tablets was not high.

19. Finally, the Court of First Instance analysed the specific features of the three-dimensional signs for which registration was sought.

As regards shape, it held that a rectangular or round tablet was one of the basic geometrical shapes and was an obvious one for a product intended for use in washing machines or dishwashers.

As to the fact that coloured layers were superimposed, the Court of First Instance pointed out that the relevant public was used to detergents containing different coloured components, including a white or off-white one, frequently with particles of different colours.

The Court of First Instance added that detergent manufacturers' advertising deliberately gives the impression that such particles indicate the presence of various active ingredients and, therefore, although they are not a descriptive indication in terms of Article 7(1)(c) of Regulation No 40/94, they suggest that the product has certain qualities rather than being indicative of its origin.

Nevertheless, it was clear that the fact that consumers may get into the habit of recognising the product from its colours is not enough, in itself, to preclude the ground for refusal based on Article 7(1)(b). Such a de-

velopment in the public's perception of the sign, if proved, would be taken into account only for the purposes of Article 7(3) of Regulation No 40/94.

The Court of First Instance did not ascribe any importance to the fact that in the present case the coloured particles were not spread evenly over the whole tablet nor to the colours actually used in the trade marks applied for, taking the view that the addition of a layer and the use of basic colours (commonplace practices which were even typical of detergents) were one of the most obvious solutions.

It also added that it was possible to obtain different combinations of those features by varying the basic geometric shapes and by adding to the product's basic colour another basic colour either as a layer in the tablet or as speckles. The ensuing differences in their appearance were not sufficient to act as an indication of the product's origin, inasmuch as the differences were obvious variations on the product's basic shapes.

20. As regards the overall impression created by the shapes of the tablets in question and the arrangement of their colours, the Court of First Instance decided that the marks applied for would not enable consumers to distinguish the products concerned from those having a different trade origin when they came to select a product for purchase.

According to the contested judgment, the inability of the mark applied for to indicate, a priori and irrespective of the use made of it within the meaning of Article 7(3) of Regulation No 40/94, the product's origin was not affected by the number of similar tablets already on the market. Consequently, it did not deem it necessary in the case before it to decide whether the distinctive character of the mark should be assessed by reference to the date on which the application for registration was filed or the date of actual registration.

21. The Court of First Instance concluded from all of the foregoing that the Board of Appeal was right to hold that the three-dimensional mark at issue was devoid of any distinctive character. The Court also rejected the pleas alleging breach of the right to be heard, misuse of powers and infringement of the principle of equal treatment, and thus dismissed the actions in their entirety.

Joined Cases C-468/01 P to C-472/01 P and Joined Cases C-473/01 P and C-474/01 P (Procter & Gamble v OHIM)

22. On 13 October 1998 Procter & Gamble Company, established in Cincinnati, Ohio (United States of America), filed a number of applications at the Office for trade marks for three-dimensional signs consisting of (i) square tablets with slightly rounded edges and corners, with the following features:

- two layers, white and pale green (Case C-468/01 P);
- two layers, white with green speckles and pale green (Case C-469/01 P);
- white with yellow and blue speckles (Case C-470/01 P);
- white with blue speckles (Case C-471/01 P);
- white with green and blue speckles (Case C-472/01 P);

and (ii) rectangular tablets with chamfered edges and slightly rounded corners and with speckles and a dark depression (square in Case C-473/01 P and triangular in Case C-474/01 P) in the centre of the upper surface. Where indicated, colour was also claimed for the marks.

23. The products in respect of which registration was sought are, as in the Henkel cases, in Class 3 of the Nice Agreement.

24. By decision of 17 June 1999, the Examiner refused the applications on the ground that the signs were devoid of any distinctive character.

25. The appeal against those decisions was dismissed on 3 March 2000 by the Board of Appeal, which pointed out that it was clear from Article 4 of Regulation No 40/94 that the shape of a product may be registered as a Community trade mark, provided that the shape displays certain features that are sufficiently unusual and arbitrary to enable the relevant consumers to recognise the product, purely on the basis of its appearance, as emanating from a specific undertaking. Given the advantages of washing tablets for laundry and dishes, the Board of Appeal also maintained that the applicant's competitors should also remain free to make such products using the simplest geometrical shapes.

26. After describing the trade mark applied for, the Board of Appeal stated that the tablet's square or rectangular shape did not make it distinctive, since the basic geometric shapes (square, round, triangular or rectangular) were the most obvious shapes for such tablets and there was nothing arbitrary or fanciful about selecting one of those designs for the manufacture of solid detergents. It added that the shouldered corners, bevelled edges and concave centre were mundane variations on the normal get-up of the products.

27. The Board of Appeal also stated that the colours of the marks did not confer distinctive character on them, since white, which was associated with spotless cleanliness, was a traditional colour for soap powders, whilst green, which was also a basic colour, was attractive to the eye and had positive connotations since it was associated with environmental protection.

28. Finally, the Board of Appeal found that the use of coloured speckles was customary in that environment and that not only were coloured speckles appealing to the eye, but they might also indicate the presence of active ingredients, for which reason other traders must be able to use them for that purpose.

29. Procter & Gamble brought actions for annulment before the Court of First Instance against each of those decisions, essentially putting forward arguments based on Article 7(1)(b) of Regulation No 40/94.

30. It is noteworthy that at the hearing before the Court of First Instance, Procter & Gamble claimed that its actions sought clarification of the legal position regarding the registrability of signs of the kind for which registration had been applied. In its view, such marks did not warrant protection under Regulation No 40/94; however, it was seeking registration in order to secure

the same rights as those claimed by other undertakings operating in the same market.

31. The Court of First Instance, in its judgments of 19 September 2001, decided to dismiss all the actions brought by Procter & Gamble, for the following reasons. (5)

32. First, it set out the applicable general principles and identified a reference person in the same way as in the actions brought by Henkel. (6)

33. It then went on to analyse the specific features of the signs for which registration was sought.

In that regard, it found that the shape of the tablets (square or rectangular) was one of the basic geometrical shapes and was an obvious one for a product intended for use in washing machines or dishwashers. The slightly rounded corners of the tablet were dictated by practical considerations and were not likely to be perceived by the average consumer as a distinctive feature of the shape claimed, capable of distinguishing it from other similar tablets.

As to the different coloured layers, with speckles, the Court of First Instance pointed out that the public concerned was used to seeing different coloured features in cleaning preparations. Powder, the form in which such products were traditionally presented, was usually very light grey or beige and appeared almost white. It often contained particles of one or more different colours.

As with the earlier cases, the Court stated that manufacturers advertising highlights the fact that those particles indicate the presence of active ingredients and thus, although they were not a descriptive indication in terms of Article 7(1)(c) of Regulation No 40/94, they suggested that the product had certain qualities and were not an indication of its origin.

Furthermore – it stressed – the fact that consumers may get into the habit of recognising the product from its colours was not enough, in itself, to preclude the ground for refusal based on Article 7(1)(b). Such a development in the public's perception of the sign, if proved, would be taken into account only for the purposes of Article 7(3) of Regulation No 40/94.

In the Court of First Instance's view, a coloured layer and speckles were not sufficient for the tablet's appearance to be perceived as indicative of its origin, since where various ingredients were to be combined, such devices were among the most obvious solutions. As to the use of various colours (white and pale green, with coloured speckles), the Court of First Instance observed that the use of basic colours was commonplace and was even typical of detergents, whilst the addition of other basic colours, such as red or yellow, was one of the most obvious variations on the typical design of these products.

The Court of First Instance concluded from the foregoing that the three-dimensional marks applied for consisted of a combination of obvious features typical of the product concerned.

34. It went on to make the same findings as those described in points 19 and 20 above.

35. Finally it added that '[a]s regards the applicant's arguments concerning the Board of Appeal's considera-

tion of the need to keep the shape and colours of the tablet at issue available, it must be observed that the absolute grounds for refusal set out in Article 7(1)(b) to (e) of Regulation No 40/94 address the concern of the Community legislature to prevent the grant to one operator alone of exclusive rights which could hinder competition on the market for the goods or services concerned However, the interest that competitors of an applicant for a three-dimensional mark consisting of the product's design may have in being able freely to choose shapes and colours for their own products is not in itself a ground for refusing registration of such a mark, nor a criterion sufficient in itself for the assessment of the mark's distinctive character. Article 7(1)(b) of Regulation No 40/94, in excluding the registration of signs devoid of any distinctive character, protects any interest there may be in keeping available various alternatives for a product's design only to the extent to which the design of the product in respect of which registration is sought is not capable, a priori and irrespective of the use made of it within the meaning of Article 7(3) of Regulation No 40/94, of functioning as a trade mark, that is to say, of enabling the public concerned to distinguish the product concerned from those having a different trade origin.

Although the Board of Appeal gave considerable weight, in the contested decision, to considerations relating to the interest in preventing trade mark law from giving rise to a monopoly on a product, it does not, however, follow that in this case the Board failed to have due regard to the criteria applicable in assessing the distinctiveness of the mark applied for. In paragraph 11 of the contested decision, the Board of Appeal states that a product's shape may be registered as a Community trade mark "provided that the shape displays certain features that are sufficiently unusual and arbitrary to enable the relevant consumers to recognise the product, purely on the basis of its appearance, as emanating from a specific undertaking". Thus it applied in substance a criterion consonant with the principles set out above.'(7)

36. As regards the tablets at whose centre there is a slight depression in a different shade (Cases C-473/01 P and C-474/01 P), the Court of First Instance found that the Board of Appeal was right to find that feature insufficient for the tablet's appearance to be perceived as indicative of the product's origin, since an addition of that kind was one of the most obvious solutions and did not change the tablet's appearance significantly. Nor was the fact that a triangular shape had been selected for the inlay sufficient to confer distinctiveness on the mark applied for because associating two basic geometric shapes in such a way as is seen in the tablet at issue was one of the most obvious variations on the get-up of the product and did not enable the public concerned to distinguish the products thus presented from those having a different trade origin.

37. In the light of the foregoing arguments, the Court of First Instance decided to dismiss all the actions.

Analysis of the appeals

38. Although a number of separate actions have been joined, the main grounds of appeal may be dealt with systematically. All the appeals rely on the same single plea in law, infringement of Article 7(1)(b) of the regulation on the Community trade mark, whereby the appellants challenge the various factors used by the Court of First Instance in determining whether the various signs consisting of multicoloured detergent tablets actually had distinctive character.

39. It is necessary to start from two premisses: first, it is not disputed – as the judgments under appeal acknowledge – that the regulation does not lay down criteria for assessment which differ according to the absolute ground for refusal concerned; second, in the present cases no appraisal of technical requirements was carried out pursuant to Article 7(1)(e)(ii) of the regulation.

40. Therefore, the claim which the Court of Justice must settle is whether the contested judgments contain a proper legal appraisal of the distinctive character of the detergent tablets for which registration of the mark was sought.

1. Grounds of appeal relating to the time by reference to which distinctive character is assessed

41. Both appellants claim that when they tried to register them as trade marks, tablets for washing machines or dishwashers existed only to a very limited extent and therefore were readily distinguishable. The distinctive character of a sign must be assessed in the light of the circumstances prevailing at the time when the application is filed. In order to ascertain whether a sign incorporates typical or commonplace features, the assessment must refer to the facts known at the time when the application is filed. Both appellants also appear to be suggesting that where the assessment is made at a later stage, such as on registration, that will entail a risk for the applicant that his competitors will have incorporated aspects of his sign in their own products, thus diminishing his sign's distinctive character.

42. The Office's response is that to be registered as a trade mark, a sign must meet the requisite conditions, both at the time when the application is filed and on registration, which means that registration must be refused when a sign which was distinctive at its filing date has lost its distinctiveness in the course of the examination procedure.

43. I concur with the Office's reasoning. As it explains, that is the logical outcome if the absolute grounds of refusal in Article 7(1) of the regulation are read in conjunction with Article 51 thereof, which, under the heading 'Absolute grounds for invalidity', includes the ground that a trade mark has been registered in breach of the provisions of Article 7. The appellants' stance would mean that a mark would have to be registered but could immediately be annulled pursuant to a declaration of invalidity on the ground that it did not have the necessary distinctive character at that point in time. The intention of the legislature cannot have been so illogical; therefore the assessment of the

requisite conditions for registration must be made at the time of registration.

44. Admittedly, it may be objected that, if the appellants' proposition is accepted, namely that the assessment should be made when the application is filed, such signs would have been registered without encountering any ground for refusal. That interpretation must be rejected in view of Article 51(2), which provides that 'where the Community trade mark has been registered in breach of the provisions of Article 7(1)(b), (c) or (d), it may nevertheless not be declared invalid if, in consequence of the use which has been made of it, it has after registration acquired a distinctive character in relation to the goods or services for which it is registered'. Had it been the legislature's intention that eligibility should be assessed by reference to the time when the application was filed, it would have referred to that point in time and not, as it does, to registration.

45. The Office adds that, in order to avoid a sign being denied registration because it has been systematically copied in the course of the examination procedure, it would exclude from its analysis of distinctive character any cases where the sign was used solely for that purpose.

46. That argument also appears right to me: if it relied on Article 7(1)(f) of the regulation, which refers to public policy and morality, or directly invoked the general principle of law proscribing acts committed in bad faith, which is recognised in Article 51(1)(b) of the regulation, the Office could refuse to take account, for the purposes of registration, of any conduct whose sole purpose was to obstruct registration of competitors' marks.

47. In any event, frequent use by other operators of the same visual components would be relevant only if the contested judgments had, in their assessment of the signs' distinctive character, espoused the criterion of the relative originality or currency of the signs. In fact, the signs were rejected on other grounds, namely the association of those components with what the Court of First Instance described as obvious features. In that regard, the ground of appeal is ineffective.

48. In my opinion, those reasons are sufficient for this part of the plea to be rejected in the terms in which the dispute is stated. However, I consider it appropriate to add that there was nothing to prevent the registration authorities from taking into account future matters when determining whether a sign was eligible for registration as a trade mark. That occurs, for example, when a general interest in preserving the availability of a mark is taken into account. That overriding interest had to be analysed within the framework of Article 7(1)(c) of the regulation. Specifically, it is consistent with that rule, since the distinctive character (as a category) of a three-dimensional sign consisting of the shape of the product must be assessed. (8) A sign with such characteristics is distinctive when it stands out from the usual get-up of the goods or (which amounts to the same thing) when the consumer, on looking at it, does not necessarily have the impression that he is perceiving it as an example of the relevant category or quality.

2. Grounds of appeal relating to whether the signs at issue have distinctive character

49. Henkel claims that it is impossible to determine that a sign is incapable of acting as an indication of origin by looking at the context in which the product is found and seeking possible similarities. It adds that the question of the eligibility of a mark for registration must not be confused with the scope of protection or the likelihood of confusion.

50. It will be recalled that there is no suggestion in the contested judgments that the Court of First Instance undertook the comparative analysis to which the appellant refers. The fact that it did not do so is moreover one of the main grounds of challenge which have arisen. The Court of First Instance, however, preferred to contrast the signs with an image of the ideal representation of the product.

51. Henkel may well be using this argument to allude to the question of the relationship between the absolute grounds for refusal and the limited extent of the protection afforded by a trade mark, as recognised by Article 12(b) of the Regulation. The usual arguments in this regard are that it is unnecessary to take an excessively strict approach in assessing the distinctive character of a sign, given that in any event its descriptive components are afforded no protection. I have already had occasion to note that nothing in Article 12 of the Regulation allows the assessment of the distinctive character of a trade mark to be transferred from the Office, on registration, to the courts responsible for ensuring that the rights conferred by the mark are exercised in practice. Rather the opposite: the long list of obstacles to registration in Articles 4 and 7, and the extensive system of appeals available against a refusal to register, suggest that examination for registration purposes is intended to be more than summary in nature. Nor is that approach appropriate from the point of view of judicial policy, since in disputes in which Article 12 is relied on, the proprietor of the trade mark will always enjoy an advantage, owing to the general reluctance to question official records and to the difficulty inherent in distinguishing what is descriptive from what is not. (9)

52. The Court of Justice clearly endorsed that approach in its judgment in *Libertel* (10) when it found that Article 6 of the Trade Mark Directive, (11) whose content is the same as that of Article 12 of the Regulation, concerns the limits on the effects of a Community trade mark once it has been registered. Furthermore, it stated that the consequence of a minimal review of the grounds for refusal at the time when the application for registration is considered, on the basis that the risk that certain operators might appropriate certain signs which, owing to their very nature, ought to remain available, is neutralised by the limitation mentioned above, is to withdraw the assessment of the grounds for refusal from the competent authority at the time when the mark is registered in order to transfer it to the courts with responsibility for ensuring that the rights conferred by the trade mark can be exercised in practice. That approach is incompatible with the scheme of the Directive, which

is founded on review prior to registration, not on an ex post facto review. There is nothing in the Directive to suggest that Article 6 leads to such a conclusion. On the contrary, the number and the detailed nature of the obstacles to registration set out in Articles 2 and 3 of the Directive, and the wide range of remedies available in the event of refusal, indicate that the examination carried out at the time when registration is applied for must not be brief, but must be stringent and thorough in order to prevent trade marks from being improperly registered. (12)

53. Therefore, the Court of First Instance did not make an error in law in its interpretation of Article 7(1)(b) of the Regulation.

54. Procter & Gamble does not agree with such a solution and maintains that the possibility that consumers may generally get into the habit of identifying a product from its colours is a matter for Article 7(1)(b) of Regulation No 40/94 and not for Article 7(3) thereof.

55. In any event, this ground of appeal is ineffective, since it purports to challenge an aspect of the Court of First Instance's reasoning which has no impact on the outcome of the case and fails to challenge the proposition, which is clearly correct, that the fact that consumers may get into the habit of recognising the product from its colours is not on its own sufficient to exclude the ground for refusal in Article 7(1)(b).

56. Procter & Gamble also claims that the Court of First Instance was wrong to hold that the estimate of the number of tablets on the market with the same features is irrelevant when the product is found to be incapable of indicating origin. On the contrary, if at the material time no similar tablets are available on the market, the shapes for which registration is sought would be appreciably different and would thus possess distinctive character.

57. However, the disputed finding of the Court of First Instance is correct: first, what is decisive is not the number of products on the market but the way in which the average consumer perceives them; second, nor is the number of products on the market capable of counteracting, for example, the descriptive nature of their appearance for the purposes of Article 7(1)(c) of the Regulation.

58. For those reasons, these grounds of appeal must be rejected.

3. Grounds of appeal relating to the definition of the consumer's level of attention

59. The contested judgments upheld the Board of Appeal's finding that the level of attention given by the average consumer to the shape and pattern of washing machine and dishwasher tablets, being everyday consumer goods, is not high.

60. Henkel accepts that the average consumer's degree of attentiveness varies according to the category of goods concerned. However, it disagrees with the Court of First Instance's analysis, since it may be presumed, specifically in relation to everyday consumer goods, that the consumer has a particular interest, not only in knowing about the category of product, but also in the product itself. Manufacturers advertise in such a way as

to highlight the qualities of detergents. For that reason – in Henkel's submission – the average consumer, who is reasonably well informed and reasonably observant and circumspect, associates particular requirements as to quality with certain products, seeking to distinguish them by their appearance.

61. Procter & Gamble submits, first, that, at the time when the application for registration was filed, dishwasher tablets, and even more so washing tablets, were not everyday consumer goods. At that time those goods were still at the high-quality end of the market and, consequently, the degree of attention given by the average consumer of those goods to the get-up was high; second, the appellant does not believe that the attention paid at the time of purchasing a product for everyday consumer use is necessarily low; rather, the everyday use of such goods continually attracts the consumer's attention to their get-up and provokes a high degree of attention.

62. Although definition of the person by reference to whom the distinctive character of a sign is assessed is a matter of law, the precise way in which it is assumed that a given category of products is perceived or the precise qualification warranted by the products, are matters of fact, which may not be reviewed on appeal. Therefore, the finding made in this respect by the Court of First Instance cannot be reexamined.

Even on the assumption that the assessment in question was of a legal nature, the assertion that, in relation to everyday consumer goods, the average consumer's level of attentiveness is lower than it is in relation to luxury goods or simply to goods of higher value or goods which are less commonly used, seems to me the correct inference to be drawn from the proposition that as regards the relevant public's perception of the trade mark, the attention of the average consumer varies according to the category of products or services in question. (13)

63. In addition, for Procter & Gamble, the time when the product is purchased is not the only relevant time for the purposes of assessing a sign's distinctive character, since, given that the products are sold in packaging which does not correspond to their shape, the public has had a chance to become familiar with a particular get-up as a result of advertising campaigns or by virtue of using the tablets in question.

64. The appellant raises a question here which, although interesting, was not addressed before the Court of First Instance and therefore cannot be used to challenge the contested judgments.

65. Therefore, the grounds of appeal relating to the consumer's degree of attention must be rejected.

4. Grounds of appeal relating to actual distinctive character

66. Both appellants submit that the Court of First Instance, in finding that the marks applied for were composed of an obvious arrangement of features, applied an incorrect test of their distinctive character. For Henkel it would have been preferable for the Court of First Instance to confine itself to ascertaining whether those features were different from the typical ones or

whether they were necessary for technical reasons. In Procter & Gamble's submission, the Court of First Instance should have asked whether the shape of the tablets differed perceptibly from the usual get-up of such detergents at the material time.

67. In Henkel's submission, the fact that the sign takes the form of a basic geometric shape is of no significance, provided that the shape is unusual for the product to which it relates.

68. To my mind, the test used by the Court of First Instance is not only correct, but is also more appropriate, than the test proposed by the appellants. When the signs for which registration is sought are compared, not with those already current, but with a paradigm composed of features which spring to mind if the shape of the product is imagined, the test performed, although based on objective criteria, does not lean so heavily on the vagaries of the market.

69. The fact that, for the purposes of the test referred to, a no more rigorous standard is used than that applied in relation to other signs does not mean that the method of assessing distinctive character cannot be adapted to the particular features of this category of registrable signs. The consumer's ability to distinguish the signs from the product of which they are an intrinsic part, as well as from other similar signs, only emerges, by definition, when the product is placed on the market. For that reason, the standard advocated by the appellants, which consists in deeming those unusual signs distinguishable, would give the more assiduous operators a disproportionate advantage, since they would be able to register in their own name the shapes which are easier to manufacture or more readily marketable.

70. For the purpose of guarding against that risk, but also for the purpose of promoting an assessment of actual distinctive character, the method adopted in these cases by the Board of Appeal and endorsed by the contested judgments, which defined it in greater detail, appears to be appropriate.

I repeat that the preferable course is to assess such hypotheses under Article 7(1)(c) of the Regulation: thus the Examiner would ascertain whether the get-up of the sign applied for essentially tallies with the average consumer's idea of the product. If so, he would refuse to register it on the basis of subparagraph (c), since the sign would amount to no more than the representation of a graphic description of the product.

71. Assessment in accordance with Article 7(1)(c) would also have the advantage of removing all doubt as to whether the need to preserve availability may be invoked, which would allow the Examiner to consider factors pertaining to the future when assessing whether a shape is eligible to be a trade mark. It is not certain that the need to preserve availability can be raised under Article 7(1)(b) of the Regulation.

72. The appellants also submit that the public perceives the arrangement of colours as an individual feature of the get-up of a given product. As to the use of a specific colour, such as red or green, Henkel maintains that it is significant that, if one colour is used

exclusively for the tablets concerned, they may be associated with the undertaking of origin.

73. Procter & Gamble adds that the Court of First Instance should have indicated whether, apart from shape and colour, the slightly rounded edges of the tablets were capable of conferring sufficient distinctive character on them.

74. It is apparent that the foregoing submissions seek to challenge the assessment made by the Court of First Instance of the material components of the signs. In an exercise of that kind, the lower court has absolute discretion to reach its own decisions on matters of fact and therefore the exercise is not amenable to review on appeal.

75. I am conscious of the fact that in the legal traditions of the Member States, there are certain discrepancies as to the nature of the assessment of the material components of a trade mark. For the purposes of the doctrine of objective normative interpretation, it is a matter of law, inasmuch as the starting point of any analysis does not consist of facts which have been proven in the course of the procedure but of an objectivised ideal reference-point.

To my mind, adopting that approach in the sphere of trade marks is not conducive to the effective administration of justice, since it negates the exceptional and specific nature of a review on appeal: first, it extends the scope for appeal to virtually all disputes in which a sign is held not to have distinctive character; second, it requires the Court of Justice to deliver a judgment which is comparable in all regards to that already given by the three lower authorities.

5. Ground of appeal relating to application of the need to preserve availability

76. Henkel submits that the Court of First Instance included in its analysis considerations relating to the so-called 'need to preserve availability'. However, in Henkel's view, the *Windsurfing Chiemsee* (14) judgment provides authority for the application of that principle only in respect of Article 7(1)(c) of the Regulation, in connection with the descriptive indications inherent in a sign. However, in the case of the tablets at issue, neither the colours nor the geometrical shapes can be deemed descriptive of the designated product.

77. In any event, Henkel maintains that registration as a trade mark of the combination of the shape and colours of the detergent tablets concerned is not precluded by any need to preserve availability. First, the shape is freely chosen by the manufacturer, subject to certain technical requirements. Second, the consumer does not perceive the colours as being dictated by a technical requirement but as the free and imaginative expression of the product's individuality. Hence, the combination of those features is not at variance with any need to preserve availability. Henkel invokes in that regard the judgment in *Procter & Gamble v OHIM (Baby-dry)*. (15)

78. As I pointed out above, it is by no means certain that considerations of general interest militating in favour of denying registration to certain signs so that they may remain fully available to all operators (the need to

preserve availability) may be taken into account for the purposes of Article 7(1)(b) of the Regulation. The purpose of the absolute ground for refusal in that provision is to prohibit the registration of signs which are devoid of any real distinctive character, that is to say, those signs which the average consumer, who is reasonably well informed and reasonably observant and circumspect, cannot identify as reliably indicating the commercial origin of the product. It is, of course, in the general interest to prevent certain operators from appropriating to themselves three-dimensional shapes which are useful from an aesthetic or technical point of view, or from monopolising certain signs apt to describe the product per se, its actual or supposed qualities and other characteristics, such as where it originates from. Subparagraphs (c) and (e) of Article 7(1) of the Regulation deal with those concerns.

79. It is also appropriate to consider the similar general interest in keeping available, for use by all, signs which are customary in the current language or in the bona fide and established practices of the trade, which – under subparagraph (d) – may not be registered.

80. However, it does not seem that extensive protection should be afforded to signs which, without being descriptive, are for other reasons devoid of any specific distinctive character. I do not believe that there is any general interest in maintaining in the public domain signs which are incapable of identifying the commercial origin of the goods or services which they designate.

Each of the grounds for refusing registration must be analysed in the light of the general interest on which it is based. (16)

81. In its judgment in *Libertel*, the Court of Justice accepted, in the context of Article 3(1)(b) of the Directive, that the registration as trade marks of colours per se, not spatially delimited, may mean that a small number of proprietors would exhaust the entire range of the colours available. Such a monopoly would be incompatible with a system of undistorted competition, since it would give rise to an unjustified competitive advantage. Nor would it be conducive to economic development or the fostering of the spirit of enterprise for established traders to be able to register the entire spectrum of colours for their own benefit, to the detriment of new traders. (17)

Those considerations – based, as is recognised in the judgment itself, on the fact that there are a limited number of colours which an average consumer can in practice identify – do not appear to be transferable to the rules relating to trade marks consisting of the shape of the product. (18)

82. Despite that, Henkel's complaint cannot be regarded as founded. I agree that, strictly speaking, it may be anomalous to mention the need to preserve availability in the context of Article 7(1)(b) of the Regulation, one point on which I disagree to some extent with the assertion in the contested judgments that 'the absolute grounds for refusal set out in Article 7(1)(b) to (e) of Regulation No 40/94 address the concern of the Community legislature to prevent the grant

to one operator alone of exclusive rights which could hinder competition on the market for the goods or services concerned'. (19)

However, I do not accept that the Court of First Instance employed this criterion improperly in its judgments. Rather, in using the notion of an obvious shape, it assessed distinctive character by reference to an ideal paradigmatic concept of the product or, in other words, to how it instinctively comes to mind, instead of by reference to products already available on the market.

83. That approach is, as I have explained, particularly pertinent when the eligibility for registration of three-dimensional signs consisting of the shape of the product is to be assessed. In such cases, there is no remote point of comparison so long as the product does not exist.

84. Nor is it less reliable or more subjective than, for example, the reference to the average consumer, whose supposed perception is deemed by law to be the yardstick for the Court of Justice. (20) Finally, when it is properly executed, it is in fact objective. In the present case, it is significant that the appellants, who claim that the shapes of the washing tablets were not customary at the time when the application was filed, accept that they are now. That is perhaps the best proof that the test carried out was the right one.

85. Therefore, the last ground of appeal cannot succeed either.

Costs

86. Under Article 69(2) of the Rules of Procedure, which applies to appeal proceedings pursuant to Article 118 thereof, the unsuccessful party is to be ordered to pay the costs. Consequently, if, as I propose, all the grounds of appeal put forward by the appellants in the various cases are rejected, the appellants must be ordered to pay the costs of the proceedings.

Conclusion

87. Since I take the view that none of the grounds of appeal advanced is capable of having any effect on the legality of the contested judgments, I propose that the Court of Justice dismiss all these appeals and consequently order the appellants to pay the costs.

1 – Original language: Spanish.

2 – Council Regulation (EC) No 40/94 of 20 December 1993 on the Community trade mark (OJ 1994 L 11, p. 1), as amended by Council Regulation (EC) No 3288/94 of 22 December 1994, implementing the agreements concluded in the framework of the Uruguay Round (OJ 1994 L 349, p. 83).

3 – Nice Agreement concerning the International Classification of Goods and Services for the Purpose of the Registration of Marks of 15 June 1957, as revised and amended.

4 – The judgments in *Henkel v OHIM*, in Case T-337/99 (ECR II-2597) and, in summary form, in Case T-335/99 (ECR II-2581) and Case T-336/99 (ECR II-2589).

5 – As set out in the judgment in Case T-118/00 Procter & Gamble v OHIM [2001] ECR II-2731, but applicable *mutatis mutandis* to the other cases.

6 – See points 17 and 18 above.

7 – Paragraphs 73 and 74.

8 – That was the approach taken by the Bundesgerichtshof in the cases which came before the Court of Justice as Joined Cases C-53/01 to C-55/01 Linde and Others [2003] ECR I-3161.

9 – See points 85 and 86 of my Opinion in Case C-104/00 P DKV v OHIM (Companyline) [2002] ECR I-7561.

10 – Case C-104/01 Libertel [2003] ECR I-3793.

11 – First Council Directive 89/104/EEC of 21 December 1988 to approximate the laws of the Member States relating to trade marks (OJ 1989 L 40, p. 1).

12 – Paragraphs 58 and 59.

13 – See the judgment of the Court of Justice in Case C-342/97 Lloyd Schuhfabrik Meyer [1999] ECR I-3819, paragraph 26.

14 – Joined Cases C-108/97 and C-109/97 Windsurfing Chiemsee [1999] ECR I-2779.

15 – Case C-383/99 [2001] ECR I-6251.

16 – See Case C-299/99 Philips [2002] ECR I-5475, paragraph 77.

17 – Libertel, cited in point 52 above, paragraph 54.

18 – At the hearing, the Office's lawyer put forward an interpretation capable of implying requirements of availability into Article 7(1)(b). It entails taking the view that signs such as basic shapes or colours do not attain a minimum degree of distinctiveness and must therefore remain available to all. However, as the lawyer himself admitted, that argument entails reversing the variables in the equation.

19 – See point 35 above.

20 – Given that factual data – obtained, for example, from expert reports or surveys of public opinion – although legitimate (see the judgment in *Windsurfing Chiemsee*, cited in paragraph 76 above, paragraph 53), may only be used as guidance (see the judgment in Case C-210/96 *Gut Springenheide and Tusky* [1998] ECR I-4657, paragraphs 31 to 36).
