



Press and Information

General Court of the European Union  
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Judgment in Case T-668/19  
Ardagh Metal Beverage Holdings v EUIPO

## **The Court gives a ruling for the first time on the registration of a sound mark submitted in audio format**

*An audio file containing the sound made by the opening of a drinks can, followed by silence and a fizzing sound, cannot be registered as a trade mark in respect of various drinks and for metal containers for storage or transport, in so far as it is not distinctive*

Ardagh Metal Beverage Holdings GmbH & Co. KG filed an application for registration of a sound sign as an EU trade mark with the European Union Intellectual Property Office (EUIPO). That sign, submitted as an audio file, recalls the sound made by a drinks can being opened, followed by a silence of approximately one second and a fizzing sound lasting approximately nine seconds. Registration was sought in respect of various drinks and metal containers for storage or transport.

EUIPO rejected the application for registration on the ground that the mark applied for was not distinctive.

In its judgment, the Court dismisses the action brought by Ardagh Metal Beverage Holdings and gives a ruling for the first time on the registration of a sound mark submitted in audio format. It clarifies the criteria for assessing the distinctive character of sound marks and the perception of those marks in general by consumers.

### **Findings of the Court**

First of all, the Court recalls that the **criteria for assessing the distinctive character<sup>1</sup> of sound marks do not differ from those applicable to other categories of marks and a sound mark must have a certain resonance which enables the target consumer to perceive it as a trade mark and not as a functional element or as an indicator without any inherent characteristics.**<sup>2</sup> Thus, the consumer of the goods or services in question must, by the simple perception of the sound mark, without its being combined with other elements such as, inter alia, word or figurative elements, or even another mark, be able to associate it with their commercial origin.

Next, in so far as EUIPO applied by analogy the case-law<sup>3</sup> according to which only a mark which departs significantly from the norm or the customs of the sector is not devoid of distinctive character, the Court emphasises that that case-law was developed in respect of three-dimensional marks consisting in the shape of the product itself or of its packaging where there are norms or customs of the sector relating to that shape. In such circumstances, the consumer concerned, who is accustomed to seeing one or several shapes corresponding to the norm or customs of the sector will not perceive the three-dimensional mark as an indication of the commercial origin of the goods if its shape is identical or similar to the usual shape or shapes. The Court adds that that case-law does not establish any new criteria for assessing the distinctive character of a mark, but merely specifies that, in the context of the application of those criteria, the perception of the average

<sup>1</sup> Within the meaning of Article 7(1)(b) of Regulation (EU) 2017/1001 of the European Parliament and of the Council of 14 June 2017 on the European Union trade mark (OJ 2017 L 154, p. 1).

<sup>2</sup> Judgment of 13 September 2016, *Globo Comunicação e Participações v EUIPO (Sound mark)* ([T-408/15](#), paragraphs 41 and 45) see also Press Release No [93/16](#).

<sup>3</sup> See *inter alia*, judgment of 7 October 2004, *Mag Instrument v OHIM* ([C-136/02 P](#), paragraph 31).

consumer is not necessarily the same in the case of a three-dimensional mark as in the case of a word, figurative or sound mark, which consists of a sign independent of the exterior appearance or shape of the goods. Consequently, the Court holds that that case-law relating to three-dimensional marks cannot, in principle, be applied to sound marks. However, even though EUIPO incorrectly applied that case-law, the Court states that that error is not such as to vitiate the reasoning set out in the contested decision, which is also based on another ground.

Regarding that other ground, based on the perception of the mark applied for by the relevant public as being a functional element of the goods in question, the Court observes, first, that **the sound produced by the opening of a can will in fact be considered, having regard to the type of goods, to be a purely technical and functional element. The opening of a can or bottle is inherent to a technical solution connected to the handling of drinks in order to consume them and such a sound will therefore not be perceived as an indication of the commercial origin of those goods.** Second, the relevant public immediately associates the sound of fizzing bubbles with drinks. In addition, the Court observes that **the sound elements and the silence of approximately one second, taken as a whole, do not have any inherent characteristic that would make it possible for them to be perceived by that public as being an indication of the commercial origin of the goods.** Those elements are not resonant enough to distinguish themselves from comparable sounds in the field of drinks. Therefore, the Court confirms EUIPO's findings relating to the lack of distinctive character of the mark applied for.

Last, the Court refutes EUIPO's finding that it is unusual on the market for drinks and their packaging to indicate the commercial origin of a product using sounds alone on the ground that those goods are silent until they are consumed. The Court points out that most goods are silent in themselves and produce a sound only when they are consumed. Thus, the mere fact that a sound is made only on consumption does not mean that the use of sounds to indicate the commercial origin of a product on a specific market would still be unusual. The Court explains nonetheless that any error on EUIPO's part in that regard does not lead to the annulment of the contested decision, because it did not have a decisive influence on the operative part of that decision.

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**NOTE:** EU trade marks are valid throughout the European Union and co-exist with national trade marks. Applications for registration of EU trade marks are sent to EUIPO. Actions against its decisions may be brought before the General Court.

**NOTE:** An appeal, limited to points of law only, may be brought before the Court of Justice against the decision of the General Court within two months and ten days of notification of the decision. The appeal will not proceed unless the Court first decides that it should be allowed to do so. Accordingly, it must be accompanied by a request that the appeal be allowed to proceed, setting out the issue(s) raised by the appeal that is/are significant with respect to the unity, consistency or development of EU law.

**NOTE:** An action for annulment seeks the annulment of acts of the institutions of the European Union that are contrary to EU law. The Member States, the European institutions and individuals may, under certain conditions, bring an action for annulment before the Court of Justice or the General Court. If the action is well founded, the act is annulled. The institution concerned must fill any legal vacuum created by the annulment of the act.

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The [full text](#) of the judgment is published on the CURIA website on the day of delivery

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