JUDGMENT OF THE COURT (Sixth Chamber)
29 April 2004 *

In Joined Cases C-468/01 P to C-472/01 P,

Procter & Gamble Company, established in Cincinnati (United States), represented by C. van Nispen and G. Kuipers, advocaten,

appellant,

FIVE APPEALS against the judgments of the Court of First Instance of the European Communities (Second Chamber) of 19 September 2001 in Case T-117/00 *Procter & Gamble* v *OHIM (Square tablet, white and pale green)* [2001] ECR II-2723, Case T-118/00 *Procter & Gamble* v *OHIM (Square tablet, white with green speckles and pale green)* [2001] ECR II-2731, Case T-119/00 *Procter & Gamble* v *OHIM (Square tablet, white with yellow and blue speckles)* [2001] ECR II-2761, Case T-120/00 *Procter & Gamble* v *OHIM (Square tablet, white with blue speckles)* [2001] ECR II-2769, and Case T-121/00 *Procter & Gamble* v *OHIM (Square tablet, white with green and blue speckles)* [2001] ECR II-2777, seeking to have those judgments set aside,

* Language of the case: English.

the other party to the proceedings being:

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

defendant at first instance,

THE COURT (Sixth Chamber),

composed of V. Skouris, acting as the President of the Sixth Chamber, J.N. Cunha Rodrigues, J.-P. Puissochet, R. Schintgen and F. Macken (Rapporteur), Judges,

Advocate General: D. Ruiz-Jarabo Colomer,
Registrar: M. Múgica Arzamendi, Principal Administrator,

having regard to the Report for the Hearing,

after hearing oral argument from the parties at the hearing on 2 October 2003, at which Procter & Gamble Company was represented by C. van Nispen and G. Kuipers and the Office for Harmonisation in the Internal Market (Trade Marks and Designs) (OHIM) by D. Schennen and A. von Mühlendahl, acting as Agent,

after hearing the Opinion of the Advocate General at the sitting on 6 November 2003,

gives the following

Judgment

1 By applications lodged at the Court Registry on 6 December 2001, Procter & Gamble Company ('Procter & Gamble') appealed pursuant to Article 49 of the EC Statute of the Court of Justice against the judgments of the Court of First Instance of 19 September 2001 in Case T-117/00 *Procter & Gamble* v *OHIM (Square tablet, white and pale green)* [2001] ECR II-2723 ('Case T-117/00'), Case T-118/00 *Procter & Gamble* v *OHIM (Square tablet, white with green speckles and pale green)* [2001] ECR II-2731 ('Case T-118/00'), Case T-119/00 *Procter & Gamble* v *OHIM (Square tablet, white with yellow and blue speckles)* [2001] ECR II-2761('Case T-119/00'), Case T-120/00 *Procter & Gamble* v *OHIM (Square tablet, white with blue speckles)* [2001] ECR II-2769 ('Case T-120/00'), and Case T-121/00 *Procter & Gamble* v *OHIM (Square tablet, white with green and blue speckles)* [2001] ECR II-2777 ('Case T-121/00') (hereinafter together referred to as 'the judgments under appeal'), by which the Court of First Instance dismissed its actions for annulment of the decisions of the Third Board of Appeal of the Office for Harmonisation in the Internal Market (Trade Marks and Designs) ('OHIM') of 29 February, 3 and 8 March 2000 (Cases R-509/1999-1, R-516/1999-1, R-519/1999-1, R-520/1999-1 and R-529/1999-1), which had rejected its appeals against the refusal to register as Community trade marks three-dimensional tablets for washing machines or dishwashers ('the contested decisions').

2 By order of the President of the Court of Justice of 20 March 2003, Cases C-468/01 P to C-472/01 P were joined for the purposes of the oral procedure and the judgment.

Legal background

3 Article 4 of Council Regulation (EC) No 40/94 of 20 December 1993 on the Community trade mark (OJ 1994 L 11, p. 1) provides:

'A Community trade mark may consist of any signs capable of being represented graphically, particularly words, including personal names, designs, letters, numerals, the shape of goods or of their packaging, provided that such signs are capable of distinguishing the goods or services of one undertaking from those of other undertakings.'

4 Article 7 of the regulation provides:

'1. The following shall not be registered:

(a) signs which do not conform to the requirements of Article 4;

(b) trade marks which are devoid of any distinctive character;

(c) trade marks which consist exclusively of signs or indications which may serve, in trade, to designate the kind, quality, quantity, intended purpose, value, geographical origin or the time of production of the goods or of rendering of the service, or other characteristics of the goods or service; trade marks which consist exclusively of signs or indications which have become customary in the current language or in the bona fide and established practices of the trade;

...

3. Paragraph 1(b), (c) and (d) shall not apply if the trade mark has become distinctive in relation to the goods or services for which registration is requested in consequence of the use which has been made of it.'

Facts of the case

5 On 13 October 1998 Procter & Gamble applied to OHIM for registration as Community trade marks of the following three-dimensional shapes, which were presented as square tablets with slightly rounded edges and corners:

— a square tablet consisting of two layers, one white and the other pale green (Case C-468/01 P);

— a square tablet consisting of two layers, one white with green speckles and the other pale green (Case C-469/01 P);

— a square white tablet with yellow and blue speckles (Case C-470/01 P);

— a square white tablet with blue speckles (Case C-471/01 P); and

— a square white tablet with green and blue speckles (Case C-472/01 P).

6 The products in respect of which registration is 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'.

7 By decisions of 17 June 1999, the OHIM examiner refused the applications on the ground that the trade marks for which registration had been applied were devoid of distinctive character and for that reason could not be registered on account of Article 7(1)(b) of Regulation No 40/94.

8 By the contested decisions, the Third Board of Appeal of OHIM upheld the examiner's decisions finding that each of the marks for which registration was sought was devoid of any distinctive character for the purposes of that provision.

9 The Board of Appeal 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 Procter & Gamble's competitors must also remain free to make such products using the simplest geometrical shapes. 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. Finally, the Board of Appeal held that the colours of the trade marks concerned did not confer distinctive character on them.

Procedure before the Court of First Instance and the judgments under appeal

10 By applications lodged at the Registry of the Court of First Instance on 3 May 2000, Procter & Gamble brought five actions for annulment of the contested decisions.

11 In Case T-118/00, the Court of First Instance held that the OHIM Board of Appeal had rightly concluded that the three-dimensional trade mark for which registration is sought was devoid of any distinctive character within the meaning of Article 7(1)(b) of Regulation No 40/94, and did so on the following grounds.

> '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. ... 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.

...

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.

...

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.'

12 The Court of First Instance reached the same conclusion in the other four judgments under appeal. Paragraphs 51 to 73 of the judgment in Case T-117/00 are couched in essentially the same terms as paragraphs 52 to 74 of the judgment in Case T-118/00, which are set out in the preceding paragraph. Likewise, paragraphs 51 to 71 of the judgments in Cases T-119/00 to T-121/00 are couched in essentially the same terms as paragraphs 52 to 61 and 64 to 74 of the judgment in Case T-118/00.

13 Therefore, by the judgments under appeal the Court of First Instance dismissed the actions brought by Procter & Gamble against the contested decisions.

The appeals

14 In its appeals Procter & Gamble claims that the judgments under appeal should be set aside and that OHIM should be ordered to pay the costs.

15 OHIM contends that the appeals should be dismissed and that Procter & Gamble should be ordered to pay the costs.

16 In support of its appeals, Procter & Gamble maintains that the Court of First Instance made an error of law in its interpretation of Article 7(1)(b) of Regulation No 40/94. That single plea in law is subdivided, in essence, into five parts relating to:

— the distinctive character of the trade marks for which registration is sought;

— the need to consider the trade mark as a whole;

— the assessment of the consumer's level of attention;

— the date by reference to which distinctive character of the marks concerned should be assessed; and

— the criterion concerning use of a trade mark.

17 OHIM contends that in the judgments under appeal the Court of First Instance did not make an error of law in its interpretation and application of Article 7(1)(b) of Regulation No 40/94.

The first part of the plea: the distinctive character of a trade mark

Arguments of the parties

18 By the first part of its plea, Procter & Gamble submits that the question whether the geometrical shape of the product is an obvious one is not relevant. Nor is it relevant whether the slightly rounded corners of the tablets in question are likely to be perceived by the average consumer as a distinctive feature of the shape for which registration as a trade mark is sought, capable of distinguishing them from other washing machine or dishwasher tablets. The right question is whether the shape of the tablets, their slightly rounded corners, the colours used and the pattern (speckles or layers) were at the material time already part of the usual get-up of tablets on the market and, if they were not, whether the difference was perceptible, rendering it apt to confer distinctive character on the marks.

19 As regards, more specifically, the coloured features of the tablets concerned, Procter & Gamble claims that even if the colours, taken individually, do not give an indication of the tablets' origin, they are part of the overall get-up and contribute to the distinctive character of the marks. Furthermore, contrary to the finding of the Court of First Instance, combinations of basic colours and the various shades thereof can constitute a valid trade mark for a whole category of products (such as detergents).

20 The Court of First Instance held that the inability of the trade marks for which registration is sought to indicate the product's origin was not affected by how many similar tablets were already on the market. Procter & Gamble submits, however, that if there were no similar tablets on the market at the material time, the get-ups of the tablets concerned were perceptibly different and were therefore distinctive.

21 OHIM contends that the Court of First Instance correctly applied the criteria in Article 7(1)(b) of Regulation No 40/94 for assessing whether a trade mark is distinctive, both as regards the relevant public and as regards the products in question, since distinctive character must be assessed by reference to the specific nature of the product. The Court of First Instance also examined each mark as a whole, with due regard to each of its components, its function and the way in which it would be perceived by the relevant consumers. Furthermore, OHIM submits that the Court of First Instance rightly refused to take into account whether Procter & Gamble, or its competitors, actually used the same or similar washing machine or dishwasher tablets at the date on which the trade-mark applications were filed.

22 As regards distinctive character, OHIM maintains that a trade mark has distinctive character if it allows the products or services claimed to be distinguished as to their trade origin and not as to their properties or characteristics. That interpretation of distinctiveness, which was adopted by the Court of First Instance, is the only interpretation which is compatible both with the wording of Article 7(1)(b) of Regulation No 40/94 and with the meaning and function of a trade mark.

23 For OHIM, the Court of First Instance's finding that the perception of the relevant public is not necessarily the same in relation to a three-dimensional trade mark consisting of the shape of the product itself as it is in relation to a word mark is of particular importance in this instance. Whilst the public is used to recognising word marks instantly as signs identifying the product, the same is not necessarily true where the sign is indistinguishable from the appearance of the product itself.

24 The mere shape of the product, in the absence of other elements which typically are used as signs — such as engraved words — will not, as a general rule, be perceived by the average consumer from the outset as being a trade mark, unless the shape has some striking feature. It is therefore necessary to define what the striking feature is which confers distinctiveness on the shape of a product, and to

do so by reference to the functions performed by trade marks. A positive definition could be that the shape must be sufficiently fanciful, arbitrary or unusual. A negative definition would be that commonplace, obvious or unremarkable shapes and/or combinations of shapes and colours are devoid of any distinctive character.

25 In this instance, the overall impression given by the tablets at issue is, in each of the cases culminating in the judgments under appeal, of a non-distinctive sign. None of these tablets possesses distinctive features which would allow an average consumer to associate it with a particular manufacturer, unless there were massive advertising and/or use, in other words unless Article 7(3) of Regulation No 40/94 applied.

26 The test proposed by Procter & Gamble — by virtue of which it is necessary, first, to ascertain what is the usual get-up of the relevant product on the market and, second, to determine whether, from the consumer's point of view, the shape of the trade mark for which registration is sought is perceptibly different — means in effect that a three-dimensional mark should be registered if it meets just one condition, namely that it is different from any other shape, which is contrary to Article 7(1)(b) of Regulation No 40/94.

27 That test in fact amounts to imposing, for the registration of trade marks, the same conditions as those which must be met if a design is to be registered. Although OHIM acknowledges that one and the same item may be protected under different systems of industrial property law, it is of the utmost importance to apply the definitions and conditions corresponding to the protection pertaining to each of those systems separately.

Findings of the Court

28 Under Article 4 of Regulation No 40/94 a Community trade mark may consist of any signs capable of being represented graphically, provided that such signs are capable of distinguishing the products or services of one undertaking from those of other undertakings.

29 It is clear from Article 4 that both a product's shape and its colours fall among the signs which may constitute a Community trade mark. Therefore, a sign consisting of the three-dimensional shape of a tablet for washing machines or dishwashers, in combination with the arrangement of the tablet's colours, may, in principle, constitute a trade mark, provided that the two conditions mentioned in the preceding paragraph are met.

30 However, as the Court of First Instance rightly pointed out in paragraph 52 of the judgment in Case T-118/00 and in the corresponding paragraphs of the judgments in Cases T-117/00 and T-119/00 to T-121/00, the fact that a sign is, in general, capable of constituting a trade mark within the meaning of Article 4 of Regulation No 40/94 does not mean that the sign necessarily has distinctive character for the purposes of Article 7(1)(b) of the regulation in relation to a specific product or service.

31 Under the last-mentioned provision, trade marks which are devoid of any distinctive character are not to be registered.

32 For a trade mark to possess distinctive character for the purposes of Article 7(1)(b) of Regulation No 40/94, it must serve to identify the product in respect of which registration is applied for as originating from a particular undertaking, and thus to distinguish that product from those of other undertakings (see, in relation

to Article 3(1)(b) of First Council Directive 89/104/EEC of 21 December 1988 to approximate the laws of the Member States relating to trade marks (OJ 1989 L 40, p. 1), a provision which is identical to Article 7(1)(b), Joined Cases C-53/01 to C-55/01 *Linde and Others* [2003] ECR I-3161, paragraph 40).

33 That distinctive character must be assessed, first, by reference to the products or services in respect of which registration has been applied for and, second, by reference to the perception of the relevant public, which consists of average consumers of the products or services in question, who are reasonably well informed and reasonably observant and circumspect (see, inter alia, *Linde*, paragraph 41, and Case C-363/99 *Koninklijke KPN Nederland* [2004] ECR I-1619, paragraph 34).

34 It is apparent from the grounds of the judgments under appeal that the Court of First Instance did not make an error of law in its interpretation of Article 7(1)(b) of Regulation No 40/94.

35 The Court of First Instance, in accordance with the settled case-law of the Court of Justice, assessed whether the trade marks at issue were devoid of any distinctive character by reference, first, to the products or services in respect of which their registration was sought, and, second, by reference to the perception of the relevant public, which consists, in this case, of all consumers.

36 The Court of First Instance was also correct in stating that the criteria for assessing the distinctive character of three-dimensional shape-of-products marks are no different from those applicable to other categories of trade mark. It none the less observed that, for the purpose of applying those criteria, the relevant public's perception is not necessarily the same in relation to a three-dimensional mark consisting of the shape and colours of the product itself as it is in relation to a word or figurative mark consisting of a sign which is independent from the

appearance of the products it denotes. Average consumers are not in the habit of making assumptions about the origin of products on the basis of their shape or the shape of their packaging in the absence of any graphic or word element and it could therefore prove more difficult to establish distinctiveness in relation to such a three-dimensional mark than in relation to a word or figurative mark (see, to that effect, *Linde*, paragraph 48, and Case C-218/01 *Henkel* [2004] ECR I-1725, paragraph 52).

37 In those circumstances, the more closely the shape for which registration is sought resembles the shape most likely to be taken by the product in question, the greater the likelihood of the shape being devoid of any distinctive character for the purposes of Article 7(1)(b) of Regulation No 40/94. Only a trade mark which departs significantly from the norm 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 that provision (see, in relation to the identical provision in Article 3(1)(b) of First Directive 89/104, *Henkel*, paragraph 49).

38 It follows that, in holding that the trade marks for which registration is sought were devoid of any distinctive character for the purposes of Article 7(1)(b) of Regulation No 40/94, the Court of First Instance did not make an error of law in relation to either that provision or the relevant case-law of the Court of Justice.

39 The actual application by the Court of First Instance of those criteria to these cases involves findings of a factual nature. The Court of First Instance has exclusive jurisdiction to make findings of fact, save where a substantive inaccuracy in its findings is attributable to the documents submitted to it, and to appraise those facts. That appraisal thus does not, save where the clear sense of the evidence produced to it has been distorted, constitute a point of law which is subject, as such, to review by the Court of Justice on appeal (see Case C-104/00 P *DKV* v *OHIM* [2002] ECR I-7561, paragraph 22).

40 In this instance, there is nothing in the findings made by the Court of First Instance to suggest that the evidence produced to it was distorted.

41 In view of the foregoing, the first part of the plea, which relates to the distinctive character of a trade mark, must be rejected as unfounded.

The second part of the plea: the need to consider the trade mark as a whole

Arguments of the parties

42 By the second part of its plea, Procter & Gamble submits that, in assessing whether the combination of the shapes of the tablets concerned and the arrangement of their colours may be perceived by the relevant public as an indication of the tablets' origin, the Court of First Instance did not actually analyse the overall impression produced by that combination, as the case-law requires it to do. It comprehensively examined each of the individual components of which of the tablets are composed and based its subsequent conclusions on that examination but it did not really analyse the overall impression produced by the specific combinations concerned.

43 OHIM challenges this part of the plea, maintaining that the Court of First Instance correctly considered the trade marks in question as a whole, although it confirmed, also quite correctly, that that approach does not preclude starting with a separate analysis of each of the individual components of the marks. OHIM, which itself carries out an analysis of that kind, contends that the overall impression given by each of the trade marks concerned is of a sign which is not distinctive.

Findings of the Court

44 As the Court has consistently held, the average consumer normally perceives a mark as a whole and does not proceed to analyse its various details (see *SABEL*, paragraph 23, and *Lloyd Schuhfabrik Meyer*, paragraph 25). Thus, in order to assess whether or not a trade mark has any distinctive character, the overall impression given by it must be considered (see *SABEL*, paragraph 23, and, in relation to a word mark, *DKV* v *OHIM*, paragraph 24).

45 That does not mean, however, that the competent authority, responsible for ascertaining whether the trade mark for which registration is sought — in this instance the graphic representation of a combination of the shape of a washing machine or dishwasher tablet and the arrangement of its colours — is capable of being perceived by the public as an indication of origin, may not first examine each of the individual features of the get-up of that mark in turn. It may be useful, in the course of the competent authority's overall assessment, to examine each of the components of which the trade mark concerned is composed

46 In this instance, the Court of First Instance, having examined each of those components separately, then assessed — as is clear from paragraphs 59 to 67 of the judgment in Case T-118/00 and the corresponding paragraphs of the judgments in Cases T-117/00 and T-119/00 to T-121/00 — the overall impression deriving from the shape of the tablets concerned and the arrangement of their colours, as is required by the case-law referred to in paragraph 44 of this judgment.

47 It follows that there is nothing in the judgments under appeal to suggest that the Court of First Instance failed to base its assessment of the distinctive character of the trade marks for which registration is sought on the overall impression which they produce.

48 Therefore, the second part of the plea, which relates to the need to consider the trade mark as a whole, must be rejected.

The third part of the plea: the assessment of the average consumer's level of attention

Arguments of the parties

49 By the third part of its plea, Procter & Gamble recalls that, at the date on which the relevant trade-mark applications were filed, dishwasher tablets and, more particularly, washing machine tablets were not everyday consumer products and that at that time they were at the top end of the relevant market. In those circumstances, Procter & Gamble maintains that, contrary to the Court of First Instance's finding, the level of attention paid by the average consumer of those products to their get-up was high.

50 In any event, Procter & Gamble adds that it does not understand why the consumer's level of attention should not be 'high' in relation to everyday consumer products. The everyday use of such products continually draws the consumer's attention to their get-up and hence is conducive to their receiving a high level of attention.

51 OHIM contends that in the judgments under appeal the Court of First Instance defined the relevant public as consisting of average consumers, who are reasonably well informed and reasonably observant and circumspect, and described the products in question as everyday consumer products. In that

regard, OHIM submits that what is important is that washing machine or dishwasher tablets are intended to be used every day by any consumer whatsoever. The fact that the tablets concerned are more expensive than washing or dishwashing products in powder form and that they are products new to the market does not mean that they are products at the top end of the market, to which consumers pay great attention.

52 Furthermore, OHIM submits that it is important to be aware of how the tablets concerned are sold, how they differ from other forms of washing or dishwashing products, what their advantages are as against those other products, and how they are actually used in the washing process. At no point in the product's application will the consumer feel the need or the urge to ask himself further questions about the shape or external appearance of the tablets.

Findings of the Court

53 On this point, the Court of First Instance's finding in paragraph 58 of the judgment in Case T-118/00 and the corresponding paragraphs of the judgments in Cases T-117/00 and T-119/00 to T-121/00, that, since washing machine and dishwasher tablets are everyday consumer products, the level of attention paid by the average consumer to their shape and colours is not high is a finding of fact, which, as has been recalled in paragraph 39 of this judgment, is not subject to review by the Court of Justice on appeal where, as in this instance, it does not entail a distortion of the factual evidence produced to the Court of First Instance.

54 In those circumstances, the third part of the plea, which relates to the assessment of the average consumer's level of attention, must also be rejected.

The fourth part of the plea: the date by reference to which the distinctive character of a trade mark must be assessed

Arguments of the parties

55 By the fourth part of its plea, Procter & Gamble claims that the Court of First Instance was wrong not to adjudicate on the question concerning the date by reference to which it is appropriate to assess the distinctive character of the trade marks for which registration is sought. In its submission, it is appropriate in this instance to ascertain what were the usual get-ups of washing machine and dishwasher tablets on the market at the date on which the various applications were filed and to determine whether, from the consumer's point of view, the get-up of the trade marks for which registration is applied is perceptibly different.

56 OHIM argues that in the judgments under appeal the Court of First Instance did not find it necessary to adjudicate on this point because, even at the date on which the applications for registration were filed, the trade marks in question lacked distinctiveness. In any event, the conditions for registration of a Community trade mark must, in its submission, be met both at the date of filing and again at the date of registration.

Findings of the Court

57 As is clear from paragraph 32 of this judgment, a trade mark has distinctive character for the purposes of Article 7(1)(b) of Regulation No 40/94 if it serves to distinguish the products or services in respect of which registration is applied from those of other undertakings.

58 In this case, the Court of First Instance was correct in finding, in paragraph 68 of the judgment in Case T-118/00 and in the corresponding paragraphs of the judgments in Cases T-117/00 and T-119/00 to T-121/00, that it was not necessary to decide which was the relevant date for the assessment of whether the trade marks had distinctive character for the purposes of that provision, since it had found that the marks for which registration was sought were not capable of identifying the origin of the products concerned and that that finding was not affected by how many similar tablets were already on the market.

59 In those circumstances, the Court of First Instance did not make an error of law in finding that there was no need for it to decide by reference to which of the two dates the assessment of the distinctive character of the trade marks in question should be carried out.

60 The fourth part of the plea, which relates to the date by reference to which the distinctive character of a trade mark should be assessed, must therefore also be rejected as unfounded.

The fifth part of the plea: the criterion concerning use of a trade mark

Arguments of the parties

61 By the fifth part of its plea, Procter & Gamble submits that the public's habit of perceiving colours as indicative of a product's origin, a habit which may be created by the use of, or advertising for, other signs, is within the ambit of Article 7(1)(b) of Regulation 40/94 and not of Article 7(3) of the regulation.

62 OHIM contends that the question whether a trade mark has acquired distinctiveness through use arises solely under Article 7(3) of Regulation No 40/94.

Findings of the Court

63 It is sufficient to state in this connection that such an argument is ineffective, since, as is apparent from paragraphs 31 to 38 of this judgment, the Court of First Instance correctly applied Article 7(1)(b) of Regulation No 40/94 and stated, without making any error of law, that the trade marks for which registration is sought were devoid of any distinctive character.

64 It follows from all of the foregoing that the appeals are unfounded and must therefore be dismissed.

Costs

65 Under Article 69(2) of the Rules of Procedure, which applies to the appeal procedure by virtue of Article 118 of those rules, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. As OHIM has applied for costs and Procter & Gamble has been unsuccessful, it must be ordered to pay the costs.

On those grounds,

THE COURT (Sixth Chamber)

hereby:

1. **Dismisses the appeals;**

2. **Orders Procter & Gamble Company to pay the costs.**

Skouris Cunha Rodrigues Puissochet

Schintgen Macken

Delivered in open court in Luxembourg on 29 April 2004.

R. Grass V. Skouris

Registrar President