

European Court of Justice, 12 January 2006,
Deutsche SiSi-Werke

R 719/1999-2



R 724/1999-2



R 747/1999-2



R 748/1999-2



TRADEMARK LAW

No distinctive character

- The average consumer will see the form of drinks packaging as an indication of the product's commercial origin only if that form may be perceived immediately as such an indication.

The Court of First Instance did not therefore err in law by holding, in paragraph 38 of the judgment under appeal, that the average consumer will see the form of drinks packaging as an indication of the product's commercial origin only if that form may be perceived immediately as such an indication. Moreover, in the same paragraph of the judgment under appeal, the Court of First Instance in no way held that the consumer would, as a matter of principle, be indifferent to the shape as an indication of origin or that the packaging of liquid goods could never have a distinctive character within the meaning of Article 7(1)(b) of Regulation No 40/94.

- To take into consideration the types of packaging used on the European market for liquids for human consumption in general.

Accordingly, the Court of First Instance was able, without erring in law, to take into consideration the types of packaging used on the European market for liquids for human consumption in general in order to determine whether the use of one or other of the eight stand-up pouches in question enables the average consumer of fruit drinks and fruit juices to distinguish, without conducting an analytical or comparative examination and without paying particular attention, the appellant's goods from those of other undertakings.

- The Court could legitimately refer to the 'standard shape', the 'basic shape', the 'standard form' or the 'standard appearance' of the stand-up pouches.

Similarly, the Court of First Instance could legitimately refer, in paragraphs 47, 48 and 52 of the judgment under appeal, to the 'standard shape', the 'basic shape', the 'standard form' or the 'standard appearance' of the stand-up pouches, which shapes and appearance it was able to determine on the basis of stand-up pouches used for the marketing of liquids for human consumption on the European market.

Impact on national decisions

- Registrations already made in Member States are only factors which may merely be taken into consideration, without being given decisive weight.

Secondly, the Court of First Instance was correct in holding, in paragraph 56 of the judgment under appeal, that registrations already made in Member States are only factors which may merely be taken into consideration, without being given decisive weight, for the purposes of registering a Community trade mark (see, to that effect, with regard to registration of national trade marks in various Member States by application of Directive 89/104, Henkel, paragraphs 62 and 63). It is appropriate to add that there is no provision in Regulation No 40/94 requiring OHIM or, on appeal, the Court of First Instance, to come to the same conclusions as those arrived at by national authorities in similar circumstances (see, to that effect, DKV v OHIM, paragraph 39).

Interpretation Article 7(1)(b) Regulation No 40/94

- The Court of First Instance did not in any way base its findings on the interest of possible competitors.

In those circumstances, as the Court has already held, the criterion according to which trade marks which are capable of being commonly used, in trade, for the presentation of the goods or services in question may not be registered is relevant in the context of Article 7(1)(c) of Regulation No 40/94 but it is not the yardstick by which Article 7(1)(b) must be interpreted (SAT.1 v OHIM, paragraph 36, and BioID v OHIM, paragraph 62). In fact, in the analysis of the trade marks applied for which it carried out in paragraphs 44 to 54 of the judgment under appeal, the Court of First Instance did not in any way base its findings on the interest of possible competitors, but limited itself to determining whether those trade marks enable the average consumer of fruit drinks and fruit juices to distinguish, without any possibility of confusion, the goods of the appellant from those of a different commercial origin.

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European Court of Justice, 12 January 2006

(P. Jann, K. Schieman, K. Lenaerts, E. Juhász and M. Ilešič)

JUDGMENT OF THE COURT (First Chamber)

12 January 2006(*)

(Appeal – Community trade mark – Article 7(1)(b) of Regulation (EC) No 40/94 – Three-dimensional shapes of stand-up pouches for fruit drinks and fruit juices – Absolute ground for refusal – Distinctive character)

In Case C-173/04 P,

APPEAL under Article 56 of the Statute of the Court of Justice, brought on 6 April 2004,

Deutsche SiSi-Werke GmbH & Co. Betriebs KG, established in Eppelheim (Germany), represented by H. Eichmann, G. Barth, U. Blumenröder, C. Niklas-Falter, M. Kinkeldey, K. Brandt, A. Franke, U. Stephani, B. Allekotte, E. Pfrang, K. Lochner and B. Ertle, Rechtsanwälte, appellant,

the other party to the proceedings being:

Office for Harmonisation in the Internal Market (Trade Marks and Designs) (OHIM), represented by G. Schneider, acting as Agent, defendant at first instance,

THE COURT (First Chamber),

composed of P. Jann, President of the Chamber, K. Schieman, K. Lenaerts, E. Juhász and M. Ilešič (Rapporteur), Judges,

Advocate General: D. Ruiz-Jarabo Colomer,

Registrar: K.H. Sztranc, Administrator,

having regard to the written procedure and further to the hearing on 16 June 2005,

after hearing the [Opinion of the Advocate General at the sitting on 14 July 2005](#),

gives the following

Judgment

1 By its appeal, Deutsche SiSi-Werke GmbH & Co. Betriebs KG seeks to have set aside the judgment of the Court of First Instance of the European Communities of 28 January 2004 in Joined Cases T- 146/02 to T- 153/02 *Deutsche SiSi-Werke v OHIM*(Flat-bottomed pouches) [2004] ECR II-447 ('the judgment under appeal'), by which the Court of First Instance dismissed its actions against the decisions of the Second Board of Appeal of the Office for Harmonisation in the Internal Market (Trade Marks and Designs) (OHIM) of 28 February 2002 (Cases R 719/1999- 2 to R 724/1999- 2, R 747/1999- 2 and R 748/1999- 2) refusing registration of eight three-dimensional marks consisting of different stand-up pouches for drinks ('the contested decisions').

Legal context

2 Article 7(1)(b) and (c) of Council Regulation (EC) No 40/94 of 20 December 1993 on the Community trade mark (OJ 1994 L 11, p. 1), states: 'The following shall not be registered:

...

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

(c) trade marks which consist exclusively of signs or indications which may serve, in trade, to designate the

kind, quality, quantity, intended purpose, value, geographical origin or the time of production of the goods or of rendering of the service, or other characteristics of the goods or service'.

Background to the dispute

3 On 8 July 1997 the appellant filed eight applications for registration of three-dimensional Community trade marks at OHIM under Regulation No 40/94.

4 Those marks consist of shapes of various stand-up pouches for packaging drinks. The pouches have a convex form, are wider at the bottom and, viewed straight on, look, depending on the application concerned, somewhat like an elongated triangle or an oval with, in some cases, concave sides.

5 The goods in respect of which registration of the trade marks was applied for, taking into account the amendments made by the appellant in that regard, are 'fruit drinks and fruit juices', in Class 32 of 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.

6 By decisions of 24 and 27 September 1999, the OHIM examiner refused the eight registrations on the ground that the trade marks applied for were devoid of any distinctive character.

7 By the contested decisions, the Second Board of Appeal of OHIM confirmed the decisions of the examiner. It took the view, in essence, that consumers would not perceive the stand-up pouches as an indication of commercial origin but solely as a form of packaging. It added that, in the interests of competitors, packaging manufacturers and beverage producers, there could be no monopoly in this type of packaging.

The procedure before the Court of First Instance and the judgment under appeal

8 The appellant brought actions before the Court of First Instance seeking annulment of the contested decisions.

9 By the judgment under appeal, the Court of First Instance held that the Second Board of Appeal of OHIM had correctly found that the trade marks applied for were devoid of any distinctive character with regard to fruit drinks and fruit juices.

10 In paragraphs 39 to 43 of the judgment under appeal, the Court of First Instance did not accept the appellant's argument that packaging fruit drinks and fruit juices in stand-up pouches is, in itself, unusual.

11 Since the appellant then maintained that the representations claimed have design features which are not merely commonplace or functional attributes, the Court of First Instance, after having carried out, in paragraphs 44 to 51 of the judgment under appeal, an examination of each of the individual features in turn, considered, in paragraph 52 of that judgment, the overall impression produced by the appearance of the pouches concerned and concluded that those representations were devoid of any distinctive character.

12 Accordingly, after having rejected the remaining arguments raised by the appellant, the Court of First Instance dismissed its actions and ordered it to pay the costs.

The appeal

13 By its appeal, in support of which it puts forward three pleas in law, the appellant claims that the Court should set aside the judgment under appeal and order OHIM to pay the costs.

14 OHIM contends that the Court should dismiss the appeal and order the appellant to pay the costs.

The first part of the first plea

Arguments of the parties

15 By the first part of its first plea, the appellant submits that the Court of First Instance failed to have regard to the sector of the goods in respect of which registration was sought and, as a result, the shapes of packaging which must be used for comparison in assessing the distinctive character of the trade marks requested.

16 The appellant submits that, in the beverages sector, contrary to the arbitrary assumption made in paragraph 38 of the judgment under appeal, consumers have for a long time been used to seeing in the packaging of a product an indication of its origin. Thus, the shape of drinks packaging constitutes a means of identification which is understood by the average consumer as an indication of origin and therefore as a trade mark.

17 It follows that, in accordance with established case-law, the shape of drinks packaging which departs significantly from the norm or customs of the sector fulfils its essential function of indicating origin.

18 According to the appellant, the Court of First Instance itself held that there is no evidence of use of stand-up pouches for fruit drinks and fruit juices. On the European market, with the exception of the appellant's goods, fruit drinks and fruit juices are packaged solely in glass bottles or in cartons. Consequently, those pouches do not constitute a usual form of packaging for those drinks and their distinctive character should have been recognised.

19 The Court of First Instance erred in law in its assessment of the normal character of those pouches by taking account not of the customs in the sector of fruit drinks and fruit juices at European level, but of the customs in the sector of liquids for human consumption in general or worldwide.

20 The Court of First Instance also erred in law by classifying the stand-up pouches in question as 'basic geometric shapes'. Since, apart from those used by the appellant, stand-up pouches are not used on the European market of fruit drinks and fruit juices, there could be no 'basic shape' for such a pouch for those goods.

21 OHIM contends that, according to established case-law, when assessing the distinctive character of the shape of packaging, it should be checked whether the average consumer is actually in a position to notice that shape, over and above its function as a container, as an indication of the commercial origin of the goods in question. In that regard, a mark fulfils its function of indicating origin when it departs significantly from the norm or customs of the sector.

22 When it refers to the departure of a shape from the norm or customs of the sector, that case-law defines a wider field of comparison than that of the normal

shapes of the goods covered by the trade mark application. According to OHIM, if a consumer has already become accustomed to seeing a particular type of packaging for a particular product, when first he sees the same type of packaging used for a different product, he will still think of it only as a type of packaging and not as an indication of the origin of the other product. Accordingly, it would be wrong to assess the public's perception by taking into consideration solely packaging already in existence for only those goods referred to in the application for trade mark registration.

23 Thus, the Court of First Instance did not err in law by taking into consideration the packaging of liquids for human consumption other than those for which registration of the trade marks was sought.

24 Furthermore, the manner in which the Court of First Instance defined in concrete terms the items for comparison necessary to the assessment of the public's perception is a question of finding and appraisal of the facts and cannot be subject to review by the Court as part of an appeal.

Findings of the Court

25 In accordance with established case-law, the distinctive character of a trade mark, within the meaning of Article 7(1)(b) of Regulation No 40/94, must be assessed, firstly, by reference to the goods or services in respect of which registration has been applied for and, secondly, by reference to the perception of them by the relevant public, which consists of average consumers of the goods or services in question, who are reasonably well informed and reasonably observant and circumspect (see [Joined Cases C- 456/01 P and C- 457/01 P Henkel v OHIM \[2004\] ECR I- 5089](#), paragraph 35 and case-law cited).

26 In the present case, it is not disputed that registration of the marks in question is sought in respect of fruit drinks and fruit juices and that the relevant public consists of all end consumers, as the Court of First Instance held in paragraphs 34 and 36 of the judgment under appeal.

27 According to equally established case-law, the criteria for assessing the distinctive character of three-dimensional marks consisting of the shape of the product itself are no different from those applicable to other categories of trade mark (see [Henkel v OHIM, paragraph 38, and Case C- 136/02 P Mag Instrument v OHIM \[2004\] ECR I- 9165](#), paragraph 30).

28 None the less, as the Court of First Instance correctly noted in paragraph 37 of the judgment under appeal, for the purpose of applying those criteria, the relevant public's perception is not necessarily the same in the case of a three-dimensional mark consisting of the appearance of the product itself as it is in the case of a word or figurative mark consisting of a sign unrelated to the appearance of the products it denotes. Average consumers are not in the habit of making assumptions about the origin of products on the basis of their shape or the shape of their packaging in the absence of any graphic or word element and it could therefore prove more difficult to establish distinctiveness in relation to such a three-dimensional mark than

in relation to a word or figurative mark (see, inter alia, *Henkel v OHIM*, paragraph 38, and *MagInstrument v OHIM*, paragraph 30).

29 With regard, in particular, to three-dimensional trade marks consisting of the packaging of goods, such as liquids, which are packaged in trade for reasons linked to the very nature of the product, the Court has held that they must enable average consumers of the goods in question, who are reasonably well informed and reasonably observant and circumspect, to distinguish the product concerned from those of other undertakings without conducting an analytical or comparative examination and without paying particular attention (see, to that effect, with regard to Article 3(1)(b) of First Council Directive 89/104/EEC of 21 December 1988 to approximate the laws of the Member States relating to trade marks (OJ 1989 L 40, p. 1), which provision is identical to Article 7(1)(b) of Regulation No 40/94, [Case C- 218/01 Henkel \[2004\] ECR I- 1725](#), paragraph 53).

30 The Court of First Instance did not therefore err in law by holding, in paragraph 38 of the judgment under appeal, that the average consumer will see the form of drinks packaging as an indication of the product's commercial origin only if that form may be perceived immediately as such an indication. Moreover, in the same paragraph of the judgment under appeal, the Court of First Instance in no way held that the consumer would, as a matter of principle, be indifferent to the shape as an indication of origin or that the packaging of liquid goods could never have a distinctive character within the meaning of Article 7(1)(b) of Regulation No 40/94.

31 According to established case-law, only a mark which departs significantly from the norm or customs of the sector and thereby fulfils its essential function of indicating origin is not devoid of any distinctive character for the purposes of Article 7(1)(b) of Regulation No 40/94 (*Henkel v OHIM*, paragraph 39, and *Mag Instrument v OHIM*, paragraph 31).

32 First, it does not follow from that case-law that it is necessary systematically to restrict the sector for the purposes of comparison to the actual goods in respect of which registration is sought. It cannot be excluded that the consumers of a given product may in certain cases be influenced, in their perception of the trade mark which the product bears, by the marketing methods used for other goods which they also use. Thus, depending on the nature of the goods in question and the trade mark applied for, it may be necessary, for the purposes of assessing whether or not the trade mark is devoid of any distinctive character, to take into consideration a wider sector.

33 In particular, when, as in the present case, the trade mark for which registration is sought consists of the three-dimensional shape of the packaging of the goods in question – a fortiori where the goods, because of their very nature, must be packaged in order to be marketed, so that the packaging chosen imposes its shape on the goods and, for the purposes of examining an application for registration as a mark, must be as-

simulated to the shape of the product (*Henkel*, supra, paragraph 33) –, the relevant norm or customs may be those which apply in the sector of the packaging of goods which are of the same type and intended for the same consumers as those goods in respect of which registration is sought.

34 It cannot be excluded that the average consumer, who is accustomed to seeing various products from different undertakings packaged in the same type of packaging, does not at first identify the use of that type of packaging by an undertaking for the marketing of a given product as being, of itself, an indication of origin, when the same product is marketed by competitors of that undertaking in other types of packaging. In that regard, it should be noted that the average consumer, who does not make a study of the market, will not know in advance that only one undertaking markets a given product in a certain type of packaging whilst its competitors use other types of packaging for that product.

35 Second, restriction of the sector in which the comparison is to be made falls within the appraisal of the facts. As is clear from Article 225 EC and the first paragraph of Article 58 of the Statute of the Court of Justice, an appeal lies on a point of law only. The Court of First Instance thus has exclusive jurisdiction to find and appraise the relevant facts and to assess the evidence. The appraisal of those facts and the assessment of that evidence thus does not, save where they distort the evidence, which is not claimed in this case, constitute a point of law which is subject, as such, to review by the Court of Justice on appeal (see *Case C- 104/00 P DKV v OHIM [2002] ECR I- 7561*, paragraph 22, and *Mag Instrument v OHIM*, paragraph 39).

36 Accordingly, the Court of First Instance was able, without erring in law, to take into consideration the types of packaging used on the European market for liquids for human consumption in general in order to determine whether the use of one or other of the eight stand-up pouches in question enables the average consumer of fruit drinks and fruit juices to distinguish, without conducting an analytical or comparative examination and without paying particular attention, the appellant's goods from those of other undertakings.

37 Similarly, the Court of First Instance could legitimately refer, in paragraphs 47, 48 and 52 of the judgment under appeal, to the 'standard shape', the 'basic shape', the 'standard form' or the 'standard appearance' of the stand-up pouches, which shapes and appearance it was able to determine on the basis of stand-up pouches used for the marketing of liquids for human consumption on the European market.

38 The first part of the first plea must therefore be rejected.

The second plea

Arguments of the parties

39 By the first part of the second plea, the appellant submits that the Court of First Instance set too high a requirement for the three-dimensional trade marks having regard to the low degree of distinctive character needed to fulfil the requirements of Article 7(1)(b) of

Regulation No 40/94. The Court of First Instance should have applied the same practice as that developed for two-dimensional trade marks, according to which marks that depart only slightly from simple geometric shapes may nevertheless be registered.

40 Even if it were accepted that stand-up pouches constitute normal forms of packaging for fruit drinks and fruit juices on the European market, the three-dimensional shapes of the pouches in respect of which registration as Community trade marks is sought have sufficient design features to be able to fulfil their function of indicating origin.

41 By the second part of the same plea, the appellant submits that where, as in the present case, OHIM has already allowed registration of other trade marks of the same type in the same sector and, at the same time, the marks applied for have already been registered in a number of Member States as national trade marks, it is for OHIM and the Court of First Instance to justify why those trade marks would not be perceived by the average consumer as an indication of the origin of the goods. The Court of First Instance has not provided such justification in the judgment under appeal.

42 In response to the first part of the second plea, OHIM submits that the Court of First Instance did not apply more stringent requirements with regard to the distinctiveness of three-dimensional trade marks, but merely recalled established case-law, according to which the perception of the public is not necessarily the same in relation to a three-dimensional mark consisting of the appearance of the product as it is in relation to a word mark or a figurative mark.

43 OHIM adds that, in an appeal, the appellant cannot validly challenge the factual assessment made by the Court of First Instance in paragraph 52 of the judgment under appeal, according to which the design features of the trade marks applied for are too insignificant to be retained by the relevant public.

44 With regard to the second part of that plea, OHIM takes the view that the complaint alleging a lack of reasoning is clearly unfounded. The fact that a trade mark has been registered at national level creates no obligation on the Court of First Instance to give specific reasons where it intends to give a decision different from that of a national authority. The Court of First Instance is merely required to give reasons for its application of the law.

Findings of the Court

45 With regard to the first part of the plea, for a trade mark to possess distinctive character for the purposes of Article 7(1)(b) of Regulation No 40/94, it must serve to identify the goods or services in respect of which registration is applied for as originating from a particular undertaking, and thus to distinguish the goods or services from those of other undertakings (see *Henkel v OHIM*, paragraph 34, and *Mag Instrument v OHIM*, paragraph 29).

46 Firstly, inasmuch as it complains that the Court of First Instance held, in paragraphs 37 and 38 of the judgment under appeal, that the perception of the relevant public is not necessarily the same in the case of a

three-dimensional trade mark, consisting of the appearance of the product itself, as in the case of a word or figurative mark, and that the average consumer perceives the shape of drinks packaging as an indication of the commercial origin of the product only if that shape is likely to be perceived from the outset as such an indication, that part of the plea is unfounded for the reasons set out in paragraphs 28 to 30 of the present judgment.

47 Secondly, inasmuch as it complains that the Court of First Instance held, in paragraphs 44 to 52 of the judgment under appeal, that the three-dimensional shapes of the pouches in respect of which registration is sought as Community trade marks do not have a sufficient number of design features to fulfil their function of indicating origin, that part of the plea seeks to challenge the factual assessment made by the Court of First Instance and must be declared inadmissible for the reasons set out in paragraph 35 of the present judgment.

48 With regard to the second part of the second plea, it is necessary to point out, first of all, that decisions concerning registration of a sign as a Community trade mark which the Boards of Appeal of OHIM are called on to take under Regulation No 40/94 are adopted in the exercise of circumscribed powers and are not a matter of discretion. Accordingly, as the Court of First Instance essentially held in paragraph 55 of the judgment under appeal, the legality of those decisions must be assessed solely on the basis of that regulation and not on the basis of a previous decision-making practice of those boards (*Case C- 37/03 P BioID v OHIM* [2005] ECR I-0000, paragraph 47).

49 Secondly, the Court of First Instance was correct in holding, in paragraph 56 of the judgment under appeal, that registrations already made in Member States are only factors which may merely be taken into consideration, without being given decisive weight, for the purposes of registering a Community trade mark (see, to that effect, with regard to registration of national trade marks in various Member States by application of Directive 89/104, *Henkel*, paragraphs 62 and 63). It is appropriate to add that there is no provision in Regulation No 40/94 requiring OHIM or, on appeal, the Court of First Instance, to come to the same conclusions as those arrived at by national authorities in similar circumstances (see, to that effect, *DKV v OHIM*, paragraph 39).

50 Accordingly, it must be held that the Court of First Instance, which set out at length the reasons why the trade marks applied for come under the ground for refusal of registration in Article 7(1)(b) of Regulation No 40/94, gave sufficient reasons for its decision.

51 The second plea must be rejected.

The second part of the first plea and the third plea Arguments of the parties

52 By the second part of the first plea and the third plea, which it is appropriate to consider together, the appellant submits, essentially, that the Court of First Instance erred in assessing the distinctive character of the trade marks applied for, within the meaning of Article 7(1)(b) of Regulation No 40/94, in the light of the

interest of possible competitors in being able to use stand-up pouches for their own goods.

53 It recalls that, in accordance with the case-law of the Court, each of the grounds for refusal of registration listed in Article 7(1) of Regulation No 40/94 is independent of the others and calls for separate examination. In addition, it is appropriate to interpret those grounds for refusal in the light of the general interest underlying each of them.

54 In the present case, the Court of First Instance assessed the distinctive character of the trade marks applied for from the point of view of fictitious basic shapes and of the possible use, in future, of stand-up pouches for the goods concerned. However, the question whether stand-up pouches may be used by competitors for fruit drinks and fruit juices is outside the assessment of distinctive character within the meaning of Article 7(1)(b) of Regulation No 40/94, but falls solely under Article 7(1)(c).

55 The general interest which underlies Article 7(1)(b) of Regulation No 40/94 includes the interest of the average consumer in being able to recognise the goods covered by a trade mark and in associating them with a particular manufacturer. The interest of competitors is sufficiently taken into account under Article 7(1)(c) of Regulation No 40/94 – which provision has not been relied on against the applications for registration of the trade marks at issue.

56 In the alternative, the appellant claims that, in the assessment of the interest of possible competitors in being able to use stand-up pouches for their own goods, the Court of First Instance wrongly failed to take into consideration the fact that for years the appellant has used such pouches to package its goods without being imitated.

57 OHIM submits that, where a trade mark is devoid of distinctive character, the general interest of consumers cannot preclude registration of that trade mark being refused pursuant to Article 7(1)(b) of Regulation No 40/94. By definition, consumers do not identify that trade mark as an indication of the origin of the goods. Accordingly, the appellant's arguments in that regard are without any legal basis and must be rejected as manifestly unfounded.

58 Furthermore, it follows from paragraph 54 of the judgment under appeal that the Court of First Instance did not make the risk of creating a monopoly in stand-up pouches a criterion for application of Article 7(1)(b) of Regulation No 40/94, such that there is no need in the present case to consider whether such a risk truly exists.

Findings of the Court

59 According to established case-law, each of the grounds for refusal to register listed in Article 7(1) of Regulation No 40/94 is independent of the others and requires separate examination. Moreover, it is appropriate to interpret those grounds for refusal in the light of the general interest which underlies each of them. The general interest to be taken into consideration when examining each of those grounds for refusal may or even must reflect different considerations according

to the ground for refusal in question (Henkel v OHIM, paragraphs 45 and 46; [Case C- 329/02 P SAT.1 v OHIM \[2004\] ECR I- 8317](#), paragraph 25, and [BioID v OHIM](#), paragraph 59).

60 Article 7(1)(b) of Regulation No 40/94 is intended to preclude registration of trade marks which are devoid of distinctive character which alone renders them capable of fulfilling the essential function of a trade mark, which is to guarantee the identity of the origin of the marked product or service 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 (see, in particular, [Case 102/77 Hoffmann-La Roche \[1978\] ECR 1139](#), paragraph 7; [Case C- 299/99 Philips \[2002\] ECR I- 5475](#), paragraph 30, and [SAT.1 v OHIM](#), paragraph 23).

61 In view of the extent of the protection afforded to a trade mark by Regulation No 40/94, the public interest underlying Article 7(1)(b) of that regulation is, manifestly, indissociable from the essential function of a trade mark ([SAT.1 v OHIM](#), paragraph 27, and [BioID v OHIM](#), paragraph 60).

62 By prohibiting the registration as Community trade marks of signs or indications which may serve, in trade, to designate characteristics of the goods or services in respect of which registration is sought, Article 7(1)(c) of Regulation No 40/94 pursues an aim which is in the public interest, namely that such signs or indications may be freely used by all. That provision accordingly prevents such signs and indications from being reserved to one undertaking alone because they have been registered as trade marks (see [Case C- 191/01 P OHIM v Wrigley \[2003\] ECR I- 12447](#), paragraph 31, and orders in [Case C- 326/01 P Telefon & Buch v OHIM \[2004\] ECR I- 1371](#), paragraph 27, and [Case C150/02 P Streamserve v OHIM \[2004\] ECR I- 1461](#), paragraph 25).

63 In those circumstances, as the Court has already held, the criterion according to which trade marks which are capable of being commonly used, in trade, for the presentation of the goods or services in question may not be registered is relevant in the context of Article 7(1)(c) of Regulation No 40/94 but it is not the yardstick by which Article 7(1)(b) must be interpreted ([SAT.1 v OHIM](#), paragraph 36, and [BioID v OHIM](#), paragraph 62).

64 In paragraph 31 of the judgment under appeal, the Court of First Instance held that trade marks devoid of any distinctive character within the meaning of Article 7(1)(b) of Regulation No 40/94 'are, in particular, those which, from the point of view of the relevant public, are commonly used, in trade, for the presentation of the goods or services concerned or with regard to which there exists, at the very least, concrete evidence justifying the conclusion that they are capable of being used in that manner'. Moreover, it held, in the final sentence of paragraph 41 of the same judgment, that there is concrete evidence that stand-up pouches 'are capable of being used' in trade for presentational purposes for the products concerned and, in the final

sentence of paragraph 42 of that judgment, that ‘the expected development of this type of packaging confirms ... that its use is unexceptional’.

65 Clearly, however, despite those findings in the judgment under appeal, the Court of First Instance did not base its decision on the criterion mentioned in paragraph 63 of the present judgment.

66 It is apparent from the first and second sentences of paragraph 42 of the judgment under appeal that, irrespective of whether stand-up pouches are capable of being used for fruit drinks and fruit juices, the Court of First Instance found that the trade marks applied for were devoid of any distinctive character on the ground that that form of packaging is already in general use in the Community for liquids for human consumption and that, therefore, it is not sufficiently unusual for the average consumer to perceive it, per se, as an indication of the specific commercial origin of a product within that category.

67 The Court of First Instance thus reached that conclusion on the basis not of the possibility that stand-up pouches may be commonly used in future in the sector of liquids for human consumption – which it used as the framework for its analysis – but of the finding that they are already commonly used. In so doing, the Court of First Instance based its conclusion on a proper criterion.

68 It was therefore merely for the sake of completeness that the Court of First Instance held in addition, in the final sentences of paragraphs 41 and 42 of the judgment under appeal, that stand-up pouches were capable of being used in future by competitors of the appellant for fruit drinks and fruit juices.

69 Furthermore, it should be observed that, in paragraph 32 of the judgment under appeal, the Court of First Instance correctly stated that ‘the interest that competitors of an applicant for a three-dimensional mark consisting of the product’s design may have in being able freely to choose shapes and patterns for their own products is not in itself a ground for refusing registration of such a mark, nor a criterion sufficient in itself for the assessment of the mark’s distinctive character’.

70 In fact, in the analysis of the trade marks applied for which it carried out in paragraphs 44 to 54 of the judgment under appeal, the Court of First Instance did not in any way base its findings on the interest of possible competitors, but limited itself to determining whether those trade marks enable the average consumer of fruit drinks and fruit juices to distinguish, without any possibility of confusion, the goods of the appellant from those of a different commercial origin.

71 Consequently, the second part of the first plea and the third plea must also be rejected and, as a result, the appeal must be dismissed.

Costs

72 Under Article 69(2) of the Rules of Procedure, which apply to the procedure on appeal 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. Since OHIM applied for the appellant to be ordered to pay the costs and the ap-

pellant has been unsuccessful, it must be ordered to pay the costs.

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

1. Dismisses the appeal;
2. Orders Deutsche SiSi-Werke GmbH & Co. Betriebs KG to pay the costs.

OPINION OF ADVOCATE GENERAL Ruiz-Jarabo Colomer

delivered on 14 July 2005 1(1)

Case C-173/04 P

Deutsche SiSi-Werke GmbH & Co. Betriebs KG
v

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

(Appeal – Community trade mark – Three-dimensional mark consisting of the packaging of the product – Stand-up pouches for fruit juices – Absolute grounds for refusal – Lack of distinctive character – Interpretation of Article 7(1)(b) of Regulation (EC) No 40/94)

1. The present appeal is brought against the judgment given by the Court of First Instance on 28 January 2004, (2) upholding the refusal of the Second Board of Appeal of the Office for Harmonisation in the Internal Market (Trade Marks and Designs) (‘OHIM’) to register eight three-dimensional shapes for stand-up pouches for drinks, intended to identify fruit drinks and fruit juices.

2. Once again there arises the question of the distinctive character of three-dimensional signs and, hence, the interpretation of Article 7(1)(b) of the Regulation on the Community trade mark. (3) Most of the pleas relied on in the appeal raise matters already discussed at length in Community case-law, with the exception of that pertaining to the spatial and objective delimitation of context when establishing whether a three-dimensional indication is capable of serving the essential function of this form of industrial property.

I – The Regulation on the Community trade mark

3. Regulation No 40/94 contains those provisions which need to be applied for a decision on the appeal.

4. Pursuant to Article 4, 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), headed ‘Absolute grounds for refusal’, requires that the following not be registered:

- (a) signs which do not conform to the requirements of Article 4;
- (b) trade marks which are devoid of any distinctive character;
- (c) trade marks which consist exclusively of signs or indications which may serve, in trade, to designate the kind, quality, quantity, intended purpose, value, geographical origin or the time of production of the goods

or of rendering of the service, or other characteristics of the goods or service;

...

(e) signs which consist exclusively of:

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

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

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

...'

6. Article 7(3) provides that paragraph 1(b), (c) and (d) are not to 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'.

II – Background to the appeal

A – The facts of the dispute

7. On 8 July 1997 Deutsche SiSi Werke GmbH & Co. Betriebs KG ('SiSi Werke') filed at OHIM eight applications for Community trade marks, for goods in Classes 1, 3, 5, 6, 16, 20, 29, 30, 32, 33, 39 and 40 of the Nice Agreement concerning the International Classification of Goods and Services for the Purposes of the Registration of Marks of 15 June 1957.

8. The applications relate to various shapes of stand-up pouches for drinks, distinguished by their convex shapes and widened bottoms, displaying one triangular or oval face and with concave sides in some cases.

9. By decisions of 24 and 27 September 1999, the OHIM examiner refused the eight registrations pursuant to Article 38 of Regulation No 40/94 on the ground that they were devoid of any distinctive character.

10. On 11 November 1999, SiSi-Werke brought appeals against those decisions under Article 59 of the Regulation, limiting its application to Classes 32 and 33. The Second Board of Appeal dismissed these appeals by decisions of 28 February 2002, holding that consumers would not perceive the signs requested as an indication of their commercial origin but only a pattern of packaging, adding that there could not be a monopoly in those packagings, in the interests of competitors or manufacturers of packagings or beverages.

11. Having exhausted all administrative appeals but prior to bringing legal action, the applicant company, in a letter of 6 May 2002, limited its application to the following goods in Class 32: 'fruit drinks and fruit juices'.

B – The judgment under appeal

12. Actions for annulment were brought against these decisions of 28 February 2002 and the cases were joined. The actions were dismissed in the judgment of the Court of First Instance of 28 January 2004, the subject of the present action.

13. The judgment of the Court of First Instance identifies the subject-matter of the proceedings on the basis of the limitation of 6 May 2002 (paragraphs 11 and 12); it restricts the legal analysis to Article 7(1)(b) of Regulation No 40/94 and sets aside subparagraph (c), which was also relied upon in the applications (paragraphs 13 to 15).

14. On the basis of its own judgments in SAT.1 v OHIM(SAT.2)(4) and Unilever v OHIM (Ovoid tablet), (5) the Court of First Instance states, in paragraph 31, that Article 7(1)(b) covers signs which, from the point of view of the relevant public, are commonly used for the presentation of the goods or services that they are meant to designate.

15. After noting, in paragraph 33, that the distinctiveness of a trade mark can only be assessed, firstly, by reference to the goods or services for which registration is sought and, secondly, on the basis of the perception of that mark by the relevant public, it is observed in paragraph 36 of the judgment that, in the present case, the goods in question are fruit juices and the public concerned is end consumers.

16. The Court then points out the special features of the public's perception of a three-dimensional sign consisting of the appearance of the product itself and, since a liquid must of necessity be packaged for sale, it finds that the average consumer will perceive the packaging first and foremost simply as a means of packaging the product for sale. Packaging can be allowed as a trade mark only if it is regarded immediately as an indication of its commercial origin (paragraphs 37 and 38).

17. On the basis of those factors, the Court considers that the check carried out by OHIM on certain internet sites shows that the pouches in question are used worldwide for packaging beverages and, in particular, fruit juices, and are used within the Community for liquids for human consumption. Thus the pouches are commonly used for this class of articles and, as they are not sufficiently unusual, consumers do not attach a specific origin to them (paragraphs 40 to 42).

18. Paragraphs 44 to 52 are concerned with the three-dimensional shapes claimed by SiSi-Werke in connection with the generic appearance of a stand-up pouch, concluding that these are mere variations on that appearance and that the sum of their specific features does not make the whole markedly different from the standard appearance of any similar container, apart from which the average consumer appears unable to retain the association of the various design features capable of identifying the whole.

19. The Court dismisses the applicant company's claim on the basis of a further argument relating to the risk of a monopoly being created by registration of the three-dimensional forms at issue, even though the interest that competitors of an applicant for a mark may have in being able freely to choose the form of their own products cannot be a ground for refusing registration, nor a criterion for assessing the distinctive character of the sign (paragraph 32). It therefore holds that the Board of Appeal of OHIM was entitled to mention that risk and confirms that the pouches at issue do not have distinctive character (paragraph 54).

III – Procedure before the Court of Justice

20. The appeal from SiSi-Werke was lodged at the Registry of the Court on 8 April 2004; OHIM lodged its response on 28 June 2004; the reply was given in a

document of 22 October 2004 but there was no rejoinder.

21. The representatives of both parties attended the hearing, which was held on 16 June 2005.

IV – Analysis of the pleas in law

22. The appellant company puts forward three pleas in law, all relating to the interpretation of Article 7(1)(b) of Regulation No 40/94, in an ill-structured document. After listing the causes of its disagreement, of which there are five, it sets down a disordered and unsystematic cluster of arguments, not specifying which of the pleas the arguments refer to, requiring the Court to engage in a complex operation to work out the true sense of the appeal.

A – The frame of reference for assessing the distinctive character of a sign (first limb of the first plea)

23. SiSi-Werke complains that the Court of First Instance was in error, when delimiting the sector of container products that must be considered in assessing the distinctive character of a mark, in choosing the forms of packaging existing on the world market for liquids for human consumption in general. In its opinion, the territorial element should relate to the Community alone and the material element should mean only packagings for fruit juices and drinks.

24. In reality, the appellant wishes to clarify whether, in assessing the distinctiveness of this type of sign, one must be concerned solely with the appearance of the packagings specific to the products referred to or with that of similar goods. The latter option is more appropriate.

25. The style or shape of an item may comprise a trade mark provided that, pursuant to Article 4 of Regulation No 40/94, it is capable of being represented graphically and of distinguishing the item as required by this legal concept. (6)

26. If it cannot be so represented and distinguished, registration must be refused or a previous registration must be revoked, under Articles 7(1)(b), 38(1) and 51(1)(a) of the Regulation.

27. ‘Distinctive character’, therefore, is seen to be an imprecise legal concept referring to the essential function of this particular property, which is to afford the end user or consumer a guarantee of the origin of an object or a service, and to assist in identifying it without any possibility of confusion with those from any other source. Consequently, this concept means that the mark must be such as to fulfil that task by attaching an unmistakable commercial origin to the goods which it designates. (7)

28. To give concrete expression to that imprecise notion in a specific instance requires examination of two complementary elements. We have to consider, first, the goods or the services which the sign is intended to represent and, second, how it will be perceived by the relevant public, taking as a model an average consumer who is reasonably well informed and reasonably observant and circumspect. (8)

29. These assessment criteria do not change (9) but, clearly, the assessment is decisively affected by the na-

ture of the indication. It seems obvious that the intensity with which and the extent to which a person receives a message depend upon its nature and the sense by which it is perceived; (10) visual observation of a two-dimensional figure does not give the same picture as observing a three-dimensional object.

30. The difference becomes more marked if this three-dimensional representation is the shape of a product or of its container (11) since it is more difficult to weigh the distinctive character of a shape devoid of any graphical or textual elements, because an average consumer is not used to guessing the origin of goods from their appearance. (12)

31. Accordingly, SiSi-Werke’s complaint would be pertinent if it were not founded on a very simplistic analysis of the case-law of the Court. One has of course to consider the goods or services for which registration has been sought, but not only those specifically affected, also those belonging to the same class, type or kind, meaning those which, being distributed through similar channels and aimed at the same consumers, may for the purposes of choice come into conflict.

32. In my Opinion of 18 January 2001, given in *Merz & Krell*, (13) referring to the instrumental nature of the rights derived from ownership of a trade mark, I suggested that, in order to assess its capacity to distinguish, regard must be had to ‘the impression made on the average consumer of the type of goods or services in question’ (points 44 and 43). And, in my Opinion, of 2 July 2002, (14) in the *Ansul* case, I noted that this special property requires a link between the sign and the item which it denotes so that, as a result of its perception by customers and the association between it and those goods, it will find a place on the market (point 64). Hence, in order to decide whether the mark has a distinctive character and thereby achieves its principal purpose, it is important to consider the structure of the sector and the marketing channels. In the *Ansul* Opinion I noted by way of example that using a mark for edible preserves is entirely different from using some other mark for electronic computer components.

33. Thus, in order to show whether an indication of the place of manufacture is capable of being distinctive, it is proper to observe the range of articles that the relevant public will encounter when making a choice. In that connection, it seems reasonable to assume that, as regards the shape of a container for fruit drinks and fruit juices, the field of assessment is restricted by reference to foodstuffs in the liquid state which, being aimed at a similar type of consumer and being distributed through similar channels, are relevant in establishing the potential of a sign in identifying goods. The reductionist theory of SiSi-Werke leads to absurdity, since restricting the examination to the goods designated would make it impossible to see whether the trade mark is properly fulfilling its role of identifying the goods on the basis of their commercial origin.

34. OHIM rightly notes that a person accustomed to a particular type of packaging for given goods will, on first encountering the same kind of container for other

goods, believe that this is a form of packaging and not an indication of its origin. It would therefore not be legitimate to inquire into consumer reaction in respect only of the containers used for the category of goods referred to in the application for registration.

35. The appellant company's complaint regarding the geographic dimension is likewise unfounded since, although it is relevant to restrict it to the Community for the purposes of the relative grounds for refusal in Article 8(1)(b) of Regulation No 40/94, in order to establish whether there is a likelihood of confusion between two trade marks, it is not justified when seeking to establish the abstract distinguishing potential of a sign.

36. Briefly, no legal rule required the Court of First Instance to adjudicate in the terms suggested by SiSi-Werke, so it made no error of law in its ruling.

B – Describing the pouches as ‘basic shapes’ (second limb of the first plea)

37. The appellant also claims that the Court of First Instance erred in law by referring to the pouches at issue as ‘basic geometric shapes’, since SiSi-Werke is the only firm to have put them on the European fruit-juice market and they cannot be described as a paradigm of packaging for that class of beverages. It considers it wrong to find them devoid of distinctive character on the basis that they are commonly used in trade for such juices, since that is the premiss on which registration is refused pursuant to Article 7(1)(b) of Regulation No 40/94, in defence of a general interest which is not governed by that provision but by Article 7(1)(c).

38. To the extent that it runs counter to the considerations in paragraph 46 et seq. of the judgment, regarding the forms claimed and their characteristics, this plea is inadmissible, since it requests the Court to interfere in assessment of the evidence, an area closed to it on appeal and an aspect which lies outside this special form of challenge to court decisions.

39. Nor does the complaint gain in relevance if it is accepted, as SiSi-Werke proposes, that the Court of First Instance finds the forms claimed devoid of distinctive character because they are capable of being used frequently for fruit juices, since this statement, made at the end of paragraph 41 of the judgment, does not question that distinctive character on the basis of a general interest which is unusual under Article 7(1)(b) of the Regulation. (15) If the judgment is read with care, it can be seen that its scope has a different dimension.

40. The basis for that statement is the argument in justification of the objective context chosen for evaluating distinctive character, explaining that, being in general use for the packaging of liquids for human consumption, the sign is not sufficiently unusual for the average consumer to perceive it as an indication of a specific commercial origin (paragraph 42). Furthermore, this problem has a link with the second plea, which considers whether the trade marks applied for are sufficiently different from the basic design of a stand-up pouch for juices.

41. In brief, the Court of First Instance does not hold that the mark is devoid of distinctive character on the basis of the interest of competitors in preventing a monopoly being created for certain forms, as I explain later in examining the final plea: it refers to the common use on the market of the packagings at issue, with the intention of emphasising the difficulties for a purchaser in identifying them as representing certain specific products. As a consequence, this second limb of the first plea must also be rejected.

C – Alleged stricter comparison of three-dimensional trade marks (first limb of the second plea)

42. SiSi-Werke complains that the judgment under appeal sets a very high threshold for three-dimensional trade marks consisting of the packaging of a product to become distinctive whilst, for two-dimensional forms, signs which deviate slightly from simple geometrical figures may be registered. In its opinion, by not accepting this, the Court of First Instance infringes Article 7(1)(b) of Regulation No 40/94.

43. This complaint also must fail. Certainly, as I have already said, the distinctiveness of a trade mark is to be established according to the same criteria, whatever its nature, but the fact remains that the particular nature of the mark renders assessment more complicated in respect of certain signs, such as three-dimensional signs (points 29 and 30 of this Opinion) (16) because, as I have also said, average consumers are not used to presuming the origin of goods presented to them on the basis of the shape, ignoring any graphical or textual element.

44. In such circumstances, the closer a shape for which registration is sought approaches that of the product in question, the less it is distinctive. (17) The packaging of a liquid reflects its image, so that a drawing of a container is not appropriate for use as a trade mark unless simple variants of the common shape are sufficient to give it distinctive character, for it is only necessary for the consumer to distinguish the product, without conducting an analysis or making a comparison or paying particular attention. (18)

45. In that task it is advisable to turn to experience, reverting to empirical principles in comparing the shapes and containers on the market; thus the appearance of any one in trade would be a valid criterion for establishing its distinctive character, (19) since the extent of its distribution may affect consumers' perception which, for this class of signs, does not seem particularly high, (20) especially if the signs relate to everyday products which differ very little in appearance from similar goods, in which circumstances the purchaser pays more heed to labelling than to shapes. (21) Similarly it is useful to assess the containers commonly used, or to assess certain basic creations, although that does not mean setting stricter criteria for this class of trade marks but, rather, weighing their particular features.

46. The test carried out in the judgment follows these norms, since it is pointed out that the pouches at issue are commonly used in trade for liquids for human

consumption in general, among which one finds beverages such as fruit juices, and that prevents the average consumer from perceiving the packaging as an indication of the commercial origin of the goods. Furthermore, the appellant company offers a number of designs which correspond to the generic image of that type of packaging, containing features which are too insignificant to be capable of being memorised by the relevant public. The judgment then considers the three features involving differences apparent to the eye: the basic shapes of the pouches (rectangular, oval and triangular), the concave sides and the metallic finish, analysing them both together and individually (22) (paragraphs 41, 42 and 46 to 52).

47. Thus the Court of First Instance turned to appropriate sources of information which, in objective terms, give no reason to question the lawfulness of the methodology chosen. It had regard to certain factors, such as the class of product and the complexity of the design, which comply with the parameters set out above. The judgment deserves no reproach on this point and the appellant's complaint should be rejected.

48. Lastly, this plea should be dismissed to the extent that it relates to factual assessments in paragraphs of the judgment cited above since, as I said earlier, the nature of an appeal precludes review of the facts established at first instance.

D – Failure to state reasons (second limb of the second plea)

49. The appellant company asserts that OHIM and certain national bodies have registered trade marks like those at issue for goods from the same commercial sector and thus, in these circumstances, the Court of First Instance and also OHIM are required to state why these marks are incapable of fulfilling the essential functions of this type of intellectual property.

50. This plea calls for different approaches according to whether the earlier registration of similar signs occurred under a national system or within the Community system.

51. In the first case, an answer is found, by implication, in the judgment in Henkel (Case C-218/01) which stated, in paragraphs 63 and 64, that registration of a mark for certain goods in one Member State does not entail the grant or refusal in another Member State of registration for a like or similar mark for the same or similar products.

52. I pointed out, in point 24 of the Opinion in that case, that this approach stems from the absence of organic links between the national systems, which are not obliged to achieve identical results, (23) and it applies also in the relationship between OHIM and a national body, so that decisions adopted under the national systems of the Member States are not binding at Alicante.

53. Registration of a mark is subject to the particular rules applying in specific circumstances, and a sign that is capable of being distinctive within a given territory may not be able to serve that function for a different geographical area.

54. That is the response in paragraph 56 of the judgment under appeal, stating that registrations made

in the Member States 'are only factors which may merely be taken into consideration, without being given decisive weight, for the purposes of registering a Community trade mark'. The Court held further that 'the Board of Appeal correctly took account of those national registrations, stating that they did not persuade it to alter its findings'. Thus, firstly, OHIM was able lawfully to disregard those external precedents without needing to explain why and, secondly, the Court of First Instance did not fail to state the reasons for its decision.

55. As regards the registrations made in Alicante, paragraph 55 of the judgment under appeal affords sufficient reasoning in noting that, in accordance with the case-law of the Court of First Instance, previous decisions are not binding on OHIM since the registrability of a sign is assessed on the basis of the relevant legislation and is not subject to the approach taken in the past by the Boards of Appeal. The appellant has indicated its assent to that approach.

56. Even if that response were to be considered unsatisfactory, the defect would be immaterial since the registrations to which SiSi-Werke refers in the appeal are later (24) than the administrative decisions challenged. OHIM therefore could not be bound by acts which did not exist at the time.

E – The interests of competitors, as a basis of the judgment (third plea)

57. SiSi-Werke protests that, in applying Article 7(1)(b) of Regulation No 40/94, the judgment under appeal has regard only to the general interests of competitors without considering, as it should have, that of consumers, forgetting that the appellant has for years been using the containers without any hindrance.

58. That complaint stems from an incorrect analysis of the judgment under appeal. Reading paragraphs 32 and 54 together gives the opposite conclusion, since paragraph 32 notes that the interest of competitors is not a ground for refusing to register a mark nor is it sufficient for assessment of the mark's distinctive character, and lack of distinctive character is assessed in the paragraphs following (33 to 53). Paragraph 54 points out that the reason for the reference in the Board of Appeal's decision to the risk of creating a monopoly in stand-up pouches is that it confirms that their shape cannot fulfil the essential function of the trade mark, 'reflecting the general interest underlying the absolute ground for refusal founded on Article 7(1)(b) of Regulation No 40/94'.

59. Therefore it cannot be asserted that the Court of First Instance denied the distinctiveness of the marks claimed with regard only to competitors, because the core of the judgment lies in consumers' inability to choose juices with certainty about their origin because the sign does not give them adequate information as to their commercial origin. It is precisely the interest of consumers which justifies the refusal to register marks devoid of distinctiveness.

60. Having regard to all of the foregoing, the final plea must also be rejected.

V – Costs

61. Taking Article 122 of the Rules of Procedure together with Article 69(2), which applies to appeals by virtue of Article 118, costs are to be ordered against the unsuccessful party. Therefore if, as I suggest, the pleas in law put forward by the appellant are rejected, it would be proper to order the appellant to pay the costs incurred in this appeal.

VI – Conclusion

62. On the grounds given, I propose that the Court should dismiss the appeal brought by SiSi-Werke against the judgment given by the Court of First Instance on 28 January 2004, in Joined Cases T-146/02 to T-153/02 and order the appellant to pay the costs incurred in hearing it.

1 – Original language: Spanish.

2 – Judgment in Joined Cases T- 146/02 to T- 153/02 Deutsche SiSi Werke v OHIM [2004] ECR II- 447.

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

4 – Case T-323/00 SAT.1 v OHIM (SAT.2) [2002] ECR II-2839.

5 – Case T-194/01 Unilever v OHIM (Ovoid tablet) [2003] ECR II-383

6 – See the judgments in Case C-299/99 Philips [2002] ECR I-5475, paragraph 73; in Joined Cases C- 53/01 to C-55/01 Linde and Others [2003] ECR I-3161, paragraph 38; and in Case C-218/01 Henkel [2004] ECR I-1725, paragraph 29: these interpret 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)

7 – Similar terms are used in the judgments in Henkel, paragraph 30, and in Linde and Others, paragraph 40. See also the judgment of 23 September 2004 Case C-107/03 P Procter & Gamble v OHIM, not published in the ECR, paragraph 28.

8 – Judgments in Linde and Others, paragraph 41, and Procter & Gamble v OHIM, paragraph 29. To the same effect see Case C-136/02 P Mag Instrument v OHIM [2004] ECR I-9165, paragraph 19.

9 – Thus in Philips (paragraph 48) and in Linde and Others (paragraph 42), already much cited.

10 – In the Opinion in Case C-273/00 Sieckmann [2002] ECR I-11737, I had the opportunity of examining the capacity of perception of the different physical senses (points 22 et seq.).

11 – In the Opinion delivered on 14 January 2003, in the Henkel case, I explained that, for liquids, gases and some granulated or very friable substances without a definite size or appearance, the packaging cannot be dissociated from the product, since the packaging is the only form which the consumer is able to perceive or which can be represented graphically (point 12). The judgment in the case adopted this indicator and stated that, in such cases, the packaging chosen gives its

shape to the product and must therefore be identified with it (paragraph 33).

12 – Judgments in Procter & Gamble v OHIM (paragraph 50) and in Mag Instrument v OHIM (paragraph 30). Nonetheless, as I considered in the Opinion delivered on 24 October 2002, in Linde and Others, the foregoing does not require examination of the distinctiveness of three- dimensional marks to be narrower or stricter than that of any other type of sign (paragraph 46 of the judgment is in similar terms).

13 – The judgment was given on 4 October 2001 (Case C-517/99, ECR I-6959).

14 – This judgment was given on 11 March 2003 (Case C-40/01, ECR I-2439).

15 – It should be noted that the public interest differs according to the absolute ground that is used for refusal (judgment in Joined Cases C-456/01 P and C-457/01 P Henkel v OHIM [2004] ECR I-5089, paragraphs 45 and 46) and Article 7(1)(b) of the Regulation cannot be interpreted as prohibiting the registration of marks which are capable of being used commonly in trade for the services or goods concerned, the criterion relevant to Article 7(1)(c) (judgment in Case C- 329/02 P SAT.1 v OHIM [2004] ECR I-8317, paragraph 36).

16 – Ströbele, P., *Absolute Eintragungshindernisse im Markenrecht, Gewerblicher Rechtsschutz und Urheberrecht*, 2001, p. 665, notes that there is no legal basis for changing the rules which establish the distinctive character of three-dimensional packagings and products.

17 – Judgment in Mag Instrument, paragraphs 31 and 32.

18 – Judgment in Mag Instrument, paragraph 32.

19 – Pollaud-Dulian, F., ‘Les marques tridimensionnelles en droit communautaire’, *Revue de jurisprudence de droit des affaires*, No 8-9 (2003), p. 712, and Hetzelt, N., *Dreidimensionale Marken – Freihaltebedürftigkeit, Unterscheidungskraft und Schutzzumfang*, Cologne 2004, p. 146.

20 – Hetzelt, N., p. 141.

21 – Ströbele, P., p. 666, and Hetzelt, N., p. 146.

22 – The judgment in Case C-251/95 SABEL [1997] ECR I-6191, paragraph 23, in comparing two marks to establish whether they have similarities that are open to challenge, adopted a similar method, referring to the overall impression given by the marks, bearing in mind their distinctive and dominant components.

23 – But the partially harmonising effects of the Trade Marks Directive do require national legislation to be interpreted in accordance with the letter and the spirit of this rule of Community law.

24 – Trade marks 2662781 and 2662765 were applied for on 22 April 2002 and were granted on 1 and 19 March 2004, respectively; the latest mark, number 2899078, was applied for on 21 October 2002 and was registered on 23 January 2004.