Operative part

The Court:

1. Dismisses the action;

2. Orders the applicant to bear its own costs and pay those of the Commission.

Judgment of the Court of First Instance (Third Chamber) of 4 October 2006 — Freixenet v OHIM (Shape of a frosted matt black bottle)

(Case T-188/04)

Community trade mark — Shape of a frosted matt black bottle — Absolute ground of refusal — Article 7(1)(b) of Regulation (EC) No 40/94 — Lack of distinctive character — Infringement of the rights of the defence — Article 73 of Regulation No 40/94

1. *Community trade mark — Appeals procedure (Council Regulation No 40/94, Art. 63(3) and (6)) (see paras 15-18, 44-47)*

2. *Community trade mark — Decisions of the Office — Compliance with rights of the defence (Council Regulation No 40/94, Art. 73) (see paras 28-30, 41, 42)*

Re:

ACTION for annulment of the decision of the Fourth Board of Appeal of OHIM of 11 February 2004 (Case R 104/2001-4) concerning registration of a mark in the form of a frosted matt black bottle as a Community trade mark.

Information relating to the case

Applicant for the Community trade mark:	Freixenet, SA
Community trade mark sought:	Three-dimensional mark in the shape of a frosted matt black bottle for goods in Class 33 — Application No 32540
Decision of the examiner:	Refusal of registration
Decision of the Board of Appeal:	Appeal dismissed

Operative part

The Court:

1. Annuls the decision of the Fourth Board of Appeal of the Office for Harmonisation in the Internal Market (Trade Marks and Designs) (OHIM) of 11 February 2004 (Case R 104/2001-4);

2. Dismisses the remainder of the action;

3. Orders OHIM to bear its own costs and to pay those of the applicant.

Judgment of the Court of First Instance (Third Chamber) of 4 October 2006 — Freixenet v OHIM (Shape of a frosted white bottle)

(Case T-190/04)

Community trade mark — Shape of a frosted white bottle — Absolute ground for refusal — Article 7(1)(b) of Regulation (EC) No 40/94 — Lack of distinctive character — Infringement of the rights of the defence — Article 73 of Regulation No 40/94