Reports of Cases

JUDGMENT OF THE GENERAL COURT (Eighth Chamber)

24 February 2016 *

(Community trade mark — Application for three-dimensional Community trade mark — Shape of a contour bottle without fluting — Absolute ground for refusal — No distinctive character — Article 7(1)(b) of Regulation (EC) No 207/2009 — No distinctive character acquired through use — Article 7(3) of Regulation No 207/2009)

In Case T-411/14,

The Coca-Cola Company, established in Atlanta, Georgia (United States), represented by D. Stone, A. Dykes, Solicitors, and S. Malynicz, Barrister,

applicant,

v

Office for Harmonisation in the Internal Market (Trade Marks and Designs) (OHIM), represented by P. Geroulakos and A. Folliard-Monguiral, acting as Agents,

defendant,

ACTION brought against the decision of the Second Board of Appeal of OHIM of 27 March 2014 (Case R 540/2013-2), concerning proceedings for the registration as a Community trade mark of a three-dimensional sign consisting of the shape of a contour bottle,

THE GENERAL COURT (Eighth Chamber),

composed of D. Gratsias, President, M. Kancheva and C. Wetter (Rapporteur), Judges,

Registrar: I. Dragan, Administrator,

having regard to the application lodged at the Court Registry on 10 June 2014,

having regard to the response lodged at the Court Registry on 22 October 2014,

further to the hearing on 16 September 2015,

gives the following

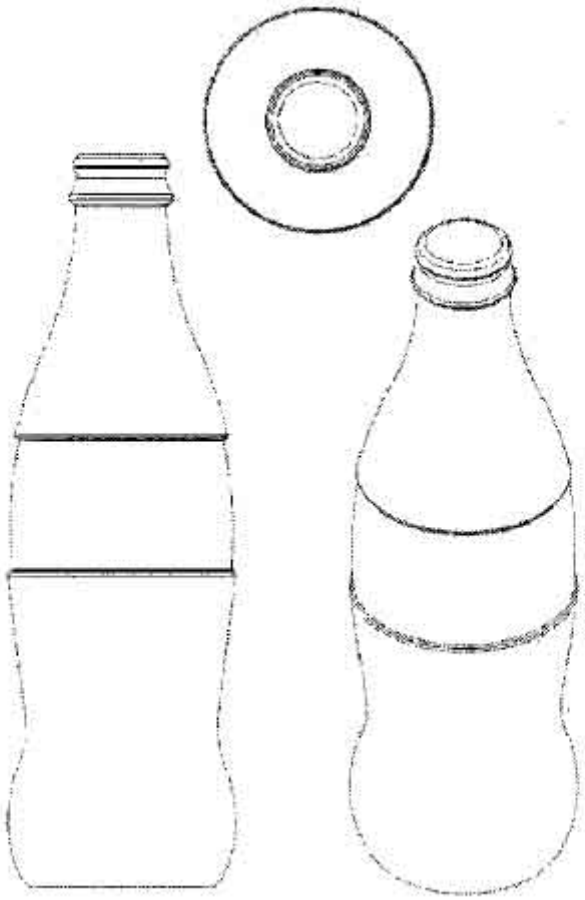
* Language of the case: English.

Judgment

Background to the dispute

1 On 29 December 2011, the applicant, The Coca-Cola Company, filed an application for registration of a Community trade mark at the Office for Harmonisation in the Internal Market (Trade Marks and Designs) (OHIM), pursuant to Council Regulation (EC) No 207/2009 of 26 February 2009 on the Community trade mark (OJ 2009 L 78, p. 1).

2 Registration as a mark was sought for the three-dimensional sign reproduced below:



3 The goods in respect of which registration was sought are in Classes 6, 21 and 32 of the Nice Agreement concerning the International Classification of Goods and Services for the Purposes of the Registration of Marks of 15 June 1957, as revised and amended, and correspond, for each of those classes, to the following description:

— Class 6: 'Common metals and their alloys; metal building materials; ironmongery, small items of metal hardware; goods of common metal not included in other classes; metallic bottles';

— Class 21: 'Household or kitchen utensils and containers; unworked or semi-worked glass (except glass used in building); glassware, porcelain and earthenware not included in other classes; glass and plastic bottles';

— Class 32: ‘Beers; mineral and aerated waters and other non-alcoholic drinks; fruit drinks and fruit juices; syrups and other preparations for making beverages’.

4 On 23 January 2012, the examiner informed the applicant that, on the basis of Article 7(1)(b) of Regulation No 207/2009, he had to refuse registration for some of the goods applied for, namely the following goods:

— Class 6: ‘Goods of common metal not included in other classes; metallic bottles’;

— Class 21: ‘Household or kitchen utensils and containers; unworked or semi-worked glass (except glass used in building); glassware, porcelain and earthenware not included in other classes; glass and plastic bottles’;

— Class 32: ‘Beers; mineral and aerated waters and other non-alcoholic drinks; fruit drinks and fruit juices; syrups and other preparations for making beverages’.

5 On 23 March 2012, the applicant informed OHIM that it wished to maintain its application for registration in respect of all the goods concerned, claiming that the sign for which registration was sought had acquired a distinctive character under Article 7(3) of Regulation No 207/2009. On 19 October 2012, after having obtained extensions on the deadline for gathering and lodging all documents in support of its claims, the applicant submitted its arguments against the initial position adopted by the examiner.

6 On 23 January 2013, the examiner dismissed the application for registration. He found, having examined the claims and items of evidence submitted by the applicant, that the mark applied for was devoid of distinctive character in respect of the goods concerned. Having taken the view that the Community trade mark application was covered by the absolute ground for refusal laid down in Article 7(1)(b) of Regulation No 207/2009, the examiner also dismissed the applicant’s application under Article 7(3) of that regulation.

7 On 20 March 2013, the applicant filed a notice of appeal with OHIM against the examiner’s decision.

8 By decision of 27 March 2014 (‘the contested decision’), the Second Board of Appeal dismissed the appeal on the ground that, in relation to the goods at issue, the mark applied for was devoid of distinctive character within the meaning of Article 7(1)(b) and Article 7(3) of Regulation No 207/2009.

9 The Board of Appeal found that the goods concerned were intended for everyday consumption and were principally aimed at the general public. In view of the mass-produced nature of the goods at issue, the Board of Appeal found that the average consumer of the goods concerned was not particularly attentive and was likely to have ‘an imperfect recollection of trade-marked products’.

10 As to the distinctive character, the Board of Appeal began by describing the mark applied for. The Board then compared it with images included in the examiner’s notice of grounds for refusal and concluded that the examiner had been right to find that the mark applied for was devoid of any distinctive character as regards the goods concerned.

11 The Board of Appeal found that the sum of the features displayed by the container at issue did not render the mark applied for distinctive in so far as they were common to the shapes of the contested goods in Classes 6 and 21 and to the packaging of the contested goods in Class 32. It therefore endorsed the examiner’s finding that the shape at issue did not differ substantially from the basic shapes of the goods in question and their packaging.

12 In view of the applicant's claim that the mark applied for had to be regarded as the 'contour bottle without fluting', which the relevant public would associate with the applicant's famous iconic bottle ('the contour bottle with fluting') given that, in the eyes of that public, the mark applied for would constitute an evolution of the latter, the Board of Appeal proceeded to compare those two bottles.

13 The Board of Appeal, while acknowledging that the two bottles presented similarities, concluded, in essence, that they created different overall impressions. In that regard, the Board particularly highlighted the fluting as being an eye-catching feature of the contour bottle with fluting. Consequently, the Board of Appeal rejected the claim that the mark applied for had to be regarded as a natural evolution of the contour bottle with fluting. It held that the mark applied for must be assessed taking into account the relevant public's perception of the sign, without assuming that that public would make a direct and immediate connection between that sign and the contour bottle with fluting for which the applicant is recognised worldwide.

14 In the light of those considerations, the Board of Appeal concluded, having assessed the features of the mark applied for, that it did not depart significantly enough from the norms and customs of the relevant sector so as to enable the relevant public to immediately and directly identify the commercial origin of the goods. The Board of Appeal therefore concluded that the mark applied for was devoid of distinctive character within the meaning of Article 7(1)(b) of Regulation No 207/2009.

15 With respect to Article 7(3) of Regulation No 207/2009, the Board of Appeal found that the applicant had failed to establish that the mark applied for had acquired a distinctive character through use.

16 The Board of Appeal expressed serious doubts as to the reliability of the surveys submitted by the applicant — particularly with regard to their source — on the ground that they had not, as stated therein, been carried out by the recognised market research company, but rather by a former director of that company who had become an independent market research consultant. The Board of Appeal also found that the surveys contained leading questions and that the percentage figures did not add up correctly (according to the Board, the total exceeded 100% on adding certain percentages). In addition to those doubts, the Board of Appeal found that the surveys had been carried out in less than half the Member States of the European Union. It also observed that the surveys had been conducted after the date of submission of the application for registration of the mark.

17 As regards the turnover and sale volume figures provided by the applicant, the Board of Appeal found, even taking into account the witness statement made by the marketing counsel of the applicant's subsidiary in France, that they related to the entire activity of the applicant and not to the mark applied for.

18 As regards advertising material, the Board of Appeal found that almost all the material submitted did not refer to the mark applied for, but rather to the applicant's other bottles or cans, and particularly to its famous contour bottle with fluting.

19 The Board of Appeal also rejected the applicant's claim that the mark applied for had acquired a distinctive character through use as part of another mark. It emphasised that the present case could be distinguished from the cases relied on by the applicant in that respect. The Board of Appeal added that the perception of the relevant consumer was not necessarily the same in the case of shapes as it is in the case of verbal components.

20 The Board of Appeal found, taking into consideration the characteristics of the sign applied for, the nature of the contested goods, and the marketing strategy shown in the evidence, that it was not irrelevant that in the present case the contour bottle without fluting may be sold with a label. In that regard, the Board of Appeal acknowledged that a brand-focused advertising strategy could not be a barrier to acquiring distinctiveness, but stated that the items of evidence adduced showed how the

goods at issue had been marketed to the relevant public under the mark applied for. In the Board of Appeal's view, those considerations regarding the marketing strategy could not be disregarded when assessing the perception of the mark applied for by the relevant public.

21 Whilst acknowledging that the applicant had made a considerable investment in advertising and that the sales figures provided were very high, the Board of Appeal found that the evidence, as a whole, remained insufficient and unconvincing as regards the relevant public's actual perception of the mark applied for.

22 The Board of Appeal observed that, as regards the contested goods other than non-alcoholic beverages, the evidence of distinctive character acquired through use was almost non-existent. Further, it noted that no evidence had been submitted concerning the purchase of 'glass and plastic bottles' and 'kitchen utensils'.

23 The Board of Appeal also found that the documentation regarding the history of the applicant's non-alcoholic beverages showed images of the contour bottle with fluting and, for the most part, appeared to involve images or text taken or written outside the European Union (particularly in the United States) or in unknown locations, and that those documents could not therefore demonstrate the acquired distinctive character of the mark applied for in the European Union.

Forms of order sought

24 The applicant claims that the Court should:

— annul the contested decision;

— order OHIM to pays the costs.

25 OHIM contends that the Court should:

— dismiss the action in its entirety;

— order the applicant to pay the costs.

Law

26 The applicant raises two pleas in law in support of its action. The first plea alleges infringement of Article 7(1)(b) of Regulation No 207/2009 and the second plea alleges infringement of Article 7(3) of that regulation.

First plea in law: infringement of Article 7(1)(b) of Regulation No 207/2009

27 The applicant criticises the Board of Appeal for failing to take into account, in accordance with the case-law of the Court, the norms and customs of the sector. In that regard, the applicant claims that if the market for the goods concerned is crowded and competitive, that may act as a major incentive for some traders to design their product packaging so as to stand out from the crowd, draw the consumer in and enable retention of the particular shape for future purchase.

28 That is the case, according to the applicant, in the beverages sector. The applicant maintains that, whilst it is true that bottles may be simply functional, on account of having a long cylindrical section and a neck, many bottle shapes are sought to be designed so as to catch the eye of the consumer and

act as distinctive signifiers of a particular trader. According to the applicant, consumers are therefore used to regarding a shape which departs from the usual shape of bottles as amounting to a trade mark. The applicant claims that such is the situation in the present case.

29 The applicant also submits that the Board of Appeal erred by failing to consider the mark applied for as a whole and the way its various features had been combined, with a view to comparing this with the usual shapes on the market.

30 Furthermore, the applicant maintains that the mark applied for differs from the examples found on the Internet by the examiner, which, moreover, were only directed at Ireland, and that the mark applied for attracts the consumer's attention so that he will retain it in mind.

31 The applicant also claims that the Board of Appeal, in paragraph 35 of the contested decision, has made the same mistake as that found by the Court of Justice in the judgment of 20 October 2011 in *Freixenet* v *OHIM* (C-344/10 P and C-345/10 P, ECR, EU:C:2011:680, paragraph 49). It claims that the Board of Appeal was wrong to consider that, since the goods are also sold with a distinctive word mark, in the present case a label, that necessarily results in the shape of the product being devoid of any distinctive character. That approach is tantamount to finding that no shape can be distinctive, since no shape is ever sold without a word mark or other type of branding.

32 OHIM disputes the applicant's arguments.

33 Under Article 7(1)(b) of Regulation No 207/2009, trade marks which are devoid of any distinctive character are not to be registered.

34 According to settled case-law, for a trade mark to possess distinctive character within the meaning of that provision, it must serve to identify the goods or services in respect of which registration is sought as originating from a particular undertaking, and thus to distinguish those goods from those of other undertakings (see judgment in *Freixenet* v *OHIM*, cited in paragraph 31 above, EU:C:2011:680, paragraph 42 and the case-law cited).

35 That distinctive character must be assessed, first, by reference to the goods or services in respect of which registration has been applied for and, secondly, by reference to the perception of them by the relevant public, which consists of the consumers of those goods or services (see judgment in *Freixenet* v *OHIM*, cited in paragraph 31 above, EU:C:2011:680, paragraph 43 and the case-law cited).

36 Also according to settled case-law, the criteria for assessing the distinctive character of three-dimensional trade marks consisting of the appearance of the goods themselves are no different from those applicable to other categories of trade mark (see judgment in *Freixenet* v *OHIM*, cited in paragraph 31 above, EU:C:2011:680, paragraph 45 and the case-law cited).

37 However, when those criteria are applied, account must be taken of the fact that the perception of the average consumer is not necessarily the same in relation to a three-dimensional mark consisting of the appearance of the goods themselves as it is in relation to a word or figurative mark consisting of a sign which is independent of the appearance of the goods it designates. Average consumers are not in the habit of making assumptions about the origin of goods on the basis of their shape or the shape of their packaging in the absence of any word or graphic element, and it could therefore prove more difficult to establish distinctive character in relation to such a three-dimensional mark than in relation to a word or figurative mark (see judgment in *Freixenet* v *OHIM*, cited in paragraph 31 above, EU:C:2011:680, paragraph 46 and the case-law cited).

38 More specifically, since liquid goods must of necessity be packaged for sale, the average consumer will perceive the packaging first and foremost simply as a form of container. A three-dimensional trade mark consisting of such a container is not distinctive unless it permits the average consumer of the

goods concerned, who is reasonably well informed and reasonably observant and circumspect, to distinguish those goods from the goods of other undertakings without any detailed examination or comparison and without being required to pay particular attention (judgments of 12 February 2004 in *Henkel*, C-218/01, ECR, EU:C:2004:88, paragraph 53, and 29 April 2004 in *Eurocermex* v *OHIM (Shape of a beer bottle)*, T-399/02, ECR, EU:T:2004:120, paragraph 24).

39 In those circumstances, only a mark which departs significantly from the norms or customs of the sector and thereby fulfils its essential function of indicating origin is not devoid of any distinctive character for the purposes of Article 7(1)(b) of Regulation No 207/2009 (see judgment in *Freixenet* v *OHIM*, cited in paragraph 31 above, EU:C:2011:680, paragraph 47 and the case-law cited).

40 In the light of the foregoing, it is necessary to ascertain whether the mark applied for departs significantly from the norms and customs of the relevant sector.

41 First of all, it must be noted that it is not disputed that, as the Board of Appeal correctly found, the goods covered by the mark applied for are everyday consumer goods aimed at the general public. Furthermore, it must be found (and is not disputed, as noted in essence by the Board of Appeal) that, having regard to the fact that the goods at issue are intended for everyday consumption, the level of attention of the relevant public must be considered to be average.

42 According to the applicant's description, the mark applied for consists of a flat base which curves out to give a flared appearance; a tapered section which tapers inwards and extends up to the first horizontal line to form a trapezium-like shape; a bulging centrepiece which is inset slightly and has a vertical appearance, although the sides curve slightly to provide a smooth profile; and a top section which tapers upwards like a funnel and bulges slightly at the neck.

43 It follows that the mark applied for is a composite sign comprised of several features.

44 It is therefore necessary, for the purposes of appraising the distinctive character of the mark applied for, to consider it as a whole. Nevertheless, that is not incompatible with an examination of each of its individual features in turn (judgments of 5 March 2003 in *Unilever* v *OHIM (Ovoid tablet)*, T-194/01, ECR, EU:T:2003:53, paragraph 54, and *Shape of a beer bottle*, cited in paragraph 38 above, EU:T:2004:120, paragraph 25).

45 First, as regards the lower section of the mark applied for, it must be considered that that section of the bottle does not possess any characteristics that distinguish it from other bottles available on the market. It is well known that the lower sections of bottles can vary greatly. Nevertheless, such variations do not, generally, enable the average consumer to infer the commercial origin of the goods concerned.

46 Secondly, as regards the middle section of the mark applied for, it must likewise be considered that that section does not display any particular features which stand out from what is available on the market. As the Board of Appeal correctly pointed out, the purpose, in normal trade practice, of that section of the mark applied for is to house a label stating the brand name, consumer information on ingredients, content volume, and the names of the manufacturer and the distributor. The fact that that section is slightly curved does not render the mark applied for distinctive in such a way as to enable consumers to infer its commercial origin.

47 Lastly, as regards the top section of the mark applied for, which consists in a funnel shape that bulges slightly at the neck, it is well known that the bottles available on the market feature characteristics which are more or less similar to those of the mark applied for. Indeed, the top section of a bottle usually comprises a funnel shape and a neck. It follows that, even though that feature is somewhat original, it cannot be regarded as departing significantly from the norms and customs of the sector.

48 Thus, the mark applied for is made up of a combination of elements, each of which is likely to be commonly used in the trade of the goods covered by the trade mark application and is therefore devoid of distinctive character in relation to those goods (see, to that effect and by analogy, judgment in *Shape of a beer bottle*, cited in paragraph 38 above, EU:T:2004:120, paragraph 30).

49 It is clear from the case-law that the fact that a composite trade mark is made up only of features which are devoid of any distinctive character in relation to the goods concerned generally leads to the conclusion that that trade mark, taken as a whole, is devoid of distinctive character. That would not be the case only if concrete factors, such as the way in which the various features are combined, were to indicate that the composite trade mark, taken as a whole, is greater than the sum of its parts (see, to that effect, judgment in *Shape of a beer bottle*, cited in paragraph 38 above, EU:T:2004:120, paragraph 31).

50 There is no indication that such factors exist in the present case. The mark applied for is characterised by its shape which has a curved silhouette. However, that shape represents nothing more than the sum of the parts of the mark applied for, that is to say, a bottle like the majority of bottles on the market. Such a shape is indeed likely to be commonly used in the trade of the goods covered by the trade mark application. It follows that the manner in which the components of the composite trade mark at issue here are combined is not capable of giving it distinctive character either (see, to that effect, judgment in *Shape of a beer bottle*, cited in paragraph 38 above, EU:T:2004:120, paragraph 32).

51 The mark applied for is thus a mere variant of the shape and packaging of the goods concerned which will not enable the average consumer to distinguish the goods in question from those of other undertakings (see, to that effect, judgments of 17 December 2008 in *Somm* v *OHIM (Shelter for shade)*, T-351/07, EU:T:2008:591, paragraph 27, and 16 September 2009 in *Alber* v *OHIM (Hand grip)*, T-391/07, EU:T:2009:336, paragraph 60).

52 The Board of Appeal therefore made no error in finding that the average consumer in the European Union would perceive the mark applied for, as a whole, merely as a variant of the shape and packaging of the goods for which registration of that mark is sought.

53 That conclusion cannot be challenged by arguing that the Board of Appeal failed to carry out a global assessment of the mark applied for. It is evident in particular from paragraph 27 of the contested decision that the Board of Appeal assessed the mark applied for having regard to the 'sum of the features displayed by the applicant's container'. The Board of Appeal also stated, in paragraph 35 of the contested decision, that 'an overall view of the characteristics cited by the applicant [did] not create a global impression capable of giving the sign applied for distinctive character'.

54 As regards the argument that the Board of Appeal failed to take into account the fact that the relevant sector is highly competitive and that it is common for players on such a market to try to make their products stand out by means of their packaging, it must be held that those circumstances do not suffice in themselves to render the mark applied for distinctive. Moreover, the Board of Appeal did indeed consider the market conditions when carrying out the global assessment of the mark applied for. It is evident in particular from paragraph 28 of the contested decision that the Board of Appeal found that, owing to the fact that the degree of freedom when designing bottles is not very high, minimum variations of usual shapes cannot be registered as trade marks because the public will not regard them as an indicator of origin.

55 Lastly, the applicant's criticism of the Board of Appeal for stating in paragraph 35 of the contested decision, for the sake of completeness, that the end user will usually direct his attention more to the label on the goods or on their packaging and the name, image, or graphic design displayed thereon, than simply to the design of the packaging itself, is, in any event, not such as to call into question the findings of the Board of Appeal (see, to that effect, judgment of 30 April 2013 in *Boehringer Ingelheim International* v *OHIM (RELY-ABLE)*, T-640/11, EU:T:2013:225, paragraph 27 and the case-law cited).

In the course of its assessment of the distinctive character of the mark applied for under Article 7(1)(b) of Regulation No 207/2009, the Board of Appeal examined the mark applied for taking account of all its relevant features, and substantiated its conclusion to the requisite legal standard on the basis of the mark applied for, namely the bare form of the contour bottle (see, to that effect, judgment of 16 July 2014 in *Langguth Erben* v *OHIM (Shape of an alcoholic beverage bottle)*, T-66/13, EU:T:2014:681, paragraphs 66 and 67).

56 It follows that the first plea must be dismissed as unfounded.

Second plea in law: infringement of Article 7(3) of Regulation No 207/2009

57 The applicant claims that, on any view, the mark applied for has acquired distinctive character through use. The applicant contends that by submitting a large number of items of evidence before the bodies of OHIM it has proven that the mark has acquired distinctive character.

58 The items of evidence submitted by the applicant during the administrative proceedings before OHIM include, inter alia:

— a history of how the mark applied for has been used, providing the background and the foundations upon which that mark has been used throughout the European Union;

— data based on surveys and the surveys themselves, conducted in 10 EU Member States, to prove that the majority of interviewees associate the mark applied for with the applicant and its Coca-Cola beverages;

— items of evidence, such as the code of conduct of the market research company, to prove that the abovementioned data were generated from well-conducted and independent surveys of approximately 5000 people representative of the relevant public in 10 Member States;

— sales figures accompanied by a table showing the distribution of sales among EU Member States and a sworn statement from the marketing counsel of Coca-Cola (Europe) to prove that the applicant has sold a large number of contour bottles with and without fluting in the European Union between 2009 and 2011;

— tables showing the amounts invested in advertising and communication between 2009 and 2011 to prove that the applicant's Coca-Cola, Coca-Cola Light and Coca-Cola Zero beverages have been marketed throughout the European Union; and

— items of evidence in the form of photos, articles and website extracts to prove that the mark applied for has been used in business communications, website publications, pop art, third party publications and other media.

59 First, the applicant claims, in essence, that the doubts of the Board of Appeal as to the source, reliability and independent nature of the surveys are unfounded. It also contends that the Board of Appeal failed to correctly interpret the surveys in the light of the explanations contained therein. In view of those errors, the applicant submits that the Board of Appeal failed to understand the data presented to it and failed to understand how the surveys were conducted, despite the explanations provided in those surveys and in the statement of grounds submitted to OHIM.

60 Secondly, the applicant essentially considers that the Board of Appeal erred in law in so far as it did not acknowledge that the mark applied for had acquired a distinctive character through its use as part of a registered trade mark or in conjunction with it. The applicant claims that there has been extensive use of the mark applied for as part of the shape of its contour bottle with fluting. In that regard, it

refers to the judgment of 7 July 2005 in *Nestlé* (C-353/03, ECR, EU:C:2005:432), in which the Court held that the distinctive character of a mark referred to in Article 7(3) of Regulation No 207/2009 may be as a result both of the use, as part of a registered trade mark, of a component thereof and of the use of a separate mark in conjunction with a registered trade mark.

61 The applicant maintains that it cannot seriously be disputed that there has been extensive use of the contour bottle with fluting. It states that the contour bottle with or without fluting has been sold in very significant quantities over many years. In addition, there has been considerable promotion of the contour bottle with or without fluting in advertising.

62 According to the applicant, there are various arguments to support a finding that the mark applied for has acquired distinctive character as part of the contour bottle with fluting. First, it argues that it is clear that there has been extensive marketing of the shape of the mark applied for (that is, the mark applied for on its own) in two-dimensional form. It claims that the evidence clearly shows a two-dimensional side view of the mark applied for, which has been depicted on point of sale material, advertising, and actual products, such as bottles and cans. The applicant maintains that there is nothing in European Union trade mark law that prevents distinctiveness being acquired in a three-dimensional mark through use of a two-dimensional mark.

63 Secondly, the applicant argues that there have been special edition bottles, configured in such a way that the fluting was masked, giving the overall appearance of a contour bottle without any fluting. Those products have been in both three-dimensional and two-dimensional form. The applicant acknowledges that those bottles were designed for special occasions but maintains that there have been a lot of them and that they have been promoted widely.

64 Thirdly, the applicant invokes the manner in which the mark applied for has been used by third parties in various forms of cultural expression. It contends that, if people did not recognise the mark applied for as distinctive of Coca-Cola, one could question what certain artists were hoping to achieve by their works since, according to the applicant, the works were clearly setting out to make a reference to the Coca-Cola bottle.

65 OHIM disputes the applicant's arguments.

66 Under Article 7(3) of Regulation No 207/2009, the absolute grounds for refusal referred to in Article 7(1)(b), (c) and (d) of that regulation do not preclude the registration of a trade mark if it 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. In the circumstances referred to in Article 7(3) of Regulation No 207/2009, the fact that the sign which constitutes the mark in question is actually perceived by the relevant section of the public as an indication of the commercial origin of goods or services is the result of the economic effort made by the trade mark applicant. That fact justifies putting aside the public-interest considerations underlying Article 7(1)(b), (c) and (d), which require that the marks referred to in those provisions may be freely used by all in order to avoid conceding an unjustified competitive advantage to a single trader (judgment of 21 April 2010 in *Schunk* v *OHIM (Presentation of part of a chuck)*, T-7/09, EU:T:2010:153, paragraph 38, and 22 March 2013 in *Bottega Veneta International* v *OHIM (Shape of a handbag)*, T-409/10, EU:T:2013:148, paragraph 74).

67 It is clear from that case-law that, in order to have the registration of a trade mark accepted under Article 7(3) of Regulation No 207/2009, the distinctive character acquired through the use of that trade mark must be demonstrated in the part of the European Union where it was devoid of any such character under Article 7(1)(b), (c) and (d) of that regulation. In addition, a mark must have become distinctive through use before the application for registration was filed (judgments in *Presentation of part of a chuck*, cited in paragraph 66 above, EU:T:2010:153, paragraph 40, and *Shape of a handbag*, cited in paragraph 66 above, EU:T:2013:148, paragraph 76).

68 Furthermore, in the case of non-word marks, such as that under consideration in the present case, it may be assumed that the assessment of distinctiveness of their character will be the same throughout the European Union, unless there is concrete evidence to the contrary. Since, in the present case, the examination of the first plea in law and of the documents before the Court do not show that such evidence exists, it must be held that the absolute ground for refusal under Article 7(1)(b) of Regulation No 207/2009 in relation to the mark applied for applies throughout the European Union. That mark must therefore have become distinctive through use throughout the European Union in order to be registrable under Article 7(3) of that regulation (see judgment of 12 September 2007 in *Glaverbel* v *OHIM (Texture of a glass surface)*, T-141/06, EU:T:2007:273, paragraph 36 and the case-law cited).

69 It is also apparent from the case-law that, for a mark to have acquired distinctiveness through use, it is necessary that at least a significant proportion of the relevant public, by virtue of that mark, identifies the goods or services concerned as originating from a particular undertaking. However, the circumstances in which that requirement for acquisition of distinctive character through use may be regarded as satisfied cannot be established solely by reference to general, abstract data such as predetermined percentages (judgments in *Presentation of part of a chuck*, paragraph 66 above, EU:T:2010:153, paragraph 39, and *Shape of a handbag*, paragraph 66 above, EU:T:2013:148, paragraph 75).

70 Furthermore, in assessing, in a particular case, whether a mark has become distinctive through use, account must be taken of factors such as the market share held by the mark; how intensive, geographically widespread and long-standing use of the mark has been; the significance of the investments by the undertaking to promote it; the proportion of the relevant class of persons who, because of the mark, identify the goods as originating from a particular undertaking and statements from chambers of commerce and industry or other trade and professional associations. If, on the basis of those factors, the relevant class of persons, or at least a significant proportion thereof, identifies goods as originating from a particular undertaking because of the mark, it must be concluded that the requirement for registering the mark laid down in Article 7(3) of Regulation No 207/2009 is satisfied (judgments in *Presentation of part of a chuck*, cited in paragraph 66 above, EU:T:2010:153, paragraph 41, and *Shape of a handbag*, cited in paragraph 66 above, EU:T:2013:148, paragraph 77).

71 According to the case-law, the distinctive character of a mark, including distinctive character acquired through use, must also be assessed in relation to the goods or services in respect of which registration is applied for and in the light of the presumed perception of an average consumer of the category of goods or services in question, who is reasonably well informed and reasonably observant and circumspect (judgments in *Presentation of part of a chuck*, cited in paragraph 66 above, EU:T:2010:153, paragraph 42, and *Shape of a handbag*, cited in paragraph 66 above, EU:T:2013:148, paragraph 78).

72 Lastly, it is apparent from the case-law that proof of distinctive character acquired through use cannot be furnished by the mere production of sales volumes and advertising material. Likewise, the mere fact that the sign has been used in the European Union for some time is also not sufficient to show that the public targeted by the goods in question perceives it as an indication of commercial origin (see, to that effect, judgment in *Texture of a glass surface*, cited in paragraph 68 above, EU:T:2007:273, paragraphs 41 and 42).

73 The Court must examine, in the light of those considerations, whether, in the present case, the Board of Appeal erred in finding that the mark applied for had not acquired distinctive character in consequence of the use which has been made of it, within the meaning of Article 7(3) of Regulation No 207/2009.

74 As a preliminary point, it should be stated that the doubts raised by the Board of Appeal with regard to the reliability of the surveys are unfounded. It is apparent from the documents before the Court that the interviewees saw only one image showing the bottle at issue, rather than images of both bottles, as

stated by the Board of Appeal. Likewise, the Board of Appeal erred in finding that the percentage figures were inaccurate. The doubts raised by the Board of Appeal regarding the person responsible for conducting the surveys are also unfounded. Moreover, those points are not disputed by OHIM.

75 Nevertheless, it is apparent from the contested decision that, notwithstanding its incorrect finding of deficiencies with regard to the surveys, as set out in paragraph 16 of the present judgment, the Board of Appeal did not reject those surveys as evidence; rather, the Board of Appeal examined them in order to determine whether they proved that the mark applied for had acquired a distinctive character in the 10 EU Member States where the surveys had been conducted. Indeed, it is apparent from paragraphs 51 and 52 of the contested decision that the Board of Appeal noted that the surveys covered less than half the Member States and that the Board considered those surveys in conjunction with the other items of evidence submitted by the applicant. It follows that the errors made by the Board of Appeal regarding the reliability of the surveys do not affect the legality of the contested decision.

76 It must also be pointed out that, as noted by the applicant, a three-dimensional mark may, in certain circumstances, acquire distinctive character through use even if it is used in conjunction with a word mark or a figurative mark. It is sufficient that, in consequence of such use, the relevant class of persons actually perceive the goods or services, designated exclusively by the mark applied for, as originating from a given undertaking (judgment in *Nestlé*, cited in paragraph 60 above, EU:C:2005:432, paragraph 30). In that regard, the Court notes that, unlike the mark at issue in the judgment in *Nestlé* (EU:C:2005:432), the mark applied for is not clearly distinguishable from the mark it is alleged to be a part of. In the present case, it is not obvious, from the evidence provided by the applicant and particularly from the advertising material, whether the bottle that is shown in them is a representation of the contour bottle with fluting, or a representation of the mark applied for. The same is true as regards the items of evidence showing contour bottles without fluting. The mark applied for is not used in combination with the mark it is alleged to be a part of but absorbs that mark or, inversely, is itself absorbed by it to the extent that the silhouettes of the mark applied for and the mark it is alleged to be part of overlap. In those circumstances, it is necessary to ascertain whether the evidence proves that, in the eyes of the relevant public, the mark applied for can be perceived as an indicator of origin of the goods at issue.

77 As regards the territory in which use must be demonstrated, it must be borne in mind that, under Article 1(2) of Regulation No 207/2009, the Community trade mark is to have a unitary character, which implies that it must have the same effects throughout the European Union. It follows from the unitary character of the Community trade mark that, in order to be accepted for registration, a sign must have distinctive character throughout the European Union. Accordingly, under Article 7(1)(b) of Regulation No 207/2009, read in conjunction with Article 7(2) thereof, a mark must be refused registration if it is devoid of distinctive character in part of the European Union and the part of the European Union referred to in Article 7(2) may be comprised of a single Member State (see, to that effect, judgments of 22 June 2006 in *Storck* v *OHIM*, C-25/05 P, ECR, EU:C:2006:422, paragraphs 81 to 83, and 29 September 2010 in *CNH Global* v *OHIM (Representation of a tractor in red, black and grey)*, T-378/07, ECR, EU:T:2010:413, paragraph 45 and the case-law cited).

78 Article 7(3) of Regulation No 207/2009, which permits registration of signs which have acquired distinctive character through use, must be read in the light of that requirement. According to the case-law cited in paragraph 66 above, it must be established that a mark has acquired distinctive character through use throughout the territory in which it initially did not have such character. However, it would be unreasonable to require proof of acquisition of distinctive character through use, in accordance with the case-law cited in paragraphs 66 to 68, with regard to each individual Member State (see, to that effect, judgment of 24 May 2012 in *Chocoladefabriken Lindt & Spriingli* v *OHIM*, C-98/11 P, ECR, EU:C:2012:307, paragraph 62).

79 It is therefore necessary to ascertain whether, in the light of the case-law referred to in paragraphs 66 to 68 above, the applicant has been able to establish that the sign in question had, before the application for registration was filed, acquired distinctive character through use throughout the European Union in respect of a significant part of the relevant public. To that end, the applicant was given the opportunity to submit before OHIM various types of evidence, including those set out in paragraph 58 above.

80 First, as regards the surveys relied on by the applicant, it must be held that the Board of Appeal was correct to find, in paragraph 51 of the contested decision, that those surveys were not capable of proving that the mark applied for had acquired distinctive character throughout the European Union in respect of a significant part of the relevant public. The surveys were conducted in 10 EU Member States, namely Denmark, Germany, Estonia, Greece, Spain, France, Italy, Poland, Portugal and the United Kingdom, even though the European Union had 27 Member States at the date on which the application for registration was lodged. It is true that the surveys in question concluded that the mark applied for had acquired a distinctive character in the 10 Member States where they were carried out, with the recognition rate being between 48% (Poland) and 79% (Spain); however, they did not establish that that was also the case in the other 17 Member States. The results of those surveys cannot be extrapolated to the 17 Member States in which no surveys were conducted. In that regard, it must be pointed out that, particularly in respect of the countries that became members of the European Union after 2004, the surveys provide almost no information regarding the perception of the relevant public in those Member States. Even though surveys were conducted in Poland and Estonia, there is no justification for extrapolating the conclusions relating to those two countries to the other states which became members of the European Union after 2004. Furthermore, the applicant has not demonstrated that certain Member State markets covered by the surveys are comparable to others and that the results of those surveys could be extrapolated to them. It is not for the Court to make assumptions in that regard.

81 In the light of the foregoing, it must be concluded that the surveys are not sufficient, in themselves, to prove to the requisite standard that the mark applied for has acquired distinctive character through use, throughout the European Union, in respect of a significant part of the relevant public.

82 Secondly, as regards the investments which have been made in advertising and communication, it is clear from the case-law that the amount invested by the undertaking in promoting a mark may be taken into account for the purposes of considering whether that mark has acquired distinctive character through use. However, in the present case, it should be noted that the figures provided in that regard do not specifically relate to the mark applied for. According to the sworn statement made by the marketing counsel of the applicant's subsidiary in France, the figures provided refer only to the Coca-Cola, Coca-Cola Light and Coca-Cola Zero beverages without specifying which packaging is being referred to. Therefore it is not possible to draw conclusions from those figures with regard to the relevant public's perception of the mark applied for.

83 Thirdly, as regards the sales figures and the advertising material, it must be pointed out, first of all, that they constitute only secondary evidence which may support, where relevant, direct evidence of distinctive character acquired through use, such as provided by the surveys submitted by the applicant.

84 The sales figures and advertising material as such do not show that the public targeted by the goods in question perceives the mark applied for as an indication of commercial origin. In respect of the Member States for which no survey has been conducted, proof of distinctive character acquired through use cannot, as a rule, be furnished by the mere production of sales figures and advertising material. That particularly applies in the circumstances of the present case since it is apparent that the sales figures provided are not reliable.

85 In that regard, even though there is no doubt that the sales figures prove that the applicant has sold large quantities of beverages throughout the European Union, it must be stated that they are, as the applicant acknowledged at the hearing, marred by inconsistencies. For instance, the sales figures for Belgium and Luxembourg, which together have a population of approximately 12 million, are almost the same as those for Germany, even though that country has a population of almost 80 million. Likewise, the sales figures for Lithuania, which has a population of approximately 3 million, are almost twice those for Poland, even though that country has a population of almost 38 million. Moreover, the sales figures for Latvia doubled between 2009 and 2010. The applicant confirmed those inconsistencies at the hearing but was not able to explain them. To conclude, it must be held that this evidence has no probative value.

86 Furthermore, even taking into account the sworn statement made by the marketing counsel of the applicant's subsidiary in France, it cannot be inferred from the data provided by the applicant that the sales figures relate specifically to the mark applied for. That sworn statement asserts that the sales figures relate to the 'contour bottle' without specifying whether that means the mark applied for, the contour bottle with fluting, or both. Consequently, it does not enable a conclusion to be drawn regarding the relevant public's perception of the mark applied for.

87 Thus, the Board of Appeal was correct in finding, in paragraph 57 of the contested decision, that the evidence was insufficient and unconvincing as regards the actual perception of the mark applied for.

88 As regards the items of evidence containing photos, articles and website extracts to prove that the mark applied for had been used in business communications, website publications, pop art, third party publications and other media, it must be held that the Board of Appeal was correct to find that almost all those items did not relate to the mark applied for. It is not obvious, on the basis of those items, whether the bottle that is shown in them is a representation of the contour bottle with fluting, or a representation of the mark applied for. Likewise, the documentation regarding the history of the applicant's non-alcoholic beverages showed only images of the contour bottle with fluting. In addition, the Board of Appeal's finding that, for the most part, those documents contain images taken outside the European Union (particularly in the United States) or in unknown locations, must be upheld. Consequently, those documents also fail to establish that the mark applied for has acquired distinctive character in the European Union.

89 Furthermore, it must be found that the applicant has submitted almost no proof of acquisition of distinctive character with regard to the contested goods other than non-alcoholic beverages, namely all the other goods contained in Class 32 and the goods contained in Classes 6 and 21 of the Nice Classification, as was indeed confirmed by the applicant at the hearing.

90 In the light of the foregoing, none of the items of evidence, considered in isolation, is sufficient to establish that the mark applied for has acquired distinctive character through use. Likewise, assessing all the items of evidence as a whole also fails to establish that such is the case. In that regard, it should be noted that the surveys covered only a part of the European Union and that the other items of evidence submitted by the applicant during the administrative proceedings before OHIM do not, in view of their imprecisions and inconsistencies, compensate for that deficiency.

91 In consequence, as none of the pleas put forward by the applicant is well-founded, the action must be dismissed in its entirety.

Costs

92 Under Article 134(1) of the Rules of Procedure of the General Court, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings.

93 Since the applicant has been unsuccessful, it must be ordered to pay the costs, in accordance with the form of order sought by OHIM.

On those grounds,

THE GENERAL COURT (Eighth Chamber),

hereby:

1. Dismisses the action;

2. Orders The Coca-Cola Company to pay the costs.

Gratsias Kancheva Wetter

Delivered in open court in Luxembourg on 24 February 2016.

[Signatures]