JUDGMENT OF THE COURT OF FIRST INSTANCE (Second Chamber)

19 September 2001 *

In Case T-118/00,

Procter & Gamble Company, established in Cincinnati, Ohio (United States of America), represented by C. van Nispen and G. Kuipers, lawyers, with an address for service in Luxembourg,

applicant,

v

Office for Harmonisation in the Internal Market (Trade Marks and Designs) (OHIM), represented by A. von Mühlendahl, D. Schennen and C. Røhl Søberg, acting as Agents,

defendant,

* Language of the case: English.

APPLICATION brought against the decision of the First Board of Appeal of the Office for Harmonisation in the Internal Market (Trade Marks and Designs) of 3 March 2000 (Case R-516/1999-1), which was notified to the applicant on 7 March 2000,

THE COURT OF FIRST INSTANCE
OF THE EUROPEAN COMMUNITIES (Second Chamber),

composed of: A.W.H. Meij, President, A. Potocki and J. Pirrung, Judges,

Registrar: D. Christensen, Administrator,

having regard to the application lodged at the Court Registry on 3 May 2000,

having regard to the response lodged at the Court Registry on 28 July 2000,

further to the hearing on 5 April 2001,

gives the following

Judgment

Background to the dispute

1 On 13 October 1998, the applicant filed an application for a Community trade mark at the Office for Harmonisation in the Internal Market (Trade Marks and Designs) (hereinafter 'the Office') under Council Regulation (EC) No 40/94 of 20 December 1993 on the Community trade mark (OJ 1994 L 11, p. 1), as amended.

2 As can be seen from its graphic representation provided by the applicant, the three-dimensional trade mark in respect of which registration was sought is in the form of a square tablet with slightly rounded edges and corners, comprising two layers, one of which is white with green speckles (upper part) and the other of which is pale green (lower part), the colours also being claimed for registration.

3 The products in respect of which registration of the mark was sought are in class 3 of the Nice Agreement concerning the International Classification of Goods and Services for the Purpose of the Registration of Marks of 15 June 1957, as revised and amended, and correspond to the description: 'washing and bleaching preparations and other substances for laundry use; cleaning, polishing, scouring and abrasive preparations; preparations for the washing, cleaning and care of dishes; soaps'.

4 By decision of 17 June 1999, the examiner refused the application under Article 38 of Regulation No 40/94 on the ground that the mark applied for was devoid of any distinctive character.

5 On 13 August 1999, the applicant appealed to the Office under Article 59 of Regulation No 40/94 against the examiner's decision.

6 The appeal was dismissed by decision of 3 March 2000 (hereinafter 'the contested decision').

7 In essence, the Board of Appeal considered that the trade mark applied for was devoid of any distinctive character. It pointed out first that it is clear from Article 4 of Regulation No 40/94 that the shape of a product may be registered as a Community trade mark, provided that the shape displays certain features that are sufficiently unusual and arbitrary to enable the relevant consumers to recognise the product, purely on the basis of its appearance, as emanating from a specific undertaking. Given the advantages offered by products put up in tablet form for washing laundry and dishes, the Board of Appeal went on to point out that the applicant's competitors must also remain free to make such products using the simplest geometrical shapes. After describing the trade mark applied for, the Board of Appeal stated that the tablet's square shape did not make it distinctive. The basic geometric shapes (square, round, triangular or rectangular) were the most obvious shapes for such tablets and there was nothing arbitrary or fanciful about selecting a square tablet for the manufacture of solid detergents. Nor did the mark's colours enhance its distinctive character, since white, which is associated with spotless cleanliness, was a traditional colour for soap powders, whilst green, which is also a basic colour, is attractive to the eye and has positive

connotations since it is associated with environmental protection. The use of coloured speckles was well established and not only were coloured speckles appealing to the eye, but they might also indicate the presence of active ingredients, for which reason other traders must be able to use them for that purpose. The Board of Appeal added that the Office could certainly take account of decisions of national authorities but was not bound by them.

Forms of order sought by the parties

8 The applicant claims that the Court should:

— annul the contested decision;

— order the Office to pay the costs.

9 The Office contends that the Court should:

— dismiss the application;

— order the applicant to pay the costs.

Admissibility

Arguments of the parties

10 At the hearing, the applicant explained that the present action and those brought in parallel Cases T-117/00, T-119/00 to T-121/00, T-128/00 and T-129/00 essentially seek clarification of the legal position regarding the registrability of the marks applied for. It considers that the marks concerned do not warrant protection under Regulation No 40/94. However, since trade mark applications seeking protection for shapes similar to the one claimed in the present case and the parallel cases referred to above have been filed on behalf of certain undertakings active on the market, all the manufacturers are, it says, obliged to try to obtain equivalent protection for their own products.

11 The Office contends that the applicant is thus essentially asking the Court to dismiss its application. It raises the question whether in those circumstances the applicant has sufficient legal interest to bring proceedings.

Findings of the Court

12 It is settled case-law that an action for annulment brought by an individual or a legal person is not admissible unless the applicant has an interest in seeing the contested measure annulled. Such an interest exists only if annulment of the

measure is of itself capable of having legal consequences (Joined Cases T-480/93 and T-483/93 *Antillean Rice Mills and Others* v *Commission* [1995] ECR II-2305, paragraph 59, and the cases cited). The same applies to an action brought under Article 63 of Regulation No 40/94.

13 In the present case, the applicant applied for registration of a three-dimensional trade mark in tablet form. That application was refused by the examiner, whose refusal was upheld by the Board of Appeal. The applicant's interest in annulment of that decision, which refuses its claims, is not affected by any opinion which the applicant may have as to whether or not it is desirable for trade mark law to protect the shape selected for the three-dimensional mark applied for. Consequently, the applicant's legal interest in bringing proceedings cannot be denied in the present case.

Substance

14 The applicant advances essentially two pleas in law. The first alleges infringement of Article 7(1)(b) of Regulation No 40/94. The second alleges breach of the obligation to state reasons. Since those two pleas are closely related in the present case, it is appropriate to examine them together.

Arguments of the parties

15 The applicant asserts, first, that the trade mark applied for, taken as a whole, is unusual and fanciful and has the minimum degree of distinctiveness required for it to be registered.

16 It goes on to make observations concerning the shape, pattern and colours of the mark applied for and the fact that, when a trade mark application is assessed, the mark must be considered as a whole. Finally, the applicant develops an argument concerning the need for a uniform application of Regulation No 40/94.

17 As regards the mark's shape, the applicant states that it is clear from Article 4 of Regulation No 40/94 that there is no prohibition on trade marks consisting of the shape of the goods.

18 The applicant criticises the Board of Appeal for having taken account of the fact that all traders have an interest in freely using the shape claimed. According to the applicant, consideration of that interest is irrelevant where the question is to ascertain whether a trade mark is devoid of distinctive character for the purposes of Article 7(1)(b) of Regulation No 40/94 and is relevant only for the purposes of an examination of the trade mark application under Article 7(1)(e) of that regulation.

19 In so far as the Board of Appeal, in the argument concerning Article 7(1)(b) of Regulation No 40/94, alluded to the ground of refusal under Article 7(1)(e), the applicant points out that other tablet shapes, such as rectangular or round shapes, may be selected, and that they seem even preferable. In addition, detergents may be presented in other forms, such as powder or liquid.

20 In the case of tablets, a different impression can be created, not only by using different basic shapes and, in the case of a rectangular shape, by varying the ratio of length to width, but also by varying the thickness of the tablet. The applicant

concludes from this that, in the present case, the square shape of the tablet alone may be considered unusual and fanciful for a detergent in comparison with the other tablets on the market at the time when the trade mark application was filed.

21 As regards the tablet's pattern, and more specifically the speckles, the applicant claims that the considerations relating to the speckles' function as an indication of the presence of certain active ingredients, even supposing that they are correct, are not relevant in any assessment of distinctive character for the purposes of Article 7(1)(b) of Regulation No 40/94. Such considerations can come into play only when the ground of refusal referred to in Article 7(1)(c) of Regulation No 40/94 is applied, which is of no relevance in the present proceedings. The applicant does not see why the fact that a feature of a mark is allegedly appealing to the eye precludes registration of the mark under Article 7(1)(b) of Regulation No 40/94. It points out that the Board of Appeal did not make any observations on the two-layer pattern of the mark and does not therefore see why the Board considered that such a pattern was devoid of distinctive character. Both the speckles and the presence of two layers, including the specific ratio between the layers resulting from the thickness of each of them, add something fanciful, arbitrary and unusual to the overall get-up. The applicant considers that both the speckles and the tablet's two layers are features which enable the public to distinguish its goods from those of other undertakings.

22 As regards the colours of the mark applied for, the applicant observes that it is well established that a sign consisting of a combination of colours may have inherent distinctive character and that in some cases even a single colour may be distinctive. Marks in which a colour combination of two or three colours is applied to a specific shape (square tablet with a certain thickness) in a specific pattern (in the present case, two layers) certainly have a minimum of distinctiveness. The applicant submits that that conclusion would be no different even if the Board of Appeal's assertion that white, which is associated with

spotless cleanliness, is the traditional colour of soap powder, and that green is appealing to the eye and has positive connotations was held to be well founded. Furthermore, the applicant disputes that assertion, in respect of which no proof has been provided. In any event, the applicant claims that the mark applied for is distinctive given that one of the colours described in the application for registration is pale green.

23 As regards the assessment of the mark, the applicant points out that distinctiveness should be assessed by reference to the mark considered as a whole. Even if the components of the mark, taken individually, were found not to be sufficiently unusual or fanciful to give the mark a distinctive character, the particular combination of the components (shape, pattern and colour) creates a distinctive and registrable sign.

24 The Board of Appeal's argument that the individual components of the mark applied for should be available for use by all operators cannot therefore be accepted as a bar to registration of the mark applied for. Even if such an argument were deemed relevant in relation to an objection under Article 7(1)(b) of Regulation No 40/94 — which is disputed by the applicant — assessment of that objection should relate to the mark considered as a whole and not to each of its components taken in isolation.

25 The applicant points out that its applications for trade marks are made only to obtain exclusive rights with respect to the specific combination of the features of each of the marks (shape, pattern and colour) and not to block other traders from using, for example, the colour green for their detergents. It declares that it is willing to include disclaimers to that effect if the Court should consider it necessary. It adds that it is clear from the many trade mark applications made to the Office for three-dimensional marks for detergents in tablet form that the number of different ways in which such tablets can be presented is almost unlimited.

26 As regards, finally, the observations on the need for a uniform application of Regulation No 40/94, the applicant argues that three-dimensional trade marks similar to its own have been accepted in a number of Member States whose trade mark law has been harmonised on the basis of the 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), including France, the United Kingdom, Belgium, the Netherlands and Luxembourg, in the case of the last three states registration of the marks having been carried out by the Bureau Benelux des Marques (Benelux Trademarks Office). Likewise, the Office has published similar applications for marks, namely:

— Application no. 809 830 in the name of Benckiser N.V. for a trade mark in the form of a round tablet consisting of two layers coloured blue and white;

— Application no. 924 829 filed in the name of the applicant for a trade mark in the form of a rectangular tablet coloured blue, green and white.

27 In that connection, the applicant also points out that the Office has accepted certain three-dimensional marks for coloured toothpastes, although objections similar to those made in this instance in respect of its own application could have been raised in respect of the shape, pattern and colour of each of those trade marks. The applicant submits that the mark applied for should have been treated in the same way. The applicant adds that it filed observations against the trade marks mentioned above in order, *inter alia*, to draw attention to the discrepancies in the way the Office applies the provisions of Regulation No 40/94 to three-dimensional trade marks.

28 The Office states that the three-dimensional mark applied for relates to washing or dishwashing preparations in tablet form and that the mark applied for is the product itself.

29 For the purposes of assessing whether the Community trade mark applied for should be granted for this new product, the Office first gives an account of the development of the different ways in which washing and dishwashing products have been marketed and the advantages of presenting them in tablet form.

30 Second, the Office explains the principles governing the registration of three-dimensional marks, referring to the various grounds for refusal which may come into play in that context.

31 According to the Office, a trade mark has distinctive character for the purposes of Article 7(1)(b) of Regulation No 40/94 if it enables the goods or services in respect of which registration of the mark is sought to be distinguished by reference to their origin and not by reference to their properties or other features.

32 According to the Office, consumers do not normally make any connection between the shape of a product and its origin. In order for consumers to view the actual shape of the product as a means of identifying its origin, the Office contends that the shape must have some striking 'feature', whatever it may be, which attracts consumers' attention.

33 The Office states that the assessment of the distinctive character of a product's shape must take place in three stages. First, it is necessary to check the shapes in which the relevant product already exists. Second, it is necessary to ascertain whether, from the consumer's point of view, the shape applied for is noticeably different. Finally, it is necessary to determine whether that particular shape is capable of denoting the origin of the product.

34 The Office points out that, for the purposes of the third stage of the analysis, the type of product and the way in which the consumer uses it are important. In the case of washing machine and dishwasher tablets, the consumer takes them out of their packaging and puts them straight into the washing machine or dishwasher and thus uses the product's packaging, which bears the manufacturer's word mark, and not the exact shape and colour of the product itself, to recognise the product when he makes a purchase.

35 According to the Office, the legal criteria for assessing the distinctive character of three-dimensional marks consisting, as in the present case, of the shape of the product itself are no different from, and no more rigorous than, those applying to other marks. However, the Office states that a product's shape is not indicative of its origin in the same way as words or figurative images applied to the product or its packaging.

36 Third, the Office undertakes an analysis of the trade mark in respect of which registration is sought.

37 The Office contends that the rectangular shape of the mark applied for is neither unusual nor fanciful but commonplace and current on the market.

38 As regards the colours, it contends that the addition of a pale green layer does not render the sign applied for distinctive and that the speckles do not have any effect either in that regard. The Office considers that adding a single colour to the basic colour (white or grey) of washing machine or dishwasher products does not constitute a colour combination.

39 According to the Office, the use of colours for different layers or parts of the tablets does not render the mark as a whole distinctive. First, basic colours, like green or blue, are commonplace in the detergent sector and evoke certain positive feelings, in particular freshness or cleaning power. Second, those colours, applied to different layers or parts of the tablets, indicate the presence of several active ingredients and therefore serve to inform the consumer about the product's properties, something that is highlighted in the tablet advertising. Third, it follows from the way in which the tablets are used that the consumer does not view their colour as indicative of the product's origin. That is particularly so in the case of the basic colours or combinations thereof.

40 According to the Office the use of coloured speckles is commonplace and is likely to indicate that certain active ingredients are being used. The speckles are indicative of the degree of homogeneity of the raw material of which the washing powder or tablet is composed but are not in any way an indication of the product's origin. In the present case, the speckles cannot constitute a 'pattern'. The Office points out that the small size of the speckles and their unremarkable shade of green do not enable them to have any impact on the overall visual impression made by the tablet.

41 As regards the assessment of the mark as a whole, the Office considers that the combination of all these non-distinctive features does not make the trade mark applied for distinctive. Distinctiveness cannot be inferred from, in particular, the fact that all the tablets are different from one another.

42 The Office contends that it does not follow from the fact that the applicant's competitors have chosen other colours for their tablets that the colours enable the products to be distinguished according to their origin. The choice of different colours can be explained by the large number of trade mark applications filed at the various offices for Community and national trade marks for products designed for washing machines and dishwashers since the recent launch of those products. The Office points out that, given that certain national offices have registered the trade mark, a manufacturer would be ill-advised to present his product in a form similar to a mark in respect of which a competitor has been granted registration, or even one claimed by a competitor, before the position is clarified by a judicial ruling.

43 Referring to Article 7(3) of Regulation No 40/94, the Office adds that, theoretically, the colours could acquire distinctiveness through use but that that would have to be proved. In the present case, the applicant has never raised the possibility that distinctive character may have been acquired through use.

44 The Office submits that the argument that the applicant should not be the only undertaking authorised to sell washing machine and dishwasher products in tablet form is relevant in the context of Article 7(1)(b) of Regulation No 40/94. The fact that the Board of Appeal used that argument does not mean that it applied a separate ground for refusal in this case, based on the need to keep a trade mark available for general use ('Freihaltebedürfnis'). If a trade mark application were to be refused on that ground, the Office would have to show that competitors have a specific and concrete legitimate interest in using the same mark. In the present case, the Office states that the Board of Appeal merely pointed out that registration of the shape claimed as a Community trade mark would have undesirable consequences for the functioning of the market. The Office contends that it is necessary to consider, when applying Article 7(1)(b) of Regulation No 40/94, the consequences of registering certain basic and commonplace words, signs or shapes. Denying this would amount to denying the essential function of the system of trade marks and industrial property, which is to foster fair competition.

45 Fourth, as regards the alleged inconsistency of the contested decision with other decisions of the Office, the latter asserts that it has refused all the applications for washing or dishwashing tablets in round or rectangular form and that those refusals have been upheld by the Boards of Appeal in all the decided cases. The Office states that trade mark applications no. 809 830 and no. 924 829 were published in the Community Trade Marks Bulletin but were not accepted for registration. Furthermore, the Office argues that, even supposing that it had actually registered those trade marks, the decisions would be incorrect and the applicant could not rely on them to ask for a decision which would repeat the error.

46 The Office argues that the trade marks registered for toothpaste are not comparable to the mark applied for here, not only because they were applied for as figurative marks but also because the products and the way in which they are used, as well as the marks' features, are different.

47 As to the practice of national offices, the Office recognises that registration in the applicant's name, in many or all Member States, of a trade mark identical to the one applied for in this instance constitutes one factor which, without being decisive, may be taken into consideration for the purposes of registering a Community trade mark. In that regard, the Office maintains that the applicant has never claimed to have obtained registration of the mark applied for in the present case in Member States of the European Community.

48 As to the registration by national offices in the Member States of marks similar to the one applied for in the present case, the Office states that the practices of those offices are not uniform.

49 The Office submits that, even if the applicant had been the first to market washing machine and dishwasher products in tablet form, it is established that the rectangular shape is now commonplace. Even if that shape became commonplace only after the date on which the Community trade mark application was filed, it may not be registered. In that regard, it points out, first, that using a mundane or commonplace shape for the first time does not in itself render the shape distinctive and, second, that the product must be distinctive at the time of registration as well.

Findings of the Court

50 The distinctive character of a trade mark must be assessed in relation to the goods or services in respect of which registration of the mark is sought.

51 In the present case, the mark applied for by the applicant in its application for a Community trade mark, which refers to 'washing and bleaching preparations and other substances for laundry use; cleaning, polishing, scouring and abrasive preparations; preparations for the washing, cleaning and care of dishes; soaps', falling within Class 3 of the Nice Agreement, consists of the shape and the arrangement of the colours of the product itself.

52 It is clear from Article 4 of Regulation No 40/94 that both a product's shape and its colours fall among the signs which may constitute a Community trade mark. However, the fact that a category of signs is, in general, capable of constituting a trade mark does not mean that signs belonging to that category necessarily have distinctive character for the purposes of Article 7(1)(b) of Regulation No 40/94 in relation to a specific product or service.

53 According to Article 7(1)(b) of Regulation No 40/94, 'trade marks which are devoid of any distinctive character' are not to be registered. A mark which enables the goods or services in respect of which registration of the mark has been sought to be distinguished as to their origin is to be considered as having distinctive character. It is not necessary for that purpose for the mark to convey exact information about the identity of the manufacturer of the product or the supplier of the services. It is sufficient that the mark enables members of the public concerned to distinguish the product or service that it designates from those which have a different trade origin and to conclude that all the products or services that it designates have been manufactured, marketed or supplied under the control of the owner of the mark and that the owner is responsible for their quality (see, to that effect, Case C-39/97 *Canon* [1998] ECR I-5507, paragraph 28).

54 It is clear from the wording of Article 7(1)(b) of Regulation No 40/94 that a minimum degree of distinctive character is sufficient to render the ground for refusal set out in that article inapplicable. It is therefore appropriate to ascertain — in an a priori examination not involving any consideration of the use made of the sign within the meaning of Article 7(3) of Regulation No 40/94 — whether the mark applied for will enable the members of the public targeted to distinguish the products concerned from those having a different trade origin when they come to select a product for purchase.

55 Article 7(1)(b) of Regulation No 40/94 does not distinguish between different categories of trade marks. The criteria for assessing the distinctive character of three-dimensional trade marks consisting of the shape of the product itself are therefore no different from those applicable to other categories of trade marks.

56 Nevertheless, when those criteria are applied, account must be taken of the fact that the perception of the relevant section of the public is not necessarily the same

in relation to a three-dimensional mark consisting of the shape and the colours of the product itself as it is in relation to a word mark, a figurative mark or a three-dimensional mark not consisting of the shape of the product. Whilst the public is used to recognising the latter marks instantly as signs identifying the product, this is not necessarily so where the sign is indistinguishable from the appearance of the product itself.

57 It is appropriate to point out that the products in respect of which the trade mark was sought in the present case are widely used consumer goods. The public concerned, in the case of these products, is all consumers. Therefore, in any assessment of the distinctive character of the mark for which registration is sought, account must be taken of the presumed expectations of an average consumer who is reasonably well-informed and reasonably observant and circumspect (see, by analogy, Case C-210/96 *Gut Springenheide and Tusky* [1998] ECR I-4657, paragraphs 30 to 32).

58 The way in which the public concerned perceives a trade mark is influenced by the average consumer's level of attention, which is likely to vary according to the category of goods or services in question (see Case C-342/97 *Lloyd Schuhfabrik Meyer* [1999] ECR I-3819, paragraph 26). The level of attention given by the average consumer to the shape and colours of washing machine and dishwasher tablets, being everyday consumer goods, is not high.

59 In order to ascertain whether the combination of the shape of the tablet at issue and the arrangement of its colours may be perceived by members of the public as an indication of origin, the overall impression produced by that combination must be analysed (see, by analogy, Case C-251/95 *SABEL* [1997] ECR I-6191,

paragraph 23). That is not incompatible with an examination of each of the product's individual features in turn.

60 The three-dimensional shape for which registration has been sought, namely a square tablet, is one of the basic geometrical shapes and is an obvious one for a product intended for use in washing machines or dishwashers. The slightly rounded corners of the tablet are dictated by practical considerations and are not likely to be perceived by the average consumer as a distinctive feature of the shape claimed, capable of distinguishing it from other washing machine or dishwasher tablets.

61 As to the tablet's two layers, one of which is white with green speckles and the other green, the public concerned is used to seeing different colour features in detergent preparations. Powder, the form in which such products are traditionally presented, is usually very light grey or beige and appears almost white. As the applicant itself explained at the hearing, powder often contains particles of one or more different colours. The advertising carried out by the applicant and other manufacturers of detergents tends to highlight the fact that those particles indicate the presence of various active ingredients. The coloured particles thus suggest certain qualities, although that does not mean that they can be regarded as a descriptive indication in terms of Article 7(1)(c) of Regulation No 40/94. However, it does not follow from the fact that that ground for refusal is inapplicable that the coloured elements necessarily confer a distinctive character on the mark applied for. Where, as in the present case, the target sector of the public sees the presence of coloured elements as a suggestion that the product has certain qualities, and not as an indication of its origin, there is no distinctive character. The fact that consumers may nevertheless get into the habit of recognising the product from its colours is not enough, on its own, to preclude the ground for refusal based on Article 7(1)(b) of Regulation No 40/94. Such a

development in the public's perception of the sign, if proved, may be taken into account only for the purposes of Article 7(3) of Regulation No 40/94.

62 As regards the fact that, as well as the coloured speckles, the tablet at issue also has a green layer, it is appropriate to examine, first, the applicant's complaint that the Board of Appeal did not state reasons to support its finding that this distribution of colours did not confer distinctiveness on the mark claimed. In that regard, it should be pointed out that the description of the mark given by the Board of Appeal in paragraph 15 of the contested decision refers to the fact that there are two layers. That finding is not specifically reiterated in paragraphs 18 and 19 of the contested decision, which are devoted to the assessment of distinctiveness from the point of view of the tablet's colour pattern. However, in support of its assertion, at paragraph 19 of the contested decision, that the use of tablets in different colour combinations is commonplace for the goods mentioned in the application, the Board of Appeal refers by way of example to two products marketed in tablet form, each comprising two differently coloured layers. It is clear that the Board of Appeal considered that a tablet comprised of two differently coloured layers is not distinctive because that design is commonplace. The contested decision is therefore sufficiently reasoned in that regard.

63 Second, the Board of Appeal's finding that the presence of a coloured layer and speckles is not sufficient for the tablet's appearance to be perceived as indicative of the product's origin is justified. Where various ingredients are to be combined in a washing machine or dishwashing product in tablet form, adding speckles or layers is one of the most obvious solutions.

64 As regards the use of the colour green, it must be observed that the use of basic colours, such as blue or green, is commonplace and is even typical of detergents. The use of other basic colours, such as red or yellow, is one of the most obvious variations on the typical design of these products. The same is true of the various

shades of those colours. For that reason, the applicant's argument that the mark applied for is distinctive because one of the layers of the tablet is 'pale green' must be dismissed.

65 It follows that the three-dimensional mark applied for consists of a combination of obvious features typical of the product concerned.

66 It should be added that it is possible to obtain different combinations of those features by varying the basic geometric shapes and by adding to the product's basic colour another basic colour either as a layer in the tablet or as speckles. The ensuing differences in the appearance of the various tablets are not sufficient to enable each of those tablets to function as an indication of the product's origin, inasmuch as those differences are, as in the present case, obvious variations on the product's basic shapes.

67 Given the overall impression created by the shape of the tablet in question and the arrangement of its colours, the mark applied for does not enable consumers to distinguish the products concerned from those having a different trade origin when they come to select a product for purchase.

68 It should be added that the inability of the mark applied for to indicate, a priori and irrespective of the use made of it within the meaning of Article 7(3) of Regulation No 40/94, the product's origin is not affected by how many similar tablets are already on the market. Consequently, it is not necessary to decide here

whether the distinctive character of the mark should be assessed by reference to the date on which the application for registration is filed or the date of actual registration.

69 Next, as regards the applicant's arguments concerning the practices of national trade mark offices, it must be reiterated that registrations already made in the Member States are only one factor which may be taken into consideration, without being given decisive weight, in the registration of a Community trade mark (Case T-122/99 *Procter & Gamble* v *OHIM* (Soap shape) [2000] ECR II-265, paragraph 61; and Case T-24/00 *Sunrider* v *OHIM* (VITALITE) [2001] ECR II-449, paragraph 33). Furthermore, it is clear from the applicant's replies to this Court's questions that the only office to have registered a mark identical to the one claimed is the Bureau Benelux des Marques, whilst registration was refused in Germany. In the United Kingdom, the registration procedure for an identical mark has been stayed pending the outcome of the present proceedings, and in France a parallel application for registration has been withdrawn. It is clear from the Office's answers to the Court's questions that, more generally, the practices of the national trade mark offices, as regards three-dimensional marks consisting of washing machine and dishwasher tablets, are not uniform. Consequently, any criticism that the Board of Appeal has failed to have regard to those practices is groundless.

70 As far as the practice of the Office itself is concerned, it is clear from the Office's replies to the Court's questions that the Community trade mark applications whose publication is relied on by the applicant have not resulted in registrations. One of the applications concerned was refused by the examiner, after commencement of the present action, and that decision is currently being reviewed by a Board of Appeal. According to the Office, it is anticipated that the other application will be refused. In those circumstances, the argument based on the publication of those applications has become otiose in any event. It should be added that, as regards the registration of certain marks for toothpastes referred to by the applicant, those trade marks and the product in respect of which their registration was sought are different from the mark and the product at issue in the

present case. So the way that the Office dealt with the registration of marks for toothpaste cannot be regarded as relevant in this case.

71 The applicant's arguments concerning the practices of the Office and certain national offices must therefore be dismissed.

72 It follows that the Board of Appeal was right to hold that the three-dimensional mark applied for is devoid of any distinctive character.

73 As regards the applicant's arguments concerning the Board of Appeal's consideration of the need to keep the shape and colours of the tablet at issue available, it must be observed that the absolute grounds for refusal set out in Article 7(1)(b) to (e) of Regulation No 40/94 address the concern of the Community legislature to prevent the grant to one operator alone of exclusive rights which could hinder competition on the market for the goods or services concerned (see, as regards the ground of refusal relating to the descriptive nature of the sign, the judgment of the Court of Justice in Joined Cases C-108/97 and C-109/97 *Windsurfing Chiemsee* [1999] ECR I-2779, paragraph 25). However, 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 colours 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. Article 7(1)(b) of Regulation No 40/94, in excluding the registration of signs devoid of any distinctive character, protects any interest there may be in keeping available various alternatives for a product's design only to the extent to which the design of the product in respect of which registration is sought is not capable, a priori and irrespective of the use made of it within the meaning of Article 7(3) of Regulation No 40/94, of functioning as a trade mark, that is to say, of enabling the public concerned to distinguish the product concerned from those having a different trade origin.

74 Although the Board of Appeal gave considerable weight, in the contested decision, to considerations relating to the interest in preventing trade mark law from giving rise to a monopoly on a product, it does not, however, follow that in this case the Board failed to have due regard to the criteria applicable in assessing the distinctiveness of the mark applied for. In paragraph 11 of the contested decision, the Board of Appeal states that a product's shape may be registered as a Community trade mark 'provided that the shape displays certain features that are sufficiently unusual and arbitrary to enable the relevant consumers to recognise the product, purely on the basis of its appearance, as emanating from a specific undertaking'. Thus it applied in substance a criterion consonant with the principles set out above.

75 In the light of the foregoing considerations, the action must be dismissed.

Costs

76 Under Article 87(3) of the Rules of Procedure, the Court may rule that costs are to be shared or that each party is to bear its own costs where each party succeeds on some and fails on other heads, or where circumstances are exceptional. Since the wording of the contested decision was capable of giving rise to doubts as to whether the Board of Appeal had in this case correctly applied Article 7(1)(b) of Regulation No 40/94 and was thus partly responsible for bringing about the proceedings, it is appropriate to order the parties to bear their own costs.

On those grounds,

THE COURT OF FIRST INSTANCE (Second Chamber)

hereby:

1. **Dismisses the action;**

2. **Orders the parties to bear their own costs.**

Meij Potocki Pirrung

Delivered in open court in Luxembourg on 19 September 2001.

H. Jung — Registrar

A.W.H. Meij — President