JUDGMENT OF THE COURT OF FIRST INSTANCE (Second Chamber)
5 March 2003 *

In Case T-194/01,

Unilever NV, established in Rotterdam (Netherlands), represented by V. von Bomhard and A. Renck, lawyers,

applicant,

v

Office for Harmonisation in the Internal Market (Trade Marks and Designs) (OHIM), represented by F. López de Rego and J.F. Crespo Carrillo, acting as Agents,

defendant,

ACTION against the decision of the First Board of Appeal of the Office for Harmonisation in the Internal Market (Trade Marks and Designs) of 22 May 2001 (Case R-1086/2000-1),

* Language of the case: English.

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

composed of: R.M. Moura Ramos, President, J. Pirrung and A.W.H. Meij, Judges,

Registrar: D. Christensen, Administrator,

having regard to the written procedure and further to the hearing on 13 November 2002,

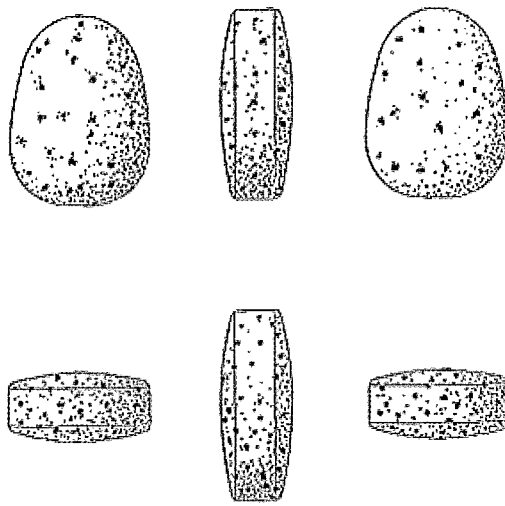
gives the following

Judgment

Background

1 On 9 December 1999, the applicant filed an application for a Community trade mark at the Office for Harmonisation in the Internal Market (Trade Marks and Designs) ('the Office') under Council Regulation (EC) No 40/94 of 20 December 1993 on the Community trade mark (OJ 1994 L 11, p. 1), as amended.

2 The three-dimensional mark for which registration was sought is:



Colour has not been claimed.

3 The products in respect of which registration of the mark was sought are in Class 3 of the Nice Agreement concerning the International Classification of Goods and Services for the Purpose of the Registration of Marks of 15 June 1957, as revised and amended, and correspond to the description: 'Detergents; preparations and substances for laundry use; fabric conditioning preparations; bleaching preparations; cleaning, polishing, scouring and abrasive preparations; preparations for dishwashing purposes; soaps; perfumery; essential oils; cosmetics; cosmetic creams; hair lotions; deodorants for personal use; alum stones; polishing stones; pumice stones; shaving stones; tripoli stones for polishing; bath salts; bleaching salts; anti-perspirants; dentifrices; make-up preparations; make-up removing preparations; toiletries.'

4 By decision of 7 September 2000, the examiner refused the application under Article 38 of Regulation No 40/94 on the ground that the mark applied for was devoid of any distinctive character for the purposes of Article 7(1)(b) of Regulation No 40/94.

5 On 7 November 2000, the applicant appealed to the Office under Article 59 of Regulation No 40/94 against the examiner's decision.

6 By decision of 22 May 2001 ('the contested decision'), notified to the applicant on 5 June 2001, the Board of Appeal annulled the examiner's decision in so far as the examiner had refused the application in respect of the following products: 'perfumery, essential oils, cosmetic creams, hair lotions, deodorants for personal use, anti-perspirants, dentifrices'. It dismissed the applicant's appeal as to the remainder.

7 Essentially, the Board of Appeal found that the mark applied for was devoid of any distinctive character so far as detergent solids and related goods were concerned. The irregular ovoid shape of the mark applied for did not differ significantly from the discoid shape which the everyday soap or detergent traditionally came in, even though it was not strictly identical to it. The speckles on the tablet were also commonplace. Tablets, such as the applicant's, were a fundamental packaging concept for detergents and a wide range of similar goods. The tablet concerned had no arbitrary features capable of distinguishing it from other similar forms on the market.

Procedure and forms of order sought

8 The applicant brought this action by application lodged at the Court Registry on 14 August 2001. The Office submitted a response on 13 November 2001. The applicant did not apply for leave to submit a reply pursuant to Article 135(2) of the Rules of Procedure of the Court of First Instance.

9 The Court, by way of measures of organisation of procedure, asked the parties to reply to a question. It also asked the applicant to produce certain documents. In response to those requests, the applicant lodged a document together with various annexes. The Court decided to take formal note of the applicant's reply to the question and of the documents produced in compliance with the request. Thus, that reply (set out at points 1 to 13 and 35 and 36 of the document) and annex 20 thereto have been included in the file. The Court refused, however, to register the document itself and the other annexes, which were returned to the applicant.

10 In its application, the applicant had claimed that the Court should:

— alter the contested decision so as to provide that the trade mark applied for is eligible for registration;

— in the alternative, annul the contested decision;

— order the Office to pay the costs.

11 At the hearing, the applicant stated that it wished to restrict the list of products in respect of which registration of the trade mark was sought so that thereafter its trade-mark application would concern solely dishwasher preparations. In response to a question from the Court, the applicant explained that that statement entailed its withdrawing its second plea in law alleging infringement of the obligation to state reasons as regards certain of the products in respect of which the Board of Appeal had upheld the examiner's decision and that it would thereafter confine itself to seeking annulment of the contested decision on the ground of breach of Article 7(1)(b) of Regulation No 40/94. In that regard, it

requested that the distinctive character of the mark applied for should be assessed solely in relation to dishwasher preparations.

12 The Office contends that the Court should:

— dismiss the application;

— order the applicant to pay the costs.

Law

The scope of the form of order sought by the applicant

13 As regards the statements made by the applicant at the hearing, it must be borne in mind that an applicant for a Community trade mark may, at any time, apply to the Office for the list of goods or services to be restricted, in accordance with Article 44 of Regulation No 40/94 and Rule 13 of Commission Regulation (EC) No 2868/95 of 13 December 1995 implementing Regulation No 40/94 (OJ 1995 L 303, p. 1). It is clear from those provisions that the list of goods or services specified in a Community trade mark application may be restricted only in accordance with certain detailed rules. Since the application which the applicant made orally at the hearing does not comply with those rules, it cannot be considered to be an application for amendment within the meaning of those provisions.

14 Rather, that statement must be interpreted as meaning that the applicant has withdrawn its action in so far as it sought annulment of the contested decision in respect of products other than dishwasher preparations.

15 Such partial withdrawal is not, as such, contrary to the prohibition in Article 135(4) of the Rules of Procedure on changing, before the Court of First Instance, the subject-matter of the proceedings before the Board of Appeal. By restricting its application for annulment solely to the part of the contested decision relating to dishwasher preparations, the applicant is not asking the Court to adjudicate on claims distinct from those heard by the Board of Appeal. Instead, the applicant, by abandoning its application for annulment of the contested decision in so far as the latter concerns a whole series of other products falling within Class 3 of the Nice Agreement, has focused its action on the products which formed the core of its trade-mark application, namely a particular category of solid detergents.

16 As regards the applicant's request that the distinctive character of the mark applied for should be assessed solely in relation to dishwasher preparations, it should none the less be pointed out that its partial withdrawal does not affect the principle that the Court's task in these proceedings is to review the legality of the Board of Appeal's decision. The review must be carried out in the light of the factual and legal context of the dispute as it was brought before the Board of Appeal. It follows that a party cannot, by withdrawing its claims in part, alter the matters of fact and law on the basis of which the legality of the Board of Appeal's decision is examined.

17 In the light of the applicant's statements at the hearing, the Court finds that the applicant now claims (i) that the contested decision should be annulled only in so far as it dismisses the appeal as to dishwasher preparations and (ii) that the Office should be ordered to pay the costs.

The legality of the contested decision

Arguments of the parties

18 Since the applicant has withdrawn its second plea in law alleging breach of the obligation to state reasons, it relies in support of its action on a single plea in law alleging infringement of Article 7(1)(b) of Regulation No 40/94. That plea is divided into four parts. First, the applicant submits that the Board of Appeal interpreted Article 7(1)(b) of Regulation No 40/94 incorrectly by applying stricter requirements to three-dimensional marks than to other marks. Second, the Board of Appeal failed to consider the relevant market situation and the habits of consumers. Third, the Board of Appeal disregarded the fact that the mark applied for differs sufficiently from the standard wash tablet shapes to be distinctive. Fourth, the applicant cites the case-law in certain Member States and the practice of national trade mark offices which, in its submission, support its proposition that wash tablet shapes that differ from the usual basic shapes may be protected as Community trade marks.

19 Under the first part of its plea, the applicant complains that the Board of Appeal discriminated between three-dimensional marks and traditional marks in contravention of Article 7(1)(b) of Regulation No 40/94. Under Regulation No 40/94, the rule is that a mark is registrable whilst the exception is that a ground for refusal exists under Article 7 of Regulation No 40/94. The Office thus has the burden of proving that there is an absolute ground for refusal. The Board inverted the relationship between the rule and the exception and reversed the burden of proof in relation to three-dimensional marks and to, more specifically, dishwasher tablets. The applicant observes that a minimum of distinctive character is sufficient for registration of a trade mark.

20 The applicant submits that the idea that consumers do not, as a general rule, perceive shapes as indicators of a product's origin is wrong. Consumers do not think about the origin of everyday consumer products, of which they do not even know, but focus exclusively on the distinction between the various products themselves. Hence trade marks function not as source identifiers but rather as product identifiers. To differentiate between the products, consumers rely on various signs, including the packaging, colour and shape of the product, the most important of which is not the product name.

21 There is no justification for applying stricter criteria to three-dimensional trade marks on the grounds that shapes must remain available to be used by all traders. First, this 'requirement of availability' is not an independent ground for refusal. Second, registration of three-dimensional marks is not intended to confer a monopoly in a given product but to reserve the particular get-up of a product. Nor can stricter requirements for three-dimensional trade marks be justified on grounds based on the protection of designs.

22 By the second part of its plea, the applicant challenges the Board of Appeal's finding that consumers do not perceive the get-up of wash tablets as an indication of origin on the ground that the finding is based solely on abstract considerations and not on any facts or evidence. The Board failed to consider all the circumstances of the case, in particular the market situation, which had been drawn to its attention by the applicant.

23 As regards the market situation, the applicant explains that manufacturers of wash tablets in Europe use the shape and get-up of the tablets to distinguish their products from those of other traders. Consumers have always been capable of

distinguishing different wash tablets by their shapes and colours and have in fact done so. In any event, consumers have been 'trained' to do so. The effect of that 'training' must not be confused with acquired distinctiveness.

24 The manufacturers of wash tablets know the market best. Therefore, the fact that they have chosen different forms or colours to distinguish their solid detergent products from those of their competitors and the fact that they go to great lengths to protect them as trade marks should be taken as evidence, or at least as a strong indication, that consumers do notice the tablets' features and rely on them, rather than solely on product names, for guidance in the market.

25 By the third part of its plea, the applicant challenges the Office's finding that the shape and get-up of the tablet at issue in this case are standard. It accepts that round or rectangular wash tablets with one or two coloured layers have become customary in the market for detergents and can therefore be considered devoid of distinctive character.

26 The applicant points out that the shape at issue here is an irregular oval with flattened edges and large dark speckles, which resembles a pebble. European consumers are attentive to the shape and colours of washing tablets. The relevant public will certainly distinguish the 'pebble shape' from the round or rectangular shapes commonly used in the relevant market. The applicant draws attention to the fact that the shape is unique on the market and that no trader has used it for the products concerned. It states that there are only round or rectangular tablets on the market and produces examples to show that this is so. The large and perfectly visible speckles on the tablet at issue are different from the get-up of

other wash tablets on the market, the speckles on the latter being much smaller and not discernible as such. In the applicant's submission, the Board of Appeal should have gathered evidence in order to prove that the shape in point was commonplace. In response to a question from the Court, the applicant stated that to date it has not itself placed on the market a dishwasher tablet with the shape of the mark applied for and is therefore unable to produce a three-dimensional example of the mark.

27 In the contested decision, the Board of Appeal acknowledged that the shape applied for in this instance was an irregular oval which was not identical to the standard shape. The Board of Appeal wrongly imposed a requirement that the mark applied for should differ significantly from commonplace shapes and should have arbitrary features in order to be eligible for registration.

28 At the hearing, the applicant added that so far as dishwasher preparations are concerned, only the rectangular shape is current on the market because that shape fits the compartments in the machines for which the products are intended. It concludes that so far as dishwasher products are concerned only the rectangular shape is devoid of distinctive character. That is not the case with the 'pebble shape' at issue here. That shape is unique and differs significantly from the usual basic shapes which have hitherto been used on the market. In addition, even if the view is taken that this shape is similar to that of the round tablets current on the market for products for washing machines, that does not provide grounds for a finding that it is devoid of distinctive character so far as dishwasher products are concerned.

29 The applicant also added at the hearing that wash tablets may be presented in a limited number of shapes, given that they are made of compressed washing powder which would be likely to crumble if the shapes selected were too elaborate. In the case of such tablets, minor differences from the basic shapes must be enough to give a shape distinctive character.

30 Under the fourth part of its plea, the applicant refers to case-law and practice in certain Member States and the practice of the Office itself in order to show that the criteria applied in this instance are too strict. First, it refers to a number of judicial decisions in Germany, the Netherlands and Italy. It concludes from that case-law that certain national courts regard wash tablets whose features depart, even slightly, from the usual form of such products as sufficiently distinctive for their get-up to be protected as a trade mark. It submits that there is all the more reason for the shape at issue here to be eligible for protection.

31 The applicant then argues that the national authorities of several Member States have registered various wash tablet shapes without requiring them to be strikingly different from the existing standard shapes. It submits that the shape of the tablet at issue in this instance differs far more from those standard shapes than the marks which have been registered at national level.

32 Finally, the applicant cites the Office's practice as regards the registration of three-dimensional marks for wash tablets. First, it refers to two applications for a trade mark which have been published, namely applications Nos 809 830 and 924 829. It acknowledges that those applications have not given rise to registrations but notes that the examiners apparently regarded them as having sufficient distinctive character. In the applicant's submission, that took place, however, before the Office took the decision that in principle wash tablets are not registrable unless they are strikingly different from normal wash tablets. The applicant then maintains that the Office registered a certain number of wash tablet shapes. Those registrations, contrasted with the refusal which the applicant has encountered in this case, show that there is some uncertainty at the Office itself about the criteria applying for the registration of trade marks for wash tablets.

33 The applicant submits that it would be consistent with the aim of Regulation No 40/94 and the practice of national authorities if the Office accepted such marks where they have a minimum degree of distinctiveness. The mark at issue

here has such minimal distinctiveness. The applicant acknowledges that such an approach will have an effect on the scope of protection of the marks concerned. However, it submits that it is appropriate that that scope should be determined on a case-by-case basis by the courts dealing with infringement matters.

34 The Office's response to the first part of the plea is that the criteria applied by the Board of Appeal do not discriminate against three-dimensional trade marks consisting of the shape of the product as opposed to other trade marks. The Board simply applied Article 7 of Regulation No 40/94, taking account of the specific characteristics of the products concerned and the way in which those products are marketed.

35 As regards the second part of the plea, the Office contends that the applicant underestimates the importance of product names when the consumer makes a choice. It also criticises the applicant's market analysis on the ground that it takes account of neither the price nor the quality of the products. In the Office's contention, the fact that the tablets are usually depicted on the products' packaging does not mean that they have distinctive character. The applicant's assertion that consumers are in a position to distinguish different wash tablets by their shapes and colours and that they have been trained to do so is merely an assumption not supported by any evidence in respect of basic or standard shapes or any obvious variations of such shapes.

36 As to the third part of the plea, the Office contends that the differences between the shape for which registration is sought and the basic shapes of round or rectangular wash tablets are not such as to be noted by the consumer. First, it compares the graphic representation of the trade mark applied for to that of a similar round tablet. It observes that where the tablet at issue is depicted from six different views, four of those depictions are identical to those of a round tablet, whilst the ovoid shape is apparent on only two of the depictions. When wash

tablets are depicted on packaging, they are usually represented in groups and/or in perspective. In neither of those cases is it possible to discern any difference between the ovoid shape in question and a round shape. As regards the speckles on the surface of the sign, the Office refers to the judgments of the Court of First Instance of 19 September 2001 concerning three-dimensional marks (Case T-335/99 *Henkel* v *OHIM* (*Rectangular tablet, red and white*) [2001] ECR II-2581; Case T-336/99 *Henkel* v *OHIM* (*Rectangular tablet, green and white*) [2001] ECR II-2589; Case T-337/99 *Henkel* v *OHIM* (*Round tablet, red and white*) [2001] ECR II-2597; Case T-117/00 *Procter & Gamble* v *OHIM* (*Square tablet, pale green and white*) [2001] ECR II-2723; Case T-118/00 *Procter & Gamble* v *OHIM* (*Square tablet, white and pale green with green speckles*) [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; Case T-121/00 *Procter & Gamble* v *OHIM* (*Square tablet, white with blue and green speckles*) [2001] ECR II-2777; Case T-128/00 *Procter & Gamble* v *OHIM* (*Square tablet with inlay*) [2001] ECR II-2785; Case T-129/00 *Procter & Gamble* v *OHIM* (*Rectangular tablet with inlay*) [2001] ECR II-2793; hereinafter 'the judgments of 19 September 2001'). According to those judgments, the fact that there are speckles is not sufficient for a tablet's get-up to be perceived as indicative of a product's origin. The Office asserts that the mark applied for is not capable of distinguishing the relevant products from those with a different origin. The shape concerned is commonplace or, in any event, an obvious variation of a standard round, square or rectangular shape.

37 Finally, as regards the fourth part of the plea, the Office argues that the approach adopted in the decisions of the national courts, to which the applicant refers, can no longer be followed in the wake of the judgments of the Court of First Instance of 19 September 2001 (cited at paragraph 36 above). It refers to the decided cases to the effect that registrations already made in the Member States are only a factor which may merely be taken into consideration, without being given decisive weight, for the purposes of registering a Community trade mark. The examples of registration submitted by the applicant show that the Office's practice has been consistent as regards the registration of trade marks for wash tablets.

Findings of the Court

38 Under Article 7(1)(b) of Regulation No 40/94 'trade marks which are devoid of any distinctive character' are not to be registered.

39 As is clear from the case-law, the trade marks covered by Article 7(1)(b) of Regulation No 40/94 are, in particular, those which, from the point of view of the relevant public, are commonly used, in trade, for the presentation of the goods or services concerned or in connection with which there exists, at the very least, concrete evidence justifying the conclusion that they are capable of being used in that manner (Case T-323/00 *SAT.1* v *OHIM (SAT.2)* [2002] ECR-II [2839], paragraph 37). Such signs do not enable the consumer buying the product or service to which the mark relates to repeat the experience, if it proves to be positive, or to avoid it, if it proves to be negative, on the occasion of a subsequent acquisition (Case T-79/00 *Rewe-Zentral* v *OHIM (LITE)* [2002] ECR II-705, paragraph 26).

40 Therefore, a sign's distinctiveness can only be assessed, first, by reference to the goods or services in respect of which registration is sought and, second, on the basis of the perception of that sign by the relevant public (*LITE*, cited at paragraph 39 above, paragraph 27, and *SAT.2*, cited at paragraph 39 above, paragraph 37).

41 As regards the products to which this action relates, namely dishwasher preparations falling within Class 3 of the Nice Agreement, it is appropriate to point out that the mark applied for consists of the get-up of the product itself.

42 The dishwasher tablets to which this action relates, like the other products within Class 3 of the Nice Agreement which were dealt with in the original trade mark application and the contested decision, 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 applied for, 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). It should also be observed that the way in which the public concerned (in this case the average consumer) perceives a trade mark is influenced by its 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).

43 Furthermore, it is not necessary for a 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).

44 As regards the first part of the plea alleging discrimination as between three-dimensional and other trade marks, the Court observes that Article 7(1)(b) of Regulation No 40/94 does not distinguish between different categories of trade marks. The criteria by reference to which the distinctive character of three-dimensional trade marks consisting of the get-up of the product itself are assessed are therefore no different from those applicable to other categories of trade marks (*Rectangular tablet with inlay*, cited at paragraph 36 above, paragraph 50; see also, in relation to Article 2 of First Council Directive 89/104/EEC of 21 December 1988 to approximate the laws of the Member States relating to trade marks (OJ 1989 L 40, p. 1), Case C-299/99 *Philips* [2002] ECR I-5475, paragraph 48, and, as regards Article 3(1)(b) of Directive 89/104, point 13 of Advocate General Ruiz-Jarabo Colomer's Opinion of 24 October 2002 in Joined Cases C-53/01 to C-55/01 *Linde and Others*.

45 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 get-up of the product itself as it is in relation to a word mark, a figurative mark or a three-dimensional mark not consisting of that get-up. 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 get-up of the product itself (*Rectangular tablet with inlay*, cited at paragraph 36 above, paragraph 51, and Advocate General Ruiz-Jarabo Colomer's Opinion, cited at paragraph 44 above, point 12).

46 It is apparent from the contested decision, in particular from points 14 and 15 thereof, that the Board of Appeal's examination of the mark applied for was consistent with the foregoing considerations. It follows that the Board of Appeal did not apply stricter criteria to three-dimensional products consisting of the shape of the product than to other marks. Consequently, the first part of the applicant's plea is unfounded.

47 As to the second part of the plea alleging that the Board of Appeal failed to consider the relevant market situation, it is clear from point 7 of the contested decision that the Board of Appeal took account of the applicant's arguments about the situation on the market for detergents. It did not, however, accept the applicant's proposition that consumers distinguish the various detergents presented in tablet form by reference to the tablets' colours and shapes. It based that finding *inter alia* on the fact that manufacturers of such tablets use conventional trade marks, which, in the Board of Appeal's view, shows that those manufacturers have doubts as to the capacity of the products' get-up to act as an indication of their trade origin.

48 In that regard, the Court cannot accept the applicant's argument that it is for the Office to demonstrate, on the basis of specific evidence, that consumers do not perceive the get-up of wash tablets as an indication of origin. The case is concerned with everyday consumer goods which are usually sold in packaging

bearing the products' name and on which there are often word marks or figurative marks or other figurative features which may include a depiction of the product. It may, as a general rule, be inferred from experience that the average consumer's level of attention with regard to products marketed in this way is not high. In such circumstances, it is for the applicant for a trade mark to show that consumers' habits on the relevant market are different and the Office cannot be required to carry out an economic analysis of the market, let alone a consumer survey, to establish to what extent consumers pay attention to the get-up of a particular category of products. The applicant for such a mark is much better placed, given its thorough knowledge of the market (mentioned by the applicant itself), to provide specific and substantiated information on the matter.

49 The applicant maintains in particular that consumers have been 'trained' to distinguish various wash tablets by reference to shape and colour. In that regard, the Court has stated in its judgments of 19 September 2001, cited at paragraph 36 above (in particular, *Rectangular tablet with inlay*, paragraph 61), that the fact that consumers may get into the habit of recognising such a product from its get-up is not enough to preclude the ground for refusal based on Article 7(1)(b) of Regulation No 40/94, since 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. In that connection, it is appropriate to point out that the 'training' referred to by the applicant does not equate to acquired distinctiveness within the meaning of Article 7(3) of Regulation No 40/94. The applicant's arguments are not concerned with whether a specific product shape has distinctive character but seek to persuade the Court to take account of the significance attached, in general, by the relevant public, to the get-up of a particular category of products.

50 The mere fact that the applicant and its competitors have chosen different shapes and colours for their detergent solids and that they seek to protect them as trade marks is not, however, a sufficient ground for concluding that the get-up of those products is normally perceived by the relevant public as an indication of their trade origin.

51 The applicant did not produce any specific evidence before the Board of Appeal to establish that the shape and colours of wash tablets play an important role when the consumer makes a choice between various products. In those circumstances, the Board of Appeal cannot be criticised for having failed to have regard to the situation on the relevant market.

52 It should be added that the applicant has not produced any such evidence at a later stage in the proceedings either, it not being necessary in this instance for the Court to adjudicate on whether it may take into account, in the course of an action under Article 63 of Regulation No 40/94, matters which were not brought to the attention of the Board of Appeal. It is true that the applicant attempted to produce to the Court certain material relating to such evidence when it submitted, in response to measures of organisation of procedure adopted by the Court, a pleading equivalent to a reply accompanied by certain annexes. In doing so, it did not, however, satisfy the conditions on which, under Article 135(2) of the Rules of Procedure, a supplementary pleading may be submitted, with the result that matters other than the responses to the measures of organisation of procedure, which the applicant sought to bring to the Court's attention by means of that pleading, could not, in any event, be taken into account.

53 It follows that the second part of the plea is unfounded.

54 In order to ascertain for the purposes of the third part of the plea whether the Board of Appeal disregarded the distinctive character of the mark applied for, the overall impression produced by the get-up of the tablet concerned must be examined (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 individual features in turn.

55 The three-dimensional shape for which registration was sought appears, when viewed horizontally or vertically from the side, to be a rectangle whose long sides are convex. In that respect, it is thus no different from other convex tablet shapes, regardless of whether they are round or quadrangular. Viewed straight on, the tablet concerned is an irregular oval, or ovoid, shape, whose lower surface is wider and flattened and which bears a slight resemblance to a trapezoidal shape with very rounded corners.

56 That shape is not, as such, one of the basic geometric shapes but it combines a number of features of various roundish shapes and also appears to draw on certain quadrangular shapes. It is thus closely related to certain tablet shapes commonly used for detergent products, in particular round and oval tablets and, to a lesser extent, rectangular tablets.

57 As the Office has correctly pointed out, the differences between the shape for which registration is sought and those other shapes are not easily perceptible. The shape applied for is a variation on the basic commonly-used shapes and is not sufficiently different from them to enable the relevant public, on the occasion of a subsequent acquisition, to recognise it and make a further purchase, if the experience proves to be positive, or to avoid a further purchase, if it proves to be negative.

58 The speckles on the tablet are not such as to confer distinctive character on the mark applied for. The addition of speckles is one of the most obvious solutions where various ingredients are to be combined in a detergent product (see, in particular, *Rectangular tablet with inlay*, cited at paragraph 36 above, paragraph 58). In addition, speckles are a commonplace feature of detergent solids. The fact that the speckles on the tablet claimed are relatively large does not have any significant bearing on the distinctive character of the mark applied for. Powder

composed of light and dark particles has a speckled appearance when it is compressed into tablet form and variations in the size of the speckles can easily be explained by the size of the particles making up the powder.

59 Consequently, the Board of Appeal was right in finding that the tablet's get-up was devoid of any distinctive character.

60 That finding is not undermined by the applicant's argument that, since only rectangular tablets are commonly used on the market for dishwasher products, any other shape has distinctive character. First, as has been explained at paragraphs 15 and 16 above, the fact that the applicant has partially withdrawn its application does not provide grounds for the Court go beyond a review of the legality of the contested decision by examining the distinctive character of the mark applied for on the basis of facts other than those of which the Board of Appeal was seised.

61 Further, even if it is assumed that the Board of Appeal should have carried out a separate examination of the distinctive character of the mark applied for as regards dishwasher products and assuming that it were established that only rectangular shapes are currently used for those products, the finding that the get-up of the tablet claimed is devoid of distinctive character would remain valid. Other basic geometric shapes, such as round, oval, square or cylindrical tablets, and variations thereon, may become commonly used, too, for those products, given that they are all obvious shapes once powder is compressed in order to be presented in solid form.

62 The fact that there are round, square and oval tablets on the related market for washing machine products constitutes specific evidence that those shapes may become commonly used, too, for dishwasher products.

63 The applicant's argument that the rectangular shape of dishwasher tablets fits the shape of the dishwasher compartments in which the product is placed is not such that that evidence can be discounted. Oval or cylindrical tablets and, depending on their size, round or square tablets may just as well be placed in those compartments as rectangular tablets.

64 Nor is it possible to accept the applicant's argument that minor differences between the mark applied for and the basic shapes should be regarded as sufficient here for a finding of distinctive character because, for technical reasons, the number of wash tablet shapes is limited. Even if that assertion were proved, it is not on any view a reason for altering the criteria by reference to which distinctive character is assessed.

65 First, there are no grounds for concluding that the relevant public's perception of the shape or get-up of a tablet, or its attention with regard to minor differences between the shape or get-up of various tablets, is influenced by the fact that it is technically possible or impossible to produce shapes which differ widely from one another.

66 Second, on the assumption that it is in fact difficult for technical reasons to produce tablets whose shapes differ significantly from one another, registering shapes which are very close to the commonly-used basic shapes would increase the risk of granting to one operator alone, by means of trade-mark law, exclusive rights which could hinder competition on the market for the goods concerned. The absolute grounds for refusal specifically address the concern of the Community legislature to prevent the creation of such monopolies (*Rectangular tablet with inlay*, cited at paragraph 36 above, paragraph 69). Therefore,

circumstances liable to increase that risk cannot be put forward as grounds for registering a sign which is not capable 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.

67 Consequently, the third part of the plea is unfounded.

68 As regards the arguments put forward by the applicant under the fourth part of its plea, concerning case-law and practice in certain Member States and the practice of the Office, it should be borne in mind that registrations already made in the Member States are only factors which may merely be taken into consideration, without being given decisive weight, for the purposes of registering a Community trade mark (Case T-122/99 *Procter & Gamble* v *OHIM (Soap bar shape)* [2000] ECR II-265, paragraph 61; Case T-24/00 *Sunrider* v *OHIM (VITALITE)* [2001] ECR II-449, paragraph 33; and *Round tablet, red and white*, cited at paragraph 36 above, paragraph 58). The same considerations apply in relation to the case-law of the courts of the Member States. Furthermore, the documents produced by the applicant in support of its argument that the practice of national trade mark offices with regard to three-dimensional marks consisting of the get-up of tablets for washing machines and dishwashers is not uniform.

69 It should also be noted that most of the marks dealt with by the national case-law and of the registrations referred to by the applicant have different features from the mark applied for in this case. Among the examples mentioned by the applicant, only two marks registered in France show certain similarities with the mark applied for, in that they are three-dimensional, consist of a variation on the basic geometric shapes and were lodged without colour being claimed. It cannot, however, be inferred from these isolated examples that the Board of Appeal failed to have regard to the practice of national offices.

70 Finally, as regards the practice of the Office, to which the applicant refers, it is true that factual or legal grounds contained in a previous decision may constitute arguments supporting a plea alleging infringement of a provision of Regulation No 40/94. Nevertheless, in the present case, the applicant has not relied on grounds contained in those decisions which might call into question the findings of the Board of Appeal as to the distinctive character of the trade mark applied for.

71 Consequently, the fourth part of the plea is unfounded.

72 Since the applicant's sole plea in law alleging infringement of Article 7(1)(b) of Regulation No 40/94 is unfounded, the action must be dismissed.

Costs

73 Under Article 87(2) of the Rules of Procedure of the Court of First Instance, the unsuccessful party is to be ordered to pay the costs if they were applied for in the successful party's pleadings. Since the applicant has been unsuccessful, it must be ordered to pay the costs, as applied for by the Office.

On those grounds,

THE COURT OF FIRST INSTANCE (Second Chamber)

hereby:

1. **Dismisses the action;**

2. **Orders the applicant to pay the costs.**

Moura Ramos Pirrung Meij

Delivered in open court in Luxembourg on 5 March 2003.

H. Jung R.M. Moura Ramos

Registrar President