

Court of Justice EC, 21 October 2004, KWS Saat v OHIM



TRADEMARK LAW

Different perception distinctive character categories of trademarks

- However, the Court of First Instance also correctly pointed out that the relevant public's perception is not necessarily the same in the case of a sign composed of a colour per se as it is in the case of a word or figurative mark, where the sign is independent of the appearance of the goods which it identifies. While the public is accustomed to perceiving word or figurative marks immediately as signs identifying the commercial origin of the goods, the same does not necessarily hold true where the sign forms part of the external appearance of the goods

So far as concerns the criteria governing appraisal of the distinctive character of the different categories of trade marks, the Court of First Instance correctly stated, in paragraph 29 of the judgment under appeal, that Article 7(1)(b) of Regulation No 40/94 does not draw any distinction between different types of sign.

Distinctive character colour marks

- In that context, a colour per se may acquire, for the goods or services in respect of which registration is sought, a distinctive character in consequence of the use which has been made of it, by virtue of Article 7(3) of Regulation No 40/94.
- By contrast, in the case of a colour per se, distinctiveness without any prior use is inconceivable save in exceptional circumstances, and particularly where the number of goods or services for which the mark is claimed is very restricted and the relevant market very specific

(see, in regard to the identical provisions of Article 3(1)(b) and (3) of Directive 89/104, Libertel, cited above, paragraphs 66 and 67).

It follows that the Court of First Instance did not apply a more stringent criterion for colour trade marks than for other marks and that, in taking the view that the mark in question did not have any distinctive character in regard to the goods for which its registration was being sought, the Court of First Instance did not err in law in relation to Article 7(1)(b) of Regulation No 40/94.

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Court of Justice EC, 21 October 2004

(...)

Judgment of the Court (Second Chamber)

21 October 2004 (1)

(Appeal – Community trade mark – Regulation (EC) No 40/94 – Absolute ground for refusal – Distinctive character – Colour per se – Orange colour)

In Case C-447/02 P,

APPEAL under Article 49 of the EC Statute of the Court of Justice,

lodged on 11 December 2002,

KWS Saat AG, established in Einbeck (Germany), represented by C. Rohnke, Rechtsanwalt,

with an address for service in Luxembourg,

appellant,

the other party to the proceedings being:

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

represented by D. Schennen and G. Schneider, acting as Agents,

defendant at first instance,

THE COURT (Second Chamber),

composed of: C.W.A. Timmermans, President of the Chamber, C. Gulmann, J.-P. Puissechet,

N. Colneric and J.N. Cunha Rodrigues (Rapporteur), Judges,

Advocate General: P. Léger,

Registrar: M. Múgica Arzamendi, Principal Administrator,

having regard to the written procedure and further to the hearing on 4 March 2004,

after hearing the Opinion of the Advocate General at the sitting on 19 May 2004,

gives the following

Judgment

1 By its appeal, KWS Saat AG ('KWS') seeks to have the judgment of the Court of First Instance of the European Communities (Second Chamber) of 9 October 2002 in Case T-173/00 KWS Saat v OHIM (shade of orange) [2002] ECR II-3843 ('the judgment under appeal') set aside in so far as that judgment did not uphold its application for registration of the colour orange as a Community trade mark for certain treatment installations for seeds and for certain agricultural, horticultural and forestry products.

The legal framework

2 Article 7(1)(b) of Council Regulation (EC) No 40/94 of 20 December 1993 on the Community trade mark (OJ 1994 L 11, p. 1) provides:

'The following shall not be registered:

...

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

3 Article 7(3) of the regulation provides:

'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.'

4 Article 73 of Regulation No 40/94 provides:

'Decisions of the Office shall state the reasons on which they are based. They shall be based only on reasons or evidence on which the parties concerned have

ad an opportunity to present their comments.’

5 Article 74 of the regulation provides:

‘1. In proceedings before it the Office shall examine the facts of its own motion; however, in proceedings relating to relative grounds for refusal of registration, the Office shall be restricted in this examination to the facts, evidence and arguments provided by the parties and the relief sought. 2. The Office may disregard facts or evidence which are not submitted in due time by the parties concerned.’

The facts of the dispute

6 KWS is a company which has its registered office in Germany.

7 On 17 March 1998 it filed an application for a Community trade mark at the Office for Harmonisation in the Internal Market (Trade Marks and Designs) (OHIM) (‘the Office’) under Regulation No 40/94.

8 The sign in respect of which registration was sought was the colour orange per se with standard reference HKS7.

9 The goods and services in respect of which registration of the sign was sought are in Classes 7, 11, 31 and 42 of the Nice Agreement of 15 June 1957 concerning the International Classification of Goods and Services for the Purposes of the Registration of Marks, as revised and amended, and correspond to the following descriptions:

- ‘Treatment installations for seeds, namely for the cleaning, dressing, pilling, calibration, treatment with an active agent, quality control and sifting of seeds’ (Class 7);
- ‘Installations for drying seeds’ (Class 11);
- ‘Agricultural, horticultural and forestry products’ (Class 31);
- ‘Technical and business consultancy in the area of plant cultivation, in particular in the seed sector’ (Class 42).

10 By a decision of 25 March 1999, the examiner of the Office refused KWS’s application on the ground that the mark applied for was not distinctive within the meaning of Article 7(1)(b) of Regulation No 40/94.

11 On 21 May 1999 KWS filed an appeal with the Office against that decision.

12 By a decision of 19 April 2000 (Case R 282/1999-2) (‘the contested decision’), which was served on KWS on 28 June 2000, the Second Board of Appeal of the Office dismissed the appeal. It took the view essentially that the mark claimed was devoid of any distinctive character within the meaning of Article 7(1)(b) of Regulation No 40/94.

13 Paragraphs 17 and 18 of the contested decision provide as follows:

‘17. ... It is clear from research carried out by the Board of Appeal that the colour indicated in the application is in no way original or even unusual within the sector in question.

18. It has for some time now been normal procedure for seed producers to dye their seeds with colorants. That procedure was established in order to indicate that the seeds have been treated (for example, with pesticides,

fungicides or herbicides). The result has been that there are even undertakings which manufacture colorants for seeds. One manufacturer thus advertises its products in the following terms:

“... Colorants identify treated seeds, as well as transgenic seeds ... Seed colorants identify treated seed, reducing mishandling of seed treated with active ingredients such as fungicide or insecticide. With the help of seed colorants and coatings, producers will feel confident that their seed investment is safe ...”
<http://www.bucolor.com/seeds/colorants.htm>’.

The judgment under appeal

14 By application lodged at the Registry of the Court of First Instance on 28 June 2000, KWS sought annulment of the contested decision on the basis of two pleas in law alleging breach of Article 7(1) (b) of Regulation No 40/94 and breach of Articles 73 and 74 of that regulation.

15 By the judgment under appeal, the Court of First Instance upheld in part the application brought by KWS.

16 With regard to the plea in law alleging breach of Article 7(1)(b) of Regulation No 40/94, the Court of First Instance held, in paragraph 33 of the judgment under appeal, that, with regard to agricultural, horticultural and forestry products in Class 31, and in particular seeds:

‘... the use of colours, including the shade of orange claimed or very similar shades, for those goods is not rare. The sign applied for will therefore not enable the relevant public immediately and with certitude to distinguish the applicant’s goods from those of other undertakings which are coloured other shades of orange.’

17 With regard to treatment installations in Classes 7 and 11, the Court of First Instance ruled as follows in paragraph 40 of the judgment under appeal:

‘... the Board of Appeal rightly stated, at paragraph 21 of the contested decision, that it is not rare to come across machines in that or a similar colour. It must be held that, being commonplace, the colour orange will not enable the relevant public to distinguish immediately and with certainty the applicant’s installations from machines in similar shades of orange with a different commercial origin. Rather, it will perceive the colour claimed as merely an element of the finish of the goods in question.’

18 By contrast, with regard to services in Class 42, the Court of First Instance concluded in paragraph 46 of its judgment that:

‘... the sign composed of the shade of orange per se is capable of enabling the relevant public to distinguish the services concerned from those of a different commercial origin when they come to make a choice on the occasion of a subsequent purchase.’

19 The Court of First Instance accordingly upheld the plea in law alleging breach of Article 7(1)(b) of Regulation No 40/94 with regard to services in Class 42. It rejected that plea in law with regard to agricultural, horticultural and forestry products in Class 31 and to treatment installations in Classes 7 and 11.

20 With regard to the plea in law alleging breach of Ar-

articles 73 and 74 of Regulation No 40/94, the Court of First Instance took the view, so far as Article 73 was concerned, that the Board of Appeal had complied with its obligation to state the reasons on which its decision was based.

21 In this connection, it ruled, in paragraph 56 of the judgment under appeal, that KWS had had the information necessary to comprehend the contested decision and to challenge its legality before the Community Courts.

22 The Court of First Instance also held, in paragraph 59 of the judgment under appeal, that the Board of Appeal had not infringed Article 73 of Regulation No 40/94 by not communicating to KWS the evidence used purely for the purposes of drawing up and justifying the contested decision, on the basis of grounds and reasoning with which KWS was already acquainted.

23 So far as Article 74 of Regulation No 40/94 is concerned, the Court of First Instance expressed the view, in the following terms, that the Board of Appeal had complied with its obligation to examine the facts of its own motion pursuant to that article:

‘60 ... the Board of Appeal did consider and make use of a number of pertinent facts in assessing the sign’s distinctive character in relation to the various goods and services referred to in the trade mark application. In that connection, the Office’s earlier analogous decisions or the examples taken from the internet are not a substitute for the reasoning in the contested decision nor do they constitute new evidence not examined by the Office of its own motion, but they are additional factors put forward by the Office in its pleadings to enable the legal basis of the contested decision to be reviewed.’

24 In those circumstances, the Court of First Instance dismissed in its entirety the plea in law alleging breach of Articles 73 and 74 of Regulation No 40/94.

25 The Court of First Instance ultimately annulled the contested decision in regard to services in Class 42, dismissed the remainder of the action and ordered KWS to bear its own costs and to pay two thirds of the costs incurred by the Office.

The forms of order sought by the parties

26 KWS claims that the Court should:

- set aside the judgment under appeal in so far as it dismisses KWS’s application;
- annul the contested decision in so far as it has not already been annulled by the judgment under appeal;
- order the Office to pay the costs.

27 The Office contends that the Court should:

- dismiss the appeal;
- order KWS to pay the costs.

The appeal

28 The Office submits as follows in its reply: ‘it would also have been necessary to refuse registration of the colour mark in question for the services claimed by the appellant and relating to consultancy in the area of plant cultivation. The Office is not challenging the judgment of the Court of First Instance in itself. That, however, need not prevent the Court of Justice from delivering a different ruling in regard to the protection

of colour marks lacking contours, or even not upholding the reasoning of the judgment under appeal.’

29 It follows from those submissions that the Office has expressly refrained from bringing a crossappeal seeking annulment of the judgment under appeal to the extent to which that judgment relates to the services in Class 42, even though it has doubts as to the soundness of the decision of the Court of First Instance in that regard.

30 The appeal brought before the Court, and consequently the present judgment, are therefore limited to the application for registration of a trade mark in respect of the goods in Classes 7, 11 and 31.

31 KWS puts forward four grounds in support of the appeal, as thus defined. The first ground alleges breach of Article 74(1) of Regulation No 40/94, providing for an examination of the facts by the Office of its own motion, the second alleges infringement of the right to a fair hearing, the third alleges breach of the obligation to state reasons, and the fourth alleges misconstruction of Article 7 (1)(b) of Regulation No 40/94 with regard to the requirement of distinctive character.

The first ground of appeal

32 By its first ground of appeal, KWS argues that, by limiting itself to stating, at paragraph 60 of the judgment under appeal, that the Board of Appeal did ‘consider and make use of a number of pertinent facts’, the Court of First Instance failed to take account of the requirement laid down in Article 74(1) of Regulation No 40/94, which provides that ‘the Office shall examine the facts of its own motion’. The Court of First Instance thus lost sight of the fact that it was necessary not only to determine whether facts had been examined but also for it to be satisfied that that examination had been sufficiently detailed. According to KWS, the examination carried out by the Office should have been sufficiently detailed to allow it to establish with certainty that there were grounds for refusal within the terms of Article 7 of that regulation.

33 Before it delivered its decision, KWS argues, the Office did not examine ‘a number of ... facts’ but rather ‘one single fact’. In paragraph 17 of the contested decision, the Board of Appeal referred to its ‘research’. As the sole result of that research, it referred, in paragraph 18 of that decision, to the internet site ‘www.bucolor.com’. That site is not sufficient to constitute grounds for its refusal, being the site of a single manufacturer. It does not suffice to establish a general usage, and is, moreover, the site of an American undertaking. The usages of the American market do not, in principle, constitute evidence of current usages within the territory of the Community. Finally, the front page of the site is written in English. It is for that reason not accessible to the relevant public within the Community.

34 By this first ground of appeal, KWS is in essence seeking to cast doubt on the appraisal of the facts made first by the Board of Appeal and subsequently by the Court of First Instance.

35 It follows from Article 225 EC and from Article 58

of the Statute of the Court of Justice that an appeal may be based only on grounds relating to breaches of rules of law, to the exclusion of any appraisal of the facts.

36 It follows that the first ground of appeal is inadmissible.

The second ground of appeal

37 By its second ground of appeal, KWS alleges that its right to a fair hearing was infringed in the proceedings before the Board of Appeal and in the proceedings before the Court of First Instance. This second ground of appeal thus consists of two limbs.

The first limb of the second ground of appeal

38 By the first limb of the second ground of appeal, KWS submits that, with regard to the facts, the Office based the contested decision on a single document, that is to say, the internet address mentioned at paragraph 18 of the contested decision and reproduced in paragraph 13 of the present judgment. The Office mentioned that reference to KWS for the first time in the contested decision, that is to say, at the conclusion of the proceedings conducted before it. The Office thus infringed KWS's right to a fair hearing.

39 Instead of noting that infringement, the Court of First Instance examined solely the question whether the documents were indispensable for understanding the contested decision. The Court of First Instance also erred in ruling, in paragraph 58 of the judgment under appeal, that 'the applicant was essentially aware of the arguments and facts which were going to be examined by the Board of Appeal for the purposes of determining whether to set aside or uphold the examiner's decision, and did therefore have an opportunity to state its views'.

40 KWS further submits that this breach of its right to a fair hearing by the Board of Appeal deprived it of the option, during the proceedings before that board, of restricting the list of goods for which registration of the mark was being sought and thereby ensuring that its application would be granted.

41 According to the second sentence of Article 73 of Regulation No 40/94, decisions of the Office may be based only on reasons or evidence on which the parties concerned have had an opportunity to present their comments.

42 In accordance with that provision, a Board of Appeal of the Office may base its decision only on matters of fact or of law on which the parties have been able to set out their views. 43 Consequently, in the case in which the Board of Appeal assembles of its own motion facts intended to serve as a basis for its decision, it is under an obligation to notify the parties of those facts in order that the parties may submit their views thereon.

44 In the present case, it is clear from the documents on the case-file that the Board of Appeal did not forward to KWS either the result of its research or the contents of the internet site mentioned in paragraphs 17 and 18 respectively of the contested decision.

45 The Board of Appeal thereby infringed the second sentence of Article 73 of Regulation No 40/94. 46 In this regard, the Court of First Instance erred in law in

ruling, at paragraph 59 of the judgment under appeal, that the Board of Appeal had not infringed Article 73 of Regulation No 40/94.

47 It is, however, necessary to point out that, in paragraphs 14 to 16 of the contested decision, the Board of Appeal, adopting the decision of the examiner, took the view that the colour in question did not have a distinctive character for the goods in question. A colour, in itself, does not in principle have a distinctive character, unless it has acquired such a character in consequence of use, and the colour orange is a very common colour for those goods. Furthermore, the appellant's competitors might also have an interest in using that colour.

48 Those grounds, on which KWS could have set out its position, were sufficient to justify dismissal of the application by the Board of Appeal.

49 The finding in paragraph 17 of the contested decision and resulting from the research of the Board of Appeal, to the effect that the colour in respect of which registration was sought was in no way unusual within the trade sector in question, merely confirms grounds which were already sufficient to justify that decision. Likewise, the finding contained in paragraph 18 of the contested decision and illustrated by an extract from an internet site, stating that producers colour their seeds to indicate that they have been treated, is merely confirmatory in character.

50 It follows that the illegality which vitiates paragraphs 17 and 18 of the contested decision in regard to the second sentence of Article 73 of Regulation No 40/94 cannot result in the annulment of that decision.

51 There are accordingly no grounds for setting aside the judgment under appeal in that regard, notwithstanding the error of law vitiating paragraph 59 thereof (see, in this connection, Joined Cases C-74/00 P and C-75/00 P Falck and Acciaierie di Bolzano v Commission [2002] ECR I-7869, paragraph 122; Case C-93/02 P Biret International v Council [2003] ECR I-10497, paragraph 60; and Case C-94/02 P Biret et Cie v Council [2003] ECR I-10565, paragraph 63).

52 That conclusion is not altered by the argument that KWS was deprived of the option, at the time of the proceedings before the Board of Appeal, of restricting the list of goods in respect of which registration of the mark was sought. KWS could at any time have requested the Office to restrict the list of goods and services, pursuant to Article 44 of Regulation No 40/94 and Rule 13 of Commission Regulation (EC) No 2868/95 of 13 December 1995 implementing Regulation No 40/94 (OJ 1995 L 303, p. 1). The fact that, throughout the entire proceedings before the Office, KWS did not submit any such request must be attributed to KWS's own choice and not to any failure on the part of the Board of Appeal to allow KWS to set out its views on the internet site referred to in the contested decision. Further, there is nothing on the case-file to justify the assumption that a restriction of the list of the goods in question would have resulted in registration of the mark requested.

53 It follows that the first limb of the second ground of appeal must be rejected as being inoperative. The sec-

ond limb of the second ground of appeal

54 By the second limb of the second ground of appeal, KWS submits that the Court of First Instance failed to take account of its arguments relating to the abovementioned internet site. The Court of First Instance, it claims, itself infringed KWS's right to a fair hearing. KWS was thus deprived of the option, at the time of the proceedings before the Court of First Instance, of restricting the list of the goods for which registration of the mark was requested, in a situation in which that restriction would probably have made such registration possible.

55 In paragraph 49 of the judgment under appeal, the Court of First Instance expressly summarised the argument of KWS that it was deprived of its right to be heard. That summary mentions in particular KWS's allegation that the documents on which the Office based itself for the purpose of taking its decision were not communicated to it.

56 In paragraphs 58 and 59 of the judgment under appeal, the Court of First Instance ruled on that argument and provided express reasons for its position. Even if, as has been established in paragraph 46 of the present judgment, its legal analysis was incorrect, it is clear from that reasoning that the Court of First Instance heard in full the assertions made by KWS.

57 It follows that the Court of First Instance did not infringe the right of KWS to put its case during the judicial proceedings.

58 The fact that the Court of First Instance did not infringe KWS's right to put its case undermines entirely the argument that such an infringement had the result of depriving KWS of the option, at the time of the proceedings before the Court of First Instance, of restricting the list of the goods in respect of which registration of the mark was sought. In any event, the Court of First Instance acted correctly in law in ruling, in paragraph 14 of the judgment under appeal, that the application made by KWS during the hearing before the Court of First Instance to have the list of goods restricted was inadmissible. An application of that kind does not correspond to the rules laid down in Regulations Nos 40/94 and 2868/95 and would be liable to change the subject-matter of the proceedings, contrary to Article 135(4) of the Rules of Procedure of the Court of First Instance.

59 The second limb of the second ground of appeal must therefore be rejected as being unfounded.

60 The second ground of appeal must accordingly be rejected in its entirety.

The third ground of appeal

61 By its third ground of appeal, KWS alleges breach, by the Court of First Instance in the judgment under appeal and by the Board of Appeal in the contested decision, of the obligation to state reasons. This ground of appeal thus consists of two limbs.

The first limb of the third ground of appeal

62 By the first limb of the third ground of appeal, KWS submits that the Court of First Instance erred in law in ruling, in the judgment under appeal, that the contested decision was adequately reasoned. The Court of First

Instance, it claims, significantly underestimated the requirement that reasons be stated.

63 The first sentence of Article 73 of Regulation No 40/94 provides that '[d]ecisions of the Office shall state the reasons on which they are based'.

64 The obligation to state reasons, as thus laid down, has the same scope as that which derives from Article 253 EC.

65 It is settled case-law that the statement of reasons required by Article 253 EC must disclose in a clear and unequivocal manner the reasoning followed by the institution which adopted the measure in question in such a way as to enable the persons concerned to ascertain the reasons for the measure and to enable the competent Community Court to exercise its power of review. It is not necessary for the reasoning to go into all the relevant facts and points of law, since the question whether the statement of reasons meets the requirements of Article 253 EC must be assessed with regard not only to its wording but also to its context and to all the legal rules governing the matter in question (see, in this connection, Case C-367/95 P Commission v Sytraval and Brink's France [1998] ECR I-1719, paragraph 63, and Case C-265/97 P VBA v Florimex and Others [2000] ECR I-2061, paragraph 93).

66 In the present case, the Board of Appeal rejected the application for registration on the ground that the mark in respect of which registration was being sought did not have a distinctive character within the terms of Article 7(1)(b) of Regulation No 40/94.

67 The Board of Appeal provided a full and precise statement of reasons for that appraisal in paragraphs 14 to 25 of the contested decision.

68 It first stated, on the one hand, that a colour does not in itself have a distinctive character, unless it can be demonstrated that it has acquired such a character by use and, on the other, that colours must remain available to all undertakings. According to the Board of Appeal, it is therefore only under certain circumstances that a colour will in itself be recognised as having a distinctive character per se, on condition that the colour in question is one that is entirely unusual in regard to the goods or services concerned. The Board of Appeal then went on to set out, in detail, the reasons why the colour orange is not unusual in regard to the goods to which the application for registration related. It added that it was not bound by the decisions on trade marks by the competent German authorities, which were cited by KWS. The Board of Appeal concluded by pointing out that KWS had not contended that the colour in issue had acquired a distinctive character in consequence of use under Article 7(3) of Regulation No 40/94.

69 There can be no doubt that such a statement of reasons satisfies the requirement laid down by the first sentence of Article 73 of Regulation No 40/94. The Court of First Instance therefore did not err in law in ruling that KWS had had at its disposal the material necessary to enable it to understand the contested decision and to challenge its legality before the Community Courts.

70 The first limb of the third ground of appeal must ac-

cordingly be rejected as being unfounded. The second limb of the third ground of appeal

71 By the second limb of the third ground of appeal, KWS submits that the Court of First Instance breached its duty to state reasons by merely ruling, at paragraph 56 of the judgment under appeal, that the contested decision 'enables the applicant to take cognisance of the reasons why its application for registration was refused'.

72 A reading of paragraph 56 of the judgment under appeal makes it clear that this paragraph summarises the elements of the contested decision which the Court of First Instance considered to be crucial and sets out the reasons why it took the view that those elements were sufficient. It was at the conclusion of that summary and exposition that the Court of First Instance held, in the final sentence of paragraph 56, that KWS had had all the information necessary to comprehend the contested decision and to challenge its legality before the Community Courts.

73 It follows that this paragraph of the judgment under appeal is adequately reasoned.

74 The second limb of the third ground of appeal is therefore unfounded.

75 The third ground of appeal must accordingly be rejected in its entirety.

The fourth ground of appeal

76 By its fourth ground of appeal, KWS submits that the distinctive character of trade marks consisting of one colour must be assessed according to the same principles as the distinctive character of other types of trade marks, in particular word and figurative marks, and that more stringent requirements must not be imposed. It is largely irrelevant whether there are, for the goods and services requested, other colours serving to indicate certain characteristics. By contrast, it is necessary to examine whether the colour requested in the specific case is perceived by the public as indicating certain characteristics. In the case where several producers use different colours to indicate particular characteristics, the public will at the same time see in those colours information pertaining to the producer. The existence of a distinctive character would then have to be acknowledged. In the present case, the colour orange is not regarded by the relevant sector as indicating characteristics for the goods and services in question and a use for decorative or functional purposes is out of the question. The distinctive character of the mark must for those reasons be recognised.

77 In the judgment under appeal, KWS continues, the Court of First Instance committed the following errors of appraisal. First, it applied a more stringent criterion for colour trade marks than for other marks. Second, it erred in regard to the criterion of distinctive character, which is solely the capacity to indicate commercial origin. Finally, it substituted its own appraisal for that of the relevant sector.

78 So far as concerns the criteria governing appraisal of the distinctive character of the different categories of trade marks, the Court of First Instance correctly stated, in paragraph 29 of the judgment under appeal, that Ar-

article 7(1)(b) of Regulation No 40/94 does not draw any distinction between different types of sign. However, the Court of First Instance also correctly pointed out that the relevant public's perception is not necessarily the same in the case of a sign composed of a colour per se as it is in the case of a word or figurative mark, where the sign is independent of the appearance of the goods which it identifies. While the public is accustomed to perceiving word or figurative marks immediately as signs identifying the commercial origin of the goods, the same does not necessarily hold true where the sign forms part of the external appearance of the goods (see, with regard to the identical provisions of 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), [Case C-104/01 Libertel \[2003\]](#) ECR I-3793, paragraph 65).

79 In that context, a colour per se may acquire, for the goods or services in respect of which registration is sought, a distinctive character in consequence of the use which has been made of it, by virtue of Article 7(3) of Regulation No 40/94. By contrast, in the case of a colour per se, distinctiveness without any prior use is inconceivable save in exceptional circumstances, and particularly where the number of goods or services for which the mark is claimed is very restricted and the relevant market very specific (see, in regard to the identical provisions of Article 3(1)(b) and (3) of Directive 89/104, [Libertel](#), cited above, paragraphs 66 and 67).

80 With regard to the treatment installations in Classes 7 and 11, the Court of First Instance stated, in paragraphs 39 and 40 of the judgment under appeal, that KWS had not pleaded any factors on the basis of which it was possible to create a category of goods for which certain colours were not commonly used and that it was not rare to come across machines that have the colour applied for or a similar colour.

81 With regard to agricultural, horticultural and forestry products in Class 31, the Court of First Instance found, in paragraph 33 of the judgment under appeal, that the use of colours for those goods, including the shade of orange claimed or very similar shades, is not rare.

82 It follows that the Court of First Instance did not apply a more stringent criterion for colour trade marks than for other marks and that, in taking the view that the mark in question did not have any distinctive character in regard to the goods for which its registration was being sought, the Court of First Instance did not err in law in relation to Article 7(1)(b) of Regulation No 40/94.

83 To that extent, the fourth ground of appeal must be rejected as being unfounded.

84 With regard to the question of the accuracy of the findings of the Court of First Instance in regard to the perception which the relevant public has of the use of the colours on the goods in question, it must be pointed out that this involves appraisals that are factual in nature.

85 It follows from Article 225 EC and from Article 58

of the Statute of the Court of Justice that an appeal may be based only on grounds relating to breaches of rules of law, to the exclusion of any appraisal of the facts.

86 It follows that, in so far as it brings into question the findings of the Court of First Instance concerning the perception of the relevant public, the fourth ground of appeal is inadmissible.

87 The fourth ground of appeal must accordingly be rejected in its entirety.

88 As none of the grounds of appeal raised by KWS has been upheld, the appeal must be dismissed.

Costs

89 Under Article 69(2) of the Rules of Procedure, which is applicable to appeals by virtue of Article 118 thereof, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. As the Office has applied for costs to be awarded against KWS, and as the latter has been unsuccessful in its submissions, KWS must be ordered to bear the costs.

On those grounds, the Court (Second Chamber) hereby:

1. dismisses the appeal;
2. orders KWS Saat AG to pay the costs.

Signatures.

Opinion of Advocate General Léger

delivered on 19 May 2004 (1)

Case C-447/02 P

KWS Saat AG

v

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

(Appeal – Community trade mark – Regulation (EC) No 40/94 – Trade mark composed of a colour per se (shade of orange) – Distinctive character – Obligation to state reasons – Right to a hearing)

1. This appeal has as its background an application to register a colour per se as a Community trade mark. It was brought by KWS Saat AG (2) against the judgment of the Court of First Instance of the European Communities of 9 October 2002 in *KWS Saat v OHIM* (shade of orange). (3) By that judgment, the Court of First Instance partially dismissed the action brought by KWS against the decision of the Second Board of Appeal of the Office for Harmonisation in the Internal Market (Trade Marks and Designs) (OHIM), (4) delivered on 19 April 2000 (Case R 282/1999-2), rejecting its application to register the colour orange per se as a Community trade mark for goods and services in connection, principally, with agricultural seeds. (5)

2. This case will therefore require the Court of Justice to re-examine the issue of the registration of a colour per se as a trade mark, on which it gave a ruling, subsequent to the contested judgment, in the context of First Council Directive 89/104/EEC, (6) in its judgment of 6 May 2003 in *Libertel*, (7) and which it also has to address in *Heidelberger Bauchemie*. (8)

I – Legal framework

3. The substantive and procedural rules concerning the

registration of a Community trade mark which are relevant to this case are laid down in Council Regulation (EC) No 40/94. (9)

4. Article 4 of the regulation defines the signs of which a Community trade mark may consist. Under that article, 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'.

5. Article 7(1) and (3) of the regulation concerns absolute grounds for refusal. It provides:

'1. The following shall not be registered:...

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

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.'

6. Articles 73 and 74 of the regulation fall under Title IX, concerning procedure. Article 73, which deals with the statement of reasons on which decisions are based, provides that '[d]ecisions of the Office shall state the reasons on which they are based' and that '[t]hey shall be based only on reasons or evidence on which the parties concerned have had an opportunity to present their comments'.

7. Article 74(1) of the regulation states that '[i]n proceedings before it the Office shall examine the facts of its own motion; however, in proceedings relating to relative grounds for refusal of registration, the Office shall be restricted in this examination to the facts, evidence and arguments provided by the parties and the relief sought'.

II – Facts and proceedings

8. On 17 March 1998, KWS applied to the Office to register the colour orange per se as a Community trade mark. That application was formalised, in the space on the registration form for entering a representation of the trade mark, by an orange rectangle and, in the section provided for a description of it, by the entry 'Orange (HKS7)'.

9. The registration at issue was sought in respect of goods and services in Classes 7, 11 and 31 of the Nice Agreement, (10) as regards the goods, and in Class 42 thereof, as regards the services. They corresponded to the following descriptions:

– 'Treatment installations for seeds, namely for the cleaning, dressing, pilling, calibration, treatment with an active agent, quality control and sifting of seeds' (Class 7);

– 'Installations for drying seeds' (Class 11);

– 'Agricultural, horticultural and forestry products' (included in Class 31); and

– 'Technical and business consultancy in the area of plant cultivation, in particular in the seed sector' (Class 42).

10. By decision of 25 March 1999, the examiner at the

Office refused KWS's application on the ground that, in relation to the goods and services concerned, the colour orange per se was devoid of any distinctive character within the meaning of Article 7(1)(b) of the regulation.

11. By the contested decision of 19 April 2000, the Second Board of Appeal of the Office dismissed the appeal brought by KWS and confirmed that the application for registration fell foul of the absolute ground for refusal laid down in Article 7(1)(b) of the regulation.

12. KWS brought an action for the annulment of that decision by an application lodged at the Registry of the Court of First Instance on 28 June 2000.

III – The contested judgment

13. In support of its application, KWS advanced two pleas in law alleging, first, infringement of Article 7(1)(b) of the regulation and, second, failure to take into account Articles 73 and 74 of that regulation.

A – The first plea alleging infringement of Article 7(1)(b) of the regulation

14. KWS argued that seed manufacturers colour their goods in order to differentiate them from those of their competitors, that the colours usually used are shades of blue, yellow or red, rather than orange, and that the shade of orange which it had applied to register would therefore be perceived immediately as an indication of origin. Consequently, contrary to the view taken by the Board of Appeal, it is not necessary that that colour be kept free for competitors, since it is unusual in the sector concerned. KWS argued that the usual colour used for treatment installations for seeds is red and that such installations are distinct from agricultural machinery in general. (11)

15. In its findings, the Court of First Instance stated, first of all, that 'colours or colour combinations per se may constitute a Community trade mark in so far as they are capable of distinguishing the goods or services of one undertaking from those of another'. (12)

16. It explained that, none the less, the fact that a sign is, in general, capable of constituting a trade mark does not mean that signs belonging to that category necessarily have a distinctive character for the purposes of Article 7(1)(b) of the regulation, and that such distinctive character can be assessed only by reference, first, to the goods or services in respect of which registration is sought and, secondly, to the relevant public's perception of that sign. (13)

17. The Court of First Instance observed, next, that, while Article 7(1)(b) of the regulation does not draw any distinction between different types of sign, the 'relevant public's perception is not necessarily the same in the case of a sign composed of a colour or colour combination per se as it is in the case of a word or figurative mark, where the sign is independent of the appearance of the goods which it identifies. While the public is accustomed to perceiving word or figurative marks immediately as signs identifying the commercial origin of the goods, the same is not necessarily true where the sign forms part of the external appearance of the goods or where the sign is composed merely of a

colour or colours used to signal services'. (14)

18. It pointed out that, in this case, the relevant public was a particular sector of the public which is more knowledgeable and attentive than the general public but which does not specialise in each of the goods concerned. (15)

19. With regard to agricultural, horticultural and forestry products in Class 31, and especially seeds, which were the goods mentioned in particular by the applicant, the Court of First Instance stated that the relevant public was able to perceive their colour as an indication of origin because it is different from their natural colour, particularly since their size makes it impossible to affix a word or figurative mark to them and since the fact that they are intended for planting in the earth means that the relevant public will not be led to think that that colour has any decorative function. (16)

20. The Court of First Instance went on to say:

'33 None the less, as the Board of Appeal found at paragraph 18 of the contested decision, the use of colours, including the shade of orange claimed or very similar shades, for those goods is not rare. The sign applied for will therefore not enable the relevant public immediately and with certitude to distinguish the applicant's goods from those of other undertakings which are coloured other shades of orange.

34 Further, even if the colour is not usual for certain categories of seed, such as maize or beet which were mentioned by the applicant at the hearing, it must be observed that other colours are also used by some undertakings to indicate that seeds have been treated.

35 In that regard it must be observed that, as was pointed out at paragraph 31 above, the relevant public has a degree of knowledge that is at least sufficient for it not to be unaware that seed colour may, amongst other things, indicate that seeds have been treated. In such cases, as the Board of Appeal pointed out, the relevant public will not perceive the colour claimed as an indication of the commercial origin of the seeds concerned.

36 That conclusion cannot be gainsaid by the applicant's argument that, as far as its goods are concerned, the colour claimed has no technical function for the purposes of seed preparation.

37 Given the general use of colours for technical purposes in the sector concerned, the relevant public cannot immediately disregard the possibility that the use of orange is or may be intended to indicate that the seeds have been treated. If it has no prior knowledge, the relevant public cannot infer that the orange colour applied for indicates the commercial origin of the seeds.

38 The trade mark application is, moreover, not limited to sugar beet and maize seeds and must therefore be assessed by reference to seeds in general, a category mentioned as an example of the agricultural products at issue in the trade mark application, and not by reference to the seeds of a particular specifically-designated species.'

21. As regards treatment installations in Classes 7 and 11, the Court of First Instance considered that these goods fall within the general category of agricultural

machinery, that the applicant did not plead any factors capable of demonstrating that such installations fall within a special category of machinery for which colours are not commonly used and that the relevant public is therefore the average consumer of all agricultural machinery. (17)

22. From this it inferred the following:

‘40 In the light of those considerations, the Board of Appeal rightly stated, at paragraph 21 of the contested decision, that it is not rare to come across machines in that or a similar colour. It must be held that, being commonplace, the colour orange will not enable the relevant public to distinguish immediately and with certainty the applicant’s installations from machines in similar shades of orange with a different commercial origin. Rather, it will perceive the colour claimed as merely an element of the finish of the goods in question.’

23. As regards the services, the Court of First Instance held, first, that a colour does not attach to the service itself, services by nature having no colour, nor does it confer any substantive value, so that the relevant public can distinguish between use of a colour as mere decoration and its use as an indication of the commercial origin of the service. (18) Secondly, it considered that, in so far as it has not been established that the colour at issue fulfils other functions, it could be easily and instantly memorable to the relevant public as a distinctive sign for the services specified. Lastly, it held that, since that colour was a specific shade, many colours remained available for identical or similar services. It inferred from this that the colour at issue was capable of enabling the relevant public to distinguish the services concerned from those of a different commercial origin. (19)

24. The Court of First Instance concluded that the plea alleging infringement of Article 7(1)(b) of the regulation was to be upheld in relation to the services but dismissed in regard to all the products.

B – The second plea alleging infringement of Articles 73 and 74 of the regulation

25. The Court of First Instance set out the applicant’s arguments as follows:

‘48 The applicant argues that Article 73 of Regulation No 40/94 requires the Office to state the reasons on which its decisions are based. That obligation is intended to compel the Office to draw up its decisions with due care on the basis of factual research.

49 The applicant argues that the evidence on which the Office’s decision was based was not communicated to it, making it impossible to verify the accuracy of the Office’s research, to comprehend the reasoning underlying the decision and the merits thereof and, if appropriate, to contest its conclusions. The applicant considers that it was thereby deprived of its right to a hearing, and of the option of restricting the list of goods and services in the application.

50 Furthermore, the applicant states that any decision must, under Article 74(1) of Regulation No 40/94, be based on specific facts. The existence in this case of decisions similar to the contested decision does not re-

move the requirement to give reasons.’

26. In its findings, the Court of First Instance observed, first of all, that the Office’s obligation to state the reasons on which its decisions are based is laid down in the first sentence of Article 73 of the regulation and that the statement of reasons must enable the applicant, if need be, to take cognisance of the reasons for refusing its application for registration and to challenge the contested decision effectively.

(20) It considered that the contested decision contained the information necessary to enable the applicant to understand it and challenge its legality. (21)

27. Secondly, the Court of First Instance stated that, under Article 73 of the regulation, decisions of the Office are to be based only on reasons or evidence on which the parties concerned have had an opportunity to present their comments. It considers, however, that the evidence which was not communicated to the applicant was not crucial for it to understand the contested decision and, if need be, exercise its right to restrict the list of goods and services specified. It found that, in the light of the grounds of appeal submitted to the Board of Appeal, the applicant was essentially aware of the arguments and facts which were going to be examined by the Board of Appeal for the purposes of determining whether to set aside or uphold the examiner’s decision, and had therefore had an opportunity to state its views. It inferred from this that the Board of Appeal had not infringed Article 73 of the regulation. (22) Conclusions 28. Lastly, as regards the Office’s obligation to examine the facts of its own motion pursuant to Article 74(1) of the regulation, the Court of First Instance found that the Board of Appeal had indeed considered and made use of a number of pertinent facts in assessing the distinctive character of the sign at issue in relation to the goods and services referred to in the application for registration. (23)

29. In conclusion, the Court of First Instance annulled the contested decision in regard to the services in Class 42 and dismissed the remainder of the action.

IV – The proceedings before the Court of Justice and the forms of order sought by the parties

30. By application lodged at the Court Registry on 11 December 2002, KWS brought an appeal against the contested judgment. The Office submitted its response to the Court on 3 March 2003. A reply and rejoinder were deemed unnecessary, in accordance with Article 117 of the Court’s Rules of Procedure. Nevertheless, the parties made their oral observations at the hearing on 4 March 2004. During that hearing, they were able to express their views on the conclusions to be drawn in the context of this appeal from the judgment in *Libertel*.

31. KWS claims that the Court should:

- set aside the contested judgment in so far as it dismisses the action;
- annul the contested decision in so far as it has not already been annulled by the contested judgment; and
- order the defendant to pay the costs.

32. Although the Office states in its response (24) that the action should have been dismissed by the Court of

First Instance in regard to the services also, it has not brought a cross-appeal. It contends that the Court should:

- dismiss the appeal; and
- order the appellant to pay the costs.

V – The appeal

33. In support of its appeal, the appellant advances several pleas alleging infringement, first, of the obligation to state reasons, secondly, of the right to a hearing, thirdly, of Article 74 of the regulation, concerning the Office's examination of the facts of its own motion, and, fourthly, of Article 7(1)(b) of the regulation. I shall examine each of these pleas in the order in which I have cited them.

A – Infringement of the obligation to state reasons

1. Arguments of the parties

34. Under this plea, KWS first accuses the Court of First Instance of having failed to take into account the provisions of the first sentence of Article 73 of the regulation, under which decisions of the Office are to state the reasons on which they are based. It argues that, pursuant to that obligation, the Office must not confine itself to a purely formulaic statement of reasons but must analyse the substance of all the relevant factors. The Court of First Instance thus underestimated the extent of such an obligation. According to KWS, the contested decision concerned fundamental intellectual property law and it was therefore very much in the appellant's interests that the reasons for that decision should be comprehensible, as the context of that decision was entirely unhelpful in that regard. As regards seeds, KWS argues that the Office based the decision solely on an extract taken from the website of a seed colourants manufacturer, which does not constitute a sufficient basis on which to find that the colour at issue does not have any distinctive character, and did not take into account the passages on that site which supported registration. Similarly, with regard to the colour of the machinery, the Office made a bald assertion without first establishing the facts.

35. Secondly, KWS also complains that the Court of First Instance itself infringed its obligation to state reasons. It thus accuses the Court of having failed to give reasons for its finding, at paragraph 56 of the contested judgment, that the contested decision enabled the appellant to take cognisance of the reasons why its application for registration was refused.

36. The Office maintains that those complaints, like all the other procedural pleas, are inadmissible because they are intended exclusively to obtain a new examination of the application lodged with the Court of First Instance. In the alternative, the Office submits that they are unfounded because the contested judgment adequately stated the reasons on which it was based and the Court of First Instance was right to hold that the contested decision contained the essential considerations on which it had been taken.

2. Findings

37. The arguments advanced by the appellant under the plea in law alleging infringement of the obligation to state reasons can in fact be broken down into two sepa-

rate pleas. First, the argument that the Court of First Instance itself failed to have regard to the obligation to give reasons for the contested judgment relates to the formal requirement to state the reasons on which that judgment was based. It is founded not on the first sentence of Article 73 of the regulation, as the appellant states in the appeal, but on the provisions contained in Article 36 of the Statute of the Court of Justice, which provides that judgments are to state the reasons on which they are based and which is applicable to the Court of First Instance under Article 53 of that Statute.

38. Under that plea, the appellant accuses the Court of First Instance of not having given reasons for the assertion, contained in paragraph 56 of the contested judgment, that '[t]he applicant ... had all the information necessary to comprehend the contested decision and to challenge its legality before the Community courts'. That complaint is unfounded. It is clear from paragraph 56 itself that the Court of First Instance preceded that assertion with a summary of the content of the contested decision and explained why it considered the information in that decision, as reproduced, to be sufficient to enable the appellant to take cognisance of the reasons why its application for registration had been refused in regard to each of the categories of goods and services referred to in that application.

39. In a second plea, KWS then accuses the Court of First Instance of having committed an error of law in finding, in the contested judgment, that sufficient reasons were given for the contested decision. It is settled case-law that the assessment by the Court of First Instance of the extent of the obligation to state the reasons on which the contested decision before it was based is a question of law reviewable by the Court on appeal. (25) However, I share the Office's view that that complaint is also unfounded.

40. It should be recalled that, under the first sentence of Article 73 of the regulation, '[d]ecisions of the Office shall state the reasons on which they are based'. That article thus transposes to the Office the obligation to state reasons which Article 253 EC lays down in respect of any legislative act of Community law. I see no reason to believe that the extent of the obligation to state reasons thus set out in Article 73 of the regulation should be different from that laid down in Article 253 EC. In this connection, it is settled case-law that the statement of reasons required by Article 253 EC must be appropriate to the act at issue and must disclose in a clear and unequivocal fashion the reasoning followed by the institution which adopted the measure in question in such a way as to enable the persons concerned to ascertain the reasons for the measure and to enable the competent Community court to exercise its power of review. The requirement to state reasons must be evaluated according to the circumstances of each case, in particular the content of the measure in question, the nature of the reasons given and the interest which the addressees of the measure, or other parties to whom it is of direct and individual concern, may have in obtaining explanations. It is not necessary for the reasoning to go into all the relevant facts and points of law, since the

question whether the statement of reasons meets the requirements of Article 253 EC must be assessed with regard not only to its wording but also to its context and to all the legal rules governing the matter in question. (26)

41. In the case of an Office decision rejecting an application for registration, compliance with the conditions set out above means that that decision must clearly set out the ground or grounds for refusal, as provided for by the regulation, on which the rejection is based and the reasons why that or those grounds applies / apply in regard to each of the categories of goods and services in respect of which registration of the trade mark is sought. The question whether the reasons thus given are sufficient to meet the twofold objective of the obligation to state reasons, that is to say to enable the applicant to ascertain the reasons for the rejection of his application and to enable the Community court to exercise its power of review as to the decision's legality, must be evaluated according to the circumstances of each case, in particular in the light of the exchanges between the applicant and the Office, the trade mark at issue and the goods and services in respect of which its registration is sought. It is by reference to those considerations that it is necessary to examine whether, in this case, the Court of First Instance was right to hold that the contested decision did not infringe the obligation to state reasons laid down by Article 73 of the regulation.

42. The contested decision shows that the Board of Appeal stated that the application for registration fell foul of Article 7(1)(b) of the regulation. (27) The Board of Appeal also set out the reasons why that absolute ground for refusal is applicable in this case. It referred, first of all, to general considerations. First, a colour per se does not have distinctive character unless it has been demonstrated that it has acquired such character through usage and, secondly, colours must be kept free for all undertakings. According to the Board of Appeal, a colour per se may therefore be recognised as having distinctive character in itself only in certain circumstances. (28)

43. The Board of Appeal went on to explain why such specific circumstances are not present in this case in regard to the goods to which the application for registration relates. Thus, the colour at issue, which is by nature a commonly found 'basic colour', in the shade in which it is claimed or in very similar shades, is not unusual as far as those goods are concerned. (29) The Board of Appeal pointed out, with respect to seeds, that seed manufacturers have for some time coloured goods of this type to indicate that they have been treated. By way of example, it cited an extract from a text posted on the website of a seed colourants manufacturer. The Board of Appeal stated that the colours used in that sector also include orange and that, in the light of those considerations, such a colour would be perceived by the relevant customers as an indication not of the origin of the product but of the fact that the seeds concerned had been treated. (30) As regards the treatment installations for seeds, it pointed out that, as the examiner found, it is not rare to come across machines in that

colour. (31)

44. Lastly, the Board of Appeal pointed out that the appellant's competitors have an interest in also being able to use that colour, that the decisions of the German authorities competent in the field, as relied on by the appellant, are not binding on the Office and that the appellant did not contend that the colour at issue had acquired distinctive character through usage. (32)

45. In the light of all those factors, it is my view that the reasons given for the contested decision were sufficient to enable the appellant to understand the legal and factual grounds on which its application to register the colour orange per se in respect of each of the categories of goods concerned had been rejected and to enable the Court of First Instance to exercise its power to review the legality of that decision. The Court of First Instance did not therefore commit an error of law by holding that the statement of reasons for the contested decision complied with the requirements laid down in Article 73 of the regulation.

46. That is why, in my opinion, the pleas in law alleging infringement of the obligation to state reasons must be dismissed as unfounded.

B – Infringement of the right to a hearing

1. Arguments of the parties

47. KWS maintains that, in this case, the Board of Appeal based the contested decision on a single document, namely an extract taken from the website of a seed colourants manufacturer, and that that information was not mentioned for the first time until that decision. The Board of Appeal therefore committed an infringement of the right to a hearing. However, the Court of First Instance did not establish that infringement and took into account only whether the evidence was crucial for KWS to understand the contested decision. It also wrongly held that the appellant was essentially aware of the facts which were going to be examined by the Board of Appeal and had therefore had an opportunity to state its views. The Court of First Instance thus failed to comply with the rule that the authority which takes the disputed decision must give the party concerned the opportunity to present its comments on all the factors which may have a bearing on the substance of that decision, and the fact that, in order for there to be an infringement of the right to a hearing, it is sufficient that a different decision would merely have been possible if that infringement had not occurred.

48. KWS also maintains that, if that document had been communicated to it, it would have been able to make known its observations on its content. In particular, it would have been able to point out that, on the website in question, it was explained that the colour of seeds was perceived as an indication of origin.

49. Furthermore, the Court of First Instance failed to reproduce that argument in the contested judgment, with the result that it too infringed the right to a hearing. The appellant maintains that those infringements by the Board of Appeal and the Court of First Instance deprived it of the possibility of restricting the list of products referred to in its application for registration to seeds and thus of ensuring that its application was

granted.

50. In its defence, the Office states that the Court of First Instance did not infringe the appellant's right to a hearing because the appellant had an opportunity to put forward all its arguments, in particular in its reply. It then contends that the reference in the contested decision to the website of a seed colourants manufacturer does not constitute the grounds for that decision but is merely a factor intended to corroborate it. Moreover, the contested decision would not have been different if the appellant had reduced the list of products referred to in its application for registration.

2. Findings

51. The arguments advanced by the appellant under the plea in law alleging infringement of the right to a hearing can likewise be broken down into two different pleas.

52. First of all, the complaint that the Court of First Instance itself infringed the appellant's right to a hearing seeks a declaration that the Court of First Instance, in the context of the judicial proceedings, did not observe the appellant's rights of defence. That plea is based not on the second sentence of Article 73 of the regulation but on the fundamental principle of Community law of respect for the rights of the defence, which requires that any person who is party to proceedings before the Court of First Instance may make known any issues useful to the defence of his interests. Under that plea, the appellant complains that the Court of First Instance did not reproduce in the contested judgment its arguments relating to the fact that the content of the website in question had not been communicated to it beforehand.

53. It should be pointed out that, according to case-law, the right to be heard in judicial proceedings does not mean that the court has to incorporate in full in its decision all the submissions put forward by each party. (33) It is for the court to take note of those submissions and, after assessing the evidence, to decide whether or not to grant the relief sought by the parties and give reasons for its decision. (34) In this case, it is apparent from the contested judgment that, while the Court of First Instance did not reproduce the arguments in question in detail, it did include a summary of them (35) and gave a reasoned response to them in paragraphs 58 and 59. Consequently, the plea in law alleging infringement by the Court of First Instance of the appellant's right to a hearing during the judicial proceedings is unfounded.

54. Then, under the second plea, the Court of First Instance is accused of having committed an error of law in finding that the Board of Appeal had not infringed the appellant's right to a hearing. In so doing, the Court of First Instance therefore failed to take into account the extent of the obligation incumbent on the Office under the second sentence of Article 73 of the regulation. It should be pointed out that the question whether the Court of First Instance correctly applied the principles governing the rights of defence and in particular the right to be heard constitutes a question of law which it falls to the Court of Justice to examine when considering an appeal. (36)

55. Under the second sentence of Article 73 of the regulation, decisions of the Office 'shall be based only on reasons or evidence on which the parties concerned have had an opportunity to present their comments'. That article thus establishes in the context of the procedure applicable before the Office the fundamental principle of Community law to the effect that the rights of the defence must be observed in all proceedings, even those of an administrative nature. (37) In that connection, it should be pointed out that the legislature took care to refer to that principle not only in general terms in Article 73 of the regulation, but also in the provisions concerning each of the stages which may lead to a decision contrary to the interests of an economic operator, both in the regulation and in the rules adopted for the purposes of implementing that regulation. (38) Thus, that principle is referred to, *inter alia*, in the provisions concerning the examination as to absolute grounds for refusal (39) and in those concerned specifically with the procedure applicable before the Board of Appeal. (40)

56. Under that principle, a Board of Appeal may base its decision refusing to register a trade mark only on matters of fact or of law on which the applicant has been able to comment. (41) The same can be said to be true of the matters of fact or of law which constitute the grounds of the examiner's decision contested before the Board of Appeal in this case. Such matters should, in principle, have been submitted for comment to the applicant by the examiner himself and the applicant had a further opportunity to contest them in the course of his appeal before that Board. Similarly, Article 73 of the regulation cannot be interpreted as requiring the Office to gather in advance the applicant's comments on the matters of fact or of law which the applicant set out in its exchanges with the examiner or in the applicant's appeal against the examiner's decision. (42) However, where the Board of Appeal decides, in accordance with Article 74 of the regulation, to gather of its own motion facts which are intended to serve as a basis for its decision rejecting an application to register a trade mark and which, necessarily, did not appear either in the examiner's decision or in the documents submitted by the applicant, it is obliged to communicate them to the latter so that it can make known its comments.

57. In this case, the documents before the Court show that the Board of Appeal did not communicate to the appellant the result of the research which it had conducted into the use of the colour at issue in conjunction with the products concerned, and to which reference is made in the contested decision, nor the content of the colourants manufacturer's website, an extract from which it cited in that decision. Nevertheless, it is my view that this does not constitute an infringement of the rights of the defence on account of which the Court of First Instance should have annulled the contested decision.

58. Indeed, as is clear from the wording of Article 58 of the Statute of the Court of Justice, pleas alleging a breach of procedure may be declared founded only if the breach in question adversely affects the interests of

the appellant. It is necessary, therefore, in order for there to be an infringement of the rights of the defence, that the proceedings could have led to a different result if the administrative authority had not committed the breach. (43) Failing that, it is incumbent on the appellant to demonstrate that, had there been no breach, it would have been better able to ensure its defence. (44) 59. In my view, those conditions are not fulfilled in this case. First of all, it is true that the research referred to by the Board of Appeal in the contested decision contradicts the appellant's claims that the colour at issue is not used by its competitors to colour the products in question. (45) However, the statement that the colour orange was already used in connection with those products does not constitute a necessary element of the grounds for refusing the application for registration. As has been seen, the Board of Appeal, reiterating in this respect the examiner's decision, considered that the colour at issue did not have distinctive character in respect of the products concerned because a colour per se is, in principle, devoid of such character, and that the colour orange is very commonplace. It also stated that seeds are usually coloured differently from their natural colour, in particular in order to indicate that they have been treated, so that their colour is not perceived as an indication of origin, and it is not rare to come across machines in orange or a similar shade. Lastly, it stated that the appellant's competitors too may have an interest in using that colour.

60. As will be seen in the examination of the last ground of appeal, those considerations provide a sufficient basis on which to refuse the application for registration. Consequently, the assertion that the colour orange was also used to colour seeds and seed treatment installations serves only to corroborate the conclusion that that colour is not perceived by the relevant public as an indication of the origin of the appellant's products.

61. As regards, next, the content of the website cited in the contested decision, it simply confirms an argument advanced by the appellant itself in support of its appeal against the examiner's decision, that is that seed manufacturers colour their products. (46)

62. In any event, the appellant does not provide any proof that prior communication of those documents might have prompted it to limit the list of products to which its application for registration related or, more importantly, show how the Board of Appeal's decision might have been different if that application had been submitted only in respect of seeds. Indeed, the grounds for refusal given by the Board of Appeal relate in particular to seeds.

63. Accordingly, the Court of First Instance was entitled to hold, without breaching Article 73 of the regulation, that the appellant's rights of defence had not been infringed in such a way as to justify the annulment of the contested decision because, on the one hand, the appellant was already aware of the grounds on which its application was rejected, most of which were contained in the examiner's decision or in its own appeal, and, on the other hand, the fact that the documents at

issue were not communicated beforehand did not adversely affect the defence of its interests. In the light of these considerations, it is my view that the pleas in law alleging infringement of the right to a hearing are unfounded.

C – The plea in law alleging infringement of Article 74 of the regulation, concerning the Office's examination of the facts of its own motion

64. KWS maintains that the Court of First Instance, by confining itself to the finding that the Board of Appeal 'did consider and make use of a number of pertinent facts', failed to comply with the requirement laid down in Article 74 of the regulation, under which the 'Office shall examine the facts of its own motion'. Thus, according to the appellant, what matters is not whether the facts were examined but whether they were examined in full. Such an examination should enable the Office to establish with certitude whether or not there are grounds for refusal under Article 7 of the regulation, since the taking of the decision whether or not to register a sign as a trade mark is a competence to be exercised strictly in accordance with the relevant rules and not at the Office's discretion.

65. In this case, however, while the contested decision talks of the 'Board's research', it refers only to the website of a seed colourants manufacturer, which cannot constitute sufficient justification for a refusal. The justification which that reference provides for such a refusal is particularly weak given that the web page in question is from the site of an American undertaking and it has not been established that the practices prevailing on the American market can constitute relevant evidence in relation to those observed within the Community. Lastly, since the web page is in English, it is neither clear nor established that the relevant public in the Community would have been aware of it.

66. Like the Office, I consider this plea to be inadmissible. For, on the pretext of an infringement of Article 74 of the regulation and the contention that the Office would probably have granted its application for registration if it had examined the relevant facts in more detail, the appellant is actually seeking to call into question the appraisal of the facts carried out first by the Board of Appeal and then by the Court of First Instance. However, it is settled case-law that, under Article 225 EC and Article 58 of the Statute of the Court of Justice, an appeal may be based only on the infringement of rules of law, to the exclusion of any appraisal of the facts. (47)

D – The infringement of Article 7(1)(b) of the regulation

1. Arguments of the parties

67. KWS points out that its application for registration was rejected by the Office and by the Court of First Instance only on the basis of Article 7(1)(b) of the regulation, under which trade marks which are devoid of any distinctive character cannot be registered.

68. It states that, according to case-law, a trade mark has distinctive character if it can be considered to be an indication of origin, that it is sufficient, in that connection, that the trade mark should merely be capable of

such usage, that it must be assessed with regard to the goods and services concerned and not in an abstract manner, that all the circumstances of the particular case and, above all, usage, must be taken into consideration and, lastly, that regard must be had to the sectors actually concerned.

69. KWS accuses the Court of First Instance of having failed to take those principles into account in that, first, it applied a stricter criterion in respect of colour marks than in respect of other marks, secondly, it relied on its own perception rather than that of the circles concerned and, lastly, it misapplied the criterion of distinctive character.

70. Thus, the Court of First Instance committed an error in stating that, in the case of a colour, the relevant public's perception 'is not necessarily the same ... as it is in the case of a word or figurative mark, where the sign is independent of the appearance of the goods which it identifies'. (48) Next, the Court of First Instance was wrong to consider that the colour at issue did not have distinctive character in respect of the products concerned even though they are targeted at a specialist market. As regards agricultural products, and in particular seeds, the appellant alone uses the shade of orange at issue to colour its products. The Court of First Instance was wrong, therefore, to assert that the use of other shades of colours by competitors made it impossible to regard the shade of orange at issue as an indication of origin. That assessment is particularly erroneous given that there is no uniform use of colours in the sector concerned. The treatment installations for seeds are special machines intended for industrial undertakings and designed to be placed in workshops. The Court of First Instance therefore also committed an error of assessment in holding that it was commonplace to paint such machines and, in particular, to paint them orange.

71. The Office maintains that that plea is unfounded.

2. Findings

72. In the judgment in *Libertel* the Court accepted that a colour per se is capable of constituting a trade mark within the meaning of Article 2 of the directive where, as in the case at issue, it is designated by an internationally recognised identification code. (49) It went on to specify the criteria which must be used to assess, in each particular case, whether a colour per se is capable of having a distinctive character within the meaning of Article 3(1)(b) of the directive and, therefore, of being registered as a trade mark in respect of the goods and services specified.

73. Given that the wording of Articles 2 and 3(1)(b) and (3) of the directive is comparable to that of Articles 4 and 7(1)(b) and (3) of the regulation, the interpretation given by the Court in *Libertel* can be transposed to the regulation. Moreover, an interpretation that the Court gives to a provision of Community law clarifies and defines the meaning and scope of that provision only as it should have been understood and applied from the time of its entry into force. (50) The retroactive scope of the judgment in *Libertel* in relation to the interpretation of the provisions of the directive there-

fore applies, *mutatis mutandis*, to the corresponding provisions of the regulation.

74. In my Opinions in *Libertel* and *Heidelberger Bauchemie*, I explained why I took the view that a colour per se does not fulfil the conditions, laid down in Article 2 of the directive, under which a sign may be considered to be one of which a trade mark may consist. However, that is not the issue in this appeal. I shall not therefore reiterate my arguments in that regard but shall continue to examine the plea in law alleging infringement of Article 7(1)(b) of the regulation on the basis of the conditions established by the Court in its judgment in *Libertel*.

75. It should be recalled that, according to the settled case-law of the Court, the essential function of a trade mark is to guarantee the identity of the origin of the marked product to the consumer or end user by enabling him, without any possibility of confusion, to distinguish the product or service from others which have another origin. (51) It follows that, on receipt of an application for registration of a trade mark, the Office must determine whether that trade mark is capable of making known to the relevant public the fact that the products or services to which the application for registration relates originate from a specific undertaking. That is why Article 7(1)(b) of the regulation provides that 'trade marks which are devoid of any distinctive character' are not to be registered. It is also common ground that the question whether the trade mark in question is capable of having a distinctive character must be assessed by reference, first, to the goods or services in respect of which its registration is sought and, second, by reference to the relevant public's perception of that mark. (52)

76. In its judgment in *Libertel* the Court held that, where the relevant public is made up of average consumers, reasonably well informed and reasonably observant and circumspect, account should be taken of the fact that the average consumer only rarely has the chance to make a direct comparison between the different marks and must place his trust in the imperfect picture of them that he has kept in his mind. It stated that the perception of the relevant public is not necessarily the same in the case of a sign consisting of a colour per se as it is in the case of a word or figurative mark consisting of a sign that bears no relation to the appearance of the goods it denotes. According to the Court, while the public is accustomed to perceiving word or figurative marks instantly as signs identifying the commercial origin of the goods, the same is not necessarily true where the sign forms part of the look of the goods in respect of which registration of the sign as a trade mark is sought. Consumers are not in the habit of making assumptions about the origin of goods based on their colour or the colour of their packaging, in the absence of any graphic or word element, because as a rule a colour per se is not, in current commercial practice, used as a means of identification. A colour per se is not normally inherently capable of distinguishing the goods of a particular undertaking. (53)

77. In the light of these considerations and contrary to

what the appellant claims, the Court of First Instance did not therefore misinterpret Article 7(1)(b) of the regulation in stating that, while that provision does not draw any distinction between different types of sign, the fact remains that the relevant public's perception is not necessarily the same in the case of a colour per se as it is in the case of a sign which is independent of the appearance of the goods which it identifies. (54)

78. Similarly, the allegation that the Court of First Instance assessed the distinctive character of the colour at issue not by reference to the relevant public, as it should do, but in the light of its own criteria is also unfounded.

79. Thus, the Court of First Instance found that the relevant public is a particular sector of the public which is more knowledgeable and attentive than the general public, but which neither specialises in each of the products concerned nor is a lay public. (55) With regard to agricultural, horticultural and forestry products in Class 31, and more specifically seeds, the Court of First Instance considered that that public can recognise their colour as an indication of origin, since it is different from their natural colour. (56) It took the view, however, that since the use of colours, including the shade of orange claimed, for those goods is not rare, that colour would not enable the relevant public to distinguish the appellant's goods from those of its competitors. (57) The Court of First Instance added that, since that public has a degree of knowledge such that it is not unaware that seed colour may indicate that seeds have been treated, that public will not perceive the colour at issue as an indication of origin. (58)

80. Similarly, as regards treatment installations in Classes 7 and 11, the Court of First Instance considered that the relevant public was also made up of average consumers of all agricultural machinery. It took the view that, since it is not rare to see machines in the shade of orange at issue or a similar colour, the relevant public would perceive that colour as merely an element of finish. (59)

81. Those grounds of the contested judgment therefore clearly show that the Court of First Instance assessed whether the colour at issue was capable of having a distinctive character on the basis of the perception of the relevant public, defined by reference to each of the categories of products to which the application for registration related.

82. Lastly, I do not consider that the appellant was justified in accusing the Court of First Instance of having made an error in its application of Article 7(1)(b) of the regulation in holding that the colour at issue did not exhibit a distinctive character in respect of the products referred to in the application for registration.

83. Thus, in the judgment in *Libertel*, the Court found that it was only in exceptional circumstances, particularly where the number of goods or services concerned by the application for registration is very restricted and the market is very specific, that a colour per se may be recognised as having a distinctive character without any prior use. (60) Moreover, it held that there was a public interest in not unduly restricting the availability

of colours for the other operators who offer goods or services of the same type as those in respect of which registration is sought, on account of the limited number of colours actually available, so that the chances of such a colour being registered will be all the more reduced the higher the number of goods or services covered is. (61)

84. In the contested judgment, the Court of First Instance considered that the colour at issue was devoid of any distinctive character in relation to the products in Class 31 because these are coloured and, more specifically in the case of seeds, their colour sometimes indicates that they have undergone treatment. As regards treatment installations for seeds in Classes 7 and 11, it held that the appellant had not demonstrated that they belonged to a special category of machines which were not coloured, and that orange and similar colours are usually used to colour machines in general.

85. In so far as the Court of First Instance, in the contested judgment, dismisses the application in respect of the products, it cannot be criticised for having failed to examine, in addition to the bovementioned grounds, the criteria established by the Court in its judgment in *Libertel* in relation to the number of products concerned, the specificity of the market and the requirement to keep the colour at issue available to competitors. It seems irrefutable, however, that taking those criteria into account in this case could only have provided further justification for refusing the appellant's application.

86. On the other hand, the contested judgment is open to criticism in so far as, in it, the Court annulled that part of the contested decision concerning the services in Class 42 because it concluded that the colour at issue was not, in relation to those services, devoid of distinctive character, without having examined all the relevant criteria or by applying them in a manner contrary to that adopted by the Court in its judgment in *Libertel*. (62) However, as I have already noted, the Office has not brought a cross-appeal and the judgment cannot therefore be reviewed by the Court of Justice in this regard.

87. The question whether or not the Court of First Instance accurately appraised the facts of the case in finding that the relevant public would not perceive the colour at issue as an indication of the origin of the seeds or the machines concerned involves a purely factual assessment. It is a well-known fact that the appraisal of the facts by the Court of First Instance, save where the clear sense of the evidence before it is distorted, does not constitute a question of law which is subject, as such, to review by the Court of Justice on appeal. (63) In the context of Community trade marks, the Court applies that rule to word marks where it is called upon to review the appraisal carried out by the Court of First Instance as to whether the trade mark in question is indeed descriptive of the goods and services concerned for the purposes of Article 7(1)(c) of the regulation, or is devoid of any distinctive character within the meaning of Article 7(1) (b). (64) I see no reason why a different position should be adopted when

it comes to reviewing the practical application by the Court of First Instance of the criteria to which the Court has made the registration of colours per se as trade marks subject. Moreover, in this case, the appellant does not claim that the Court of First Instance distorted the evidence before it.

VI – Conclusion

88. In the light of the foregoing considerations, I therefore propose that the Court dismiss the appeal and order KWS Saat AG to pay the costs.

1 – Original language: French.

2 – Hereinafter ‘KWS’.

3 – Case T-173/00 [2002] ECR II-3843 (hereinafter ‘the contested judgment’).

4 – Hereinafter ‘the Office’.

5 – Hereinafter ‘the contested decision’.

6 – Directive of 21 December 1988 to approximate the laws of the Member States relating to trade marks (OJ 1989 L 40, p. 1, hereinafter ‘the directive’).

7 – Case C-104/01 [2003] ECR I-3793.

8 – Case C-49/02 [2004] ECR I-6129.

9 – Regulation of 20 December 1993 on the Community trade mark (OJ 1994 L 11, p.1), as amended (hereinafter ‘the regulation’).

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

11 – Contested judgment (paragraphs 16 to 19).

12 – Ibid. (paragraph 25).

13 – Ibid. (paragraphs 26 and 28).

14 – Ibid. (paragraph 29).

15 – Ibid. (paragraph 31).

16 – Ibid. (paragraph 32).

17 – Contested judgment (paragraph 39).

18 – Contested judgment (paragraph 42).

19 – Ibid. (paragraph 46).

20 – Contested judgment (paragraphs 54 and 55).

21 – Ibid. (paragraph 56).

22 – Ibid. (paragraphs 58 and 59).

23 – Ibid. (paragraph 60).

24 – Paragraph 9.

25 – Case C-166/95 P Commission v Daffix [1997] ECR I-983, paragraphs 24 and 33 to 38, and Case C-188/96 P Commission v V [1997] ECR I-6561, paragraph 24.

26 – Case C-367/95 P Commission v Sytraval and Brink’s France [1998] ECR I-1719, paragraph 63, and Case C-265/97 P VBA v Florimex and Others [2000] ECR I-2061, paragraph 93.

27 – Paragraph 25.

28 – Paragraph 14.

29 – Paragraphs 16 and 17.

30 – Paragraphs 18 to 20.

31 – Paragraph 21.

32 – Paragraphs 22 to 24.

33 – Case C-221/97 P Schröder and Others v Commission [1998] ECR I-8255, paragraph 24. 34 – Idem.

35 – It should be recalled that the Court of First Instance summarised the appellant’s arguments as follows: ‘[t]he applicant argues that the evidence on

which the Office’s decision was based was not communicated to it, making it impossible to verify the accuracy of the Office’s research, to comprehend the reasoning underlying the decision and the merits thereof and, if appropriate, to contest its conclusions. The applicant considers that it was thereby deprived of its right to a hearing, and of the option of restricting the list of goods and services in the application’ (paragraph 49 of the contested judgment).

36 – Case C-462/98 P *Mediocurso v Commission* [2000] ECR I-7183, paragraph 35.

37 – Joined Cases 100/80 to 103/80 *Musique Diffusion française and Others v Commission* [1983] ECR 1825, paragraph 9, and Case C-32/95 P *Commission v Lisrestal and Others* [1996] ECR I-5373, paragraph 21.

38 – Commission Regulation (EC) No 2868/95 of 13 December 1995 implementing Council Regulation (EC) No 40/94 (OJ 1995 L 303, p. 1).

39 – Article 38(3) of the regulation and Rule 11 in Article 1 of Regulation No 2868/95. 40 – Article 61(2) of the regulation.

41 – Case T-198/00 *Hershey Foods v OHIM* (Kiss device with plume) [2002] ECR II-2567, paragraph 25, and Case T-16/02 *Audi v OHIM* [2003] ECR II-5167, paragraphs 71 and 75.

42 – In the abovementioned judgment in *Hershey Foods v OHIM* (Kiss device with plume), the Court of First Instance held, in this regard, that the Board of Appeal was entitled, in the context of the examination of an appeal against the examiner’s decision, to use any of the items of information included in the application form, without first having to give the applicant the opportunity to comment on them (paragraph 20).

43 – Case 30/78 *Distillers Company v Commission* [1980] ECR 2229, paragraph 26, and Case C-194/99 P *Thyssen Stahl v Commission* [2003] ECR I-10821, paragraph 31. 44 – Case C-51/92 P *Hercules Chemicals v Commission* [1999] ECR I-4235, paragraph 81, and Joined Cases C-238/99 P, C-244/99 P, C-245/99 P, C-247/99 P, C-250/99 P to C-252/99 P and C-254/99 P *Limburgse VinylMaatschappij and Others v Commission* [2002] ECR I-8375, paragraph 318.

45 – See the grounds of the appeal brought by the appellant against the examiner’s decision (paragraph 8 of the contested decision).

46 – Idem.

47 – See, inter alia, *VBA v Florimex and Others*, paragraph 138.

48 – Contested judgment (paragraph 29).

49 – Paragraphs 27 to 42.

50 – See, inter alia, Case C-184/99 *Grzelczyk* [2001] ECR I-6193, paragraph 50.

51 – Case C-39/97 *Canon* [1998] ECR I-5507, paragraph 28; Case C-517/99 *Merz & Krell* [2001] ECR I-6959, paragraph 22; and Case C-218/01 *Henkel* [2004] ECR I-1725, paragraph 30.

52 – See, inter alia, *Libertel*, paragraph 75, and *Henkel*, paragraph 50.

53 – *Libertel*, paragraphs 63 to 65.

54 – Contested judgment (paragraph 29).

55 – Ibid. (paragraph 31).

56 – Ibid. (paragraph 32).

57 – Ibid. (paragraph 33).

58 – Ibid. (paragraph 35).

59 – Ibid. (paragraphs 39 and 40).

60 – Paragraph 66.

61 – Ibid. (paragraphs 54 to 56).

62 – Thus, in the contested judgment, the Court of First Instance held that, ‘in so far as the colour claimed ... is a specific shade, many colours remain available for identical or similar services’ (paragraph 45), whereas, in the judgment in *Libertel*, the Court held that ‘the fact that the number of colours actually available is limited means that a small number of trade mark registrations for certain services or goods could exhaust the entire range of colours available’ (paragraph 54).

63 – Joined Cases C-280/99 P to C-282/99 P *Moccia Irme and Others v Commission* [2001] ECR I-4717, paragraph 78, and order in Case C-323/00 P *DSG v Commission* [2002] ECR I-3919, paragraph 34.

64 – Case C-104/00 P *DKV v OHIM* [2002] ECR I-7561, paragraph 22, and order in Case C-326/01 P *Telefon & Buch v OHIM* [2004] ECR I-1371, paragraph 35.
