



Press and Information

General Court of the European Union  
**PRESS RELEASE No 126/21**  
Luxembourg, 14 July 2021

Judgment in Case T-488/20  
Guerlain v EUIPO

## **EU trade mark: the three-dimensional mark in the shape of a Guerlain lipstick may be registered**

*The General Court annuls the decision of EUIPO which dismissed Guerlain's initial application*

Guerlain applied to the European Union Intellectual Property Office (EUIPO) for registration of a three-dimensional EU trade mark in respect of lipsticks. It is a three-dimensional sign consisting in the shape of a lipstick, represented as follows:



The EUIPO Examiner found that the mark applied for lacked distinctive character<sup>1</sup> and dismissed the application. The Board of Appeal upheld that decision, finding that the mark did not depart sufficiently from the norms and customs of the sector.

The General Court of the European Union annuls the decision of the Board of Appeal. It finds that the mark applied for has distinctive character because it departs significantly from the norm and customs of the lipstick sector.

### **Assessment of the General Court**

First, the General Court recalls that the assessment of whether it has distinctive character is not based on the originality or the lack of use of the mark applied for in the field to which the goods and services concerned belong. Indeed, a three-dimensional mark consisting in the shape of the

<sup>1</sup> The distinctive character of a mark, 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) means that this mark enables the product in respect of which registration is sought to be identified as originating from a particular undertaking and thus enables that product to be distinguished from those of other undertakings.

product must necessarily depart significantly from the norm or customs of the sector concerned. Accordingly, the mere novelty of that shape is not sufficient in order to conclude that there is distinctiveness. However, the fact that a sector is characterised by a wide variety of product shapes does not mean that a new possible shape will necessarily be perceived as one of them.

Second, according to the General Court, the fact that goods have a high-quality design does not necessarily mean that a mark consisting in the three-dimensional shape of those goods makes it possible for them to be distinguished from the goods of other undertakings. It notes that taking into account the aesthetic aspect of the mark applied for does not amount to an assessment of the attractiveness of the product in question but is done with the aim of determining whether that product is capable of generating an objective and uncommon visual effect in the perception of the relevant public.

Third, whilst taking into account the images taken into consideration by the Board of Appeal as constituting the norm and customs of the sector concerned, the General Court finds that the shape in question is uncommon for a lipstick and differs from any other shape existing on the market. Indeed, it observes, first of all, that this shape is reminiscent of that of a boat hull or a baby carriage. Such a shape differs significantly from the images taken into consideration by the Board of Appeal, most of which represented cylindrical and parallelepiped lipsticks. Next, the presence of the small oval embossed shape is unusual and contributes to the uncommon appearance of the mark applied for. Finally, the fact that the lipstick represented by this mark cannot be placed upright reinforces the uncommon visual aspect of its shape.

Consequently, the General Court finds that the relevant public will be surprised by this easily memorable shape and will perceive it as departing significantly from the norm and customs of the lipstick sector and capable of indicating the origin of the goods concerned. Accordingly, the mark applied for has distinctive character, which permits it to be registered.

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**NOTE:** EU trade marks are valid for the entire territory of the EU and coexist with national trade marks. Applications for registration of an EU trade mark are addressed 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 European Union 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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