# JUDGMENT OF THE COURT (Second Chamber)

21 October 2004 *

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,

* Language of the case: German.

THE COURT (Second Chamber),

composed of: C.W.A. Timmermans, President of the Chamber, C. Gulmann, J.-P. Puissochet, 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 had 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 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 cross-appeal 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 second 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 accordingly 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 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.