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

In Joined Cases C-456/01 P and C-457/01 P,

Henkel KGaA, established in Düsseldorf (Germany), represented by C. Osterrieth, Rechtsanwalt,

appellant,

TWO APPEALS against the judgments of the Court of First Instance of the European Communities (Second Chamber) of 19 September 2001 in Case T-335/99 *Henkel* v *OHIM (rectangular tablet, red and white)* [2001] ECR II-2581 and Case T-336/99 *Henkel* v *OHIM (rectangular tablet, green and white)* [2001] ECR II-2589, seeking to have those judgments set aside,

the other party to the proceedings being:

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

defendant at first instance,

* Language of the case: German.

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 Henkel KGaA was represented by C. Osterrieth 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 26 November 2001, Henkel KGaA ('Henkel') 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-335/99 *Henkel* v *OHIM (rectangular tablet, red and white)* [2001] ECR II-2581 ('Case T-335/99') and Case T-336/99 *Henkel* v *OHIM (rectangular tablet, green and white)* [2001] ECR II-2589 ('Case T-336/99') (together hereinafter 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 21 September 1999 (Cases R 70/1999-3 and R 71/1999-3), which had rejected its appeals against the refusal to register as Community trade marks three-dimensional tablets for various classes of products, including in particular products for washing machines or dishwashers ('the contested decisions').

2 By order of the President of the Sixth Chamber of 2 June 2003, Cases C-456/01 P and C-457/01 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 15 December 1997 and 8 January 1998, Henkel applied to OHIM for registration as Community trade marks of two three-dimensional tablets, the first consisting of a white layer and a red layer superposed (Case T-335/99) and the second consisting of a white layer and a green layer superposed (Case T-336/99).

6 The products in respect of which registration of the mark 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 or dishwashing preparations in tablet form'.

7 By decisions of 3 February1999, the OHIM examiner refused the applications on the ground that the trade marks for which registration was sought 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 trade marks for which registration was sought was devoid of distinctive character for the purposes of Article 7(1)(b) of Regulation No 40/94, since its actual shape did not, with regard to the consumer or end buyer, serve to identify the origin of the products to which the trade mark would be affixed. The Board of Appeal stated that a three-dimensional shape had to be sufficiently unique to imprint itself easily on the mind and to stand out from whatever is normal in trade.

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

9 By applications lodged at the Registry of the Court of First Instance on 26 November 1999, Henkel brought two actions for annulment of the contested decisions.

10 In Case T-335/99, the Court of First Instance held that the Board of Appeal of OHIM had rightly found 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:

'41 The mark in respect of which registration is sought in the present case consists of the shape and the colour arrangement of a washing machine or dishwasher tablet, that is, of the design of the product itself.

42 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.

43 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).

44 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.

45 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.

46 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.

47 The Board of Appeal rightly points out that, as regards the perception of the public concerned, the products for which trade-mark registration was sought in the present case, namely washing machine and dishwasher products in tablet form, 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).

48 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). In that regard, the Board of Appeal rightly held that the level of attention given by the average consumer to the shape and colours of washing machine and dishwasher tablets, being everyday goods, is not high.

49 In order to ascertain whether the combination of the tablet's shape 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.

50 The three-dimensional shape for which registration has been sought ... is one of the basic geometrical shapes and is an obvious one for a product intended for use in washing machines or dishwashers. ...

51 As to the tablet's two layers ... , 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, in itself, 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.

...

53 ... 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.

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

...

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

57 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.

...

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

60 The fact that the criteria applied to assess distinctive character, in the case of a three-dimensional mark consisting of the shape of the product itself, are not more rigorous than those applying to other categories of trade marks does not alter that conclusion.

61 The factors which led the Board of Appeal to find that the mark applied for was devoid of any distinctive character constitute valid reasons for drawing the same conclusion with regard to the criteria for the assessment of distinctive character applying to all trade marks, whether they are word marks, figurative marks or three-dimensional marks.'

11 The Court of First Instance reached the same conclusion in Case T-336/99. Paragraphs 38 to 58 of the judgment in that case are couched in essentially the same terms as paragraphs 40 to 52 and 54 to 61 of the judgment in Case T-335/99, set out in the preceding paragraph.

12 Therefore, by the judgments under appeal, the Court of First Instance dismissed the actions brought by Henkel against the contested decisions.

The appeals

13 Henkel claims that the judgments under appeal should be set aside, that the contested decisions should be annulled and that OHIM should be ordered to pay the costs.

14 OHIM contends that the appeals should be dismissed and that Henkel should be ordered to pay the costs.

15 By order of 9 January 2003, the President of the Court dismissed the application made by Reckitt Benckiser NV, lodged at the Court Registry on 6 May 2002, for leave to intervene in support of Henkel's claims.

16 In support of its appeals, Henkel 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 three parts relating to:

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

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

— the date by reference to which the distinctive character of the trade marks should be assessed.

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 First, Henkel maintains that, in finding the rectangular shapes used for the tablets in question to be obvious shapes, the Court of First Instance used the wrong test for assessing whether a trade mark has distinctive character. In these cases, it should have confined itself to ascertaining whether the features of these tablets were different from those which are customary for such products or whether they had to be used because of technical requirements.

19 Henkel also disputes the Court of First Instance's statement that the various colours used in a detergent product are not perceived as an indication of the product's origin but merely suggest to the consumer that the product contains various active ingredients. In its submission, the public perceives the arrangement of colours as an individual feature of the get-up of a particular detergent product.

20 Henkel adds, with reference to Case C-456/01 P, that in its assessment of the distinctive character of the trade mark for which registration is sought the Court of First Instance should not have disregarded the fact that Henkel was the only undertaking to use the colour red for detergent products. It is important for the purpose of assessing whether that mark has distinctive character that the public is able to associate the product with the owner of the trade mark purely on that basis, Henkel being alone in using red for such products.

21 Second, Henkel submits that the fact that the Court of First Instance relied principally on the premiss that the shapes and colours of the tablets at issue consist of basic geometric shapes or basic colours suggests that it included in its assessment of the distinctive character of the trade mark considerations relating to the need to preserve the availability of a sign, contrary to what was decided in Joined Cases C-108/97 and C-109/97 *Windsurfing Chiemsee* [1999] ECR I-2779.

22 Henkel adds that, in any event, the requirement of availability does not preclude use of the combination of a shape and colours such as those for which registration as trade marks is sought in this instance. As regards, first, the shape chosen, it is the manufacturer which, subject to compliance with certain technical requirements, determines freely what the shape is to be. From a technical point of view, it does not seem that competitors are not able to manufacture tablets for consumer use unless they select the shape for which registration is sought in this instance. Further, there is no need to preserve the availability of the specific arrangement of

colours. If the consumer comes across an arrangement of colours, he will not perceive it as indicative of a technical requirement but as the free and imaginative expression of the product's individuality. Finally, it follows that no requirement of availability precludes registration of a particular combination of shapes and colours, such as that at issue here.

23 OHIM contends, first, that the Court of First Instance rightly found that the trade marks for which registration is sought are not eligible for protection pursuant to Article 7(1)(b) of Regulation No 40/94, on the ground that these are three-dimensional trade marks consisting of a combination of obvious features typical of the product concerned, which do not allow the relevant public to distinguish the products concerned from those having a different commercial origin.

24 OHIM submits that if a three-dimensional shape-of-product mark is to have distinctive character for the purposes of Article 7(1)(b), the trade mark must be original, unusual or arbitrary. Commonplace, unremarkable or obvious shapes and/or combinations of shapes and colours are devoid of any distinctive character.

25 A washing machine or dishwasher tablet is primarily functional and, for the consumer, a rectangle or any other such basic shape is obvious and usual for that type of product. The consumer does not ask himself any questions about the exact composition and effect of the tablet's colouring agents but, at the most, will assume that the colours are indicative of two ingredients with different properties, not that they are a means of identifying the product's origin. The shape of the product itself does not serve to indicate the product's origin save in exceptional cases. That does not derive from distinct, more stringent, legal rules. Rather, it arises as the result of a factual situation, namely the way in which consumers perceive the products concerned.

26 OHIM also submits that, in the judgments under appeal, the Court of First Instance rightly based its assessment of the distinctive character of the trade marks for which registration is sought on the overall impression produced by the trade mark, such an approach not precluding the various features from being considered separately and perhaps even requiring that to be the case. That approach is consistent with OHIM's practice when examining trade-mark applications, in particular in the case of three-dimensional trade marks.

27 OHIM concludes that filing a trade-mark application in relation to such basic and commonplace shapes of products cannot allow the applicant to be afforded the priority of a Community trade mark and that tablets of this kind, for washing machines or dishwashers, are eligible for protection only if and when, following extremely widespread use, they have managed to establish themselves as signs of a particular manufacturer, in accordance with Article 7(3) of Regulation No 40/94.

28 Second, regarding the need for certain signs to remain available, OHIM contends that Henkel's interpretation of that notion, which is based on the earlier case-law of the German courts, has been categorically rejected by the Court of Justice in its judgment in *Windsurfing Chiemsee*.

29 It adds that Henkel's description of how washing products and the market for those products has developed suggests that there actually is a need for certain signs to remain available (although not, however, within the meaning of the abovementioned case-law), since that development shows the extent to which the various competing undertakings have, from the outset, used both rectangular and circular shapes and a second coloured layer for washing machine or dishwasher tablets.

Findings of the Court

30 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.

31 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 tablet's arrangement of colours may, in principle, constitute a trade mark, provided that the two conditions mentioned in the preceding paragraph are met.

32 However, as the Court of First Instance rightly pointed out in paragraph 42 of the judgment in Case T-335/99 and in paragraph 40 of the judgment in Case T-336/99, 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.

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

34 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).

35 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 *KoninklijkeKPN Nederland* [2004] ECR I-1619, paragraph 34).

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

37 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.

38 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).

39 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).

40 It follows that, in holding that the trade marks for which registration is sought are 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.

41 The actual application by the Court of First Instance of those criteria to this case 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).

42 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.

43 As regards Henkel's allegation that the Court of First Instance relied on the requirement of availability, it must be stated that the Court of First Instance took as its basis the fact that the shape and colours of the tablets in question were devoid of distinctive character.

44 In any event, even on the assumption that the Court of First Instance did include considerations pertaining to the public interest in its assessment of distinctive character, it did not make an error of law in that regard.

45 Each of the grounds for refusal to register listed in Article 7(1)(b) of Regulation No 40/94 is independent of the others and calls for separate examination. Furthermore, the various grounds for refusal must be interpreted in the light of the public interest underlying each of them (see, to that effect, Case C-299/99 *Philips* [2002] ECR I-5475, paragraph 77, and *Linde*, paragraphs 67 and 71).

46 The public interest taken into account in the examination of each of those grounds for refusal may, or even must, reflect different considerations, depending upon which ground for refusal is at issue.

47 In relation to the registration as a trade mark of a colour *per se*, not spatially defined, the Court held in Case C-104/01 *Libertel* [2003] ECR I-3793, paragraph 60, that the public interest underlying Article 3(1)(b) of First Directive 89/104, a

provision which is identical to Article 7(1)(b) of Regulation No 40/94, is directed at the need not to restrict unduly the availability of colours for the other traders who offer for sale goods or services of the same type as those in respect of which registration is sought.

48 It should also be stated that there is no public interest in conferring the benefit of the full protection envisaged by Regulation No 40/94 on a trade mark which does not fulfil its essential function, namely that of ensuring that the consumer or the end user can identify the origin of the product or service concerned by allowing him to distinguish that product or service from those emanating from a different origin, without any risk of confusion.

49 Finally, as regards Henkel's argument that OHIM has already accepted that trade marks consisting of the shape of washing machine or dishwasher tablets comparable to those for which registration is sought in this instance have distinctive character, it must be stated that that argument was not raised before the Court of First Instance.

50 To allow a party to put forward for the first time before the Court of Justice a plea in law which it has not raised before the Court of First Instance would be to allow it to bring before the Court, whose jurisdiction in an appeal is limited, a case of wider ambit than that which came before the Court of First Instance. In an appeal the Court's jurisdiction is thus confined to review of the findings of law on the pleas argued before the Court of First Instance (see the judgment in Case C-136/92 P *Commission* v *Brazzelli Lualdi and Others* [1994] ECR I-1981, paragraph 59, and the order of 28 June 2001 in Case C-352/99 P *Eridania and Others* v *Council* [2001] ECR I-5037, paragraph 53).

51 That argument must therefore be rejected as inadmissible.

52 In view of all of the foregoing considerations, 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: assessment of the average consumer's level of attention

Arguments of the parties

53 Henkel acknowledges that, as a general rule, the average consumer's level of attention may vary depending on the type of product concerned. However, it submits that, contrary to the Court of First Instance's assessment, there is nothing to suggest that the consumer's level of attention is inherently not very high for everyday consumer products. In its submission, in relation to everyday consumer items such as those at issue here, the consumer should instead be regarded as having a particular interest in knowing not only in which category the product concerned belongs but also the exact nature of the product.

54 Furthermore, the manufacturers of washing machine and dishwasher products clearly emphasise in their advertising the quality of their various products.

Consequently, the average consumer, who is reasonably well informed and reasonably observant and circumspect, associates certain requirements as to quality with certain products and attempts to distinguish products by reference to their appearance.

55 OHIM contends that the judgments under appeal found that the relevant public consisted of all consumers, since washing machine and dishwasher products put up in tablet form are widely-used consumer products. If the average consumer pays only scant attention to the exact shape and colour of the tablets, it is precisely because they are not sold loose but in packaging, from which it is sufficient to take only the number of tablets necessary for each use. The consumer holds the tablet for only a few seconds and has no reason to raise any questions concerning the tablet which he proposes to use.

Findings of the Court

56 On this point, the finding made by the Court of First Instance in paragraph 48 of the judgment in Case T-335/99 and paragraph 46 of that in Case T-336/99 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 41 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.

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

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

Arguments of the parties

58 In Henkel's submission, the Court of First Instance did not adjudicate on the question concerning the date by reference to which it is appropriate to assess whether the trade marks for which registration is sought are devoid of distinctive character. That assessment must, in its submission, be carried out by reference to the facts as they exist at the date on which the trade-mark application is filed. The applicant can decide whether or not to file a trade-mark application only on the basis of the facts of which he is aware at that time. In order to determine whether a sign possesses features which stand out from those which are typical of a product or which are dictated by technical requirements, account may be taken only of products known at the time when the application is filed and of features typical of them.

59 Henkel maintains, with reference to the market situation at the date on which it filed its trade-mark applications, that the condition relating to distinctive character was met at that date. Typically washing machine and dishwasher products were presented in powder form at that time, so that the mere idea of tablets sufficed to confer a distinctive feature on those products which went beyond powder form, which was then customary and made necessary by technical constraints. The trade marks for which registration is sought, with their arbitrary features, which are neither dictated by technical requirements nor inherent in the product, possess distinctive features in comparison with the products on the market at the material time.

60 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. The conditions for registration of a Community trade mark must be met both at the date of filing and at the date of registration. In this instance, registration was precluded in particular by the fact that the combination of the shape and colours of the tablets had become customary.

Findings of the Court

61 As is clear from paragraph 34 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 for from those of other undertakings.

62 In this case, the Court of First Instance was correct in finding, in paragraph 57 of the judgment in Case T-335/99 and the corresponding paragraph of the judgment in Case T-336/99, 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.

63 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.

64 The third 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.

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

Costs

66 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 Henkel KGaA 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