JUDGMENT OF THE COURT (First Chamber)

12 January 2006 *

In Case C-173/04 P,

APPEAL under Article 56 of the Statute of the Court of Justice, brought on 6 April 2004,

Deutsche SiSi-Werke GmbH & Co. Betriebs KG, established in Eppelheim (Germany), represented by H. Eichmann, G. Barth, U. Blumenröder, C. Niklas-Falter, M. Kinkeldey, K. Brandt, A. Franke, U. Stephani, B. Allekotte, E. Pfrang, K. Lochner and B. Ertle, Rechtsanwälte,

appellant,

the other party to the proceedings being:

Office for Harmonisation in the Internal Market (Trade Marks and Designs) (OHIM), represented by G. Schneider, acting as Agent,

defendant at first instance,

* Language of the case: German.

THE COURT (First Chamber),

composed of P. Jann, President of the Chamber, K. Schiemann, K. Lenaerts, E. Juhász and M. Ilešič (Rapporteur), Judges,

Advocate General: D. Ruiz-Jarabo Colomer,
Registrar: K.H. Sztranc, Administrator,

having regard to the written procedure and further to the hearing on 16 June 2005,

after hearing the Opinion of the Advocate General at the sitting on 14 July 2005,

gives the following

Judgment

1 By its appeal, Deutsche SiSi-Werke GmbH & Co. Betriebs KG seeks to have set aside the judgment of the Court of First Instance of the European Communities of 28 January 2004 in Joined Cases T-146/02 to T-153/02 *Deutsche SiSi-Werke* v *OHIM (Flat-bottomed pouches)* [2004] ECR II-447 ('the judgment under appeal'), by which the Court of First Instance dismissed its actions against the decisions of the Second Board of Appeal of the Office for Harmonisation in the Internal Market (Trade

Marks and Designs) (OHIM) of 28 February 2002 (Cases R 719/1999-2 to R 724/1999-2, R 747/1999-2 and R 748/1999-2) refusing registration of eight three-dimensional marks consisting of different stand-up pouches for drinks ('the contested decisions').

Legal context

2 Article 7(1)(b) and (c) of Council Regulation (EC) No 40/94 of 20 December 1993 on the Community trade mark (OJ 1994 L 11, p. 1), states:

'The following shall not be registered:

...

(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'.

Background to the dispute

3 On 8 July 1997 the appellant filed eight applications for registration of three-dimensional Community trade marks at OHIM under Regulation No 40/94.

4 Those marks consist of shapes of various stand-up pouches for packaging drinks. The pouches have a convex form, are wider at the bottom and, viewed straight on, look, depending on the application concerned, somewhat like an elongated triangle or an oval with, in some cases, concave sides.

5 The goods in respect of which registration of the trade marks was applied for, taking into account the amendments made by the appellant in that regard, are 'fruit drinks and fruit juices', in Class 32 of the Nice Agreement concerning the International Classification of Goods and Services for the Purposes of the Registration of Marks of 15 June 1957, as revised and amended.

6 By decisions of 24 and 27 September 1999, the OHIM examiner refused the eight registrations on the ground that the trade marks applied for were devoid of any distinctive character.

7 By the contested decisions, the Second Board of Appeal of OHIM confirmed the decisions of the examiner. It took the view, in essence, that consumers would not perceive the stand-up pouches as an indication of commercial origin but solely as a form of packaging. It added that, in the interests of competitors, packaging manufacturers and beverage producers, there could be no monopoly in this type of packaging.

The procedure before the Court of First Instance and the judgment under appeal

8 The appellant brought actions before the Court of First Instance seeking annulment of the contested decisions.

9 By the judgment under appeal, the Court of First Instance held that the Second Board of Appeal of OHIM had correctly found that the trade marks applied for were devoid of any distinctive character with regard to fruit drinks and fruit juices.

10 In paragraphs 39 to 43 of the judgment under appeal, the Court of First Instance did not accept the appellant's argument that packaging fruit drinks and fruit juices in stand-up pouches is, in itself, unusual.

11 Since the appellant then maintained that the representations claimed have design features which are not merely commonplace or functional attributes, the Court of First Instance, after having carried out, in paragraphs 44 to 51 of the judgment under appeal, an examination of each of the individual features in turn, considered, in paragraph 52 of that judgment, the overall impression produced by the appearance of the pouches concerned and concluded that those representations were devoid of any distinctive character.

12 Accordingly, after having rejected the remaining arguments raised by the appellant, the Court of First Instance dismissed its actions and ordered it to pay the costs.

The appeal

13 By its appeal, in support of which it puts forward three pleas in law, the appellant claims that the Court should set aside the judgment under appeal and order OHIM to pay the costs.

14 OHIM contends that the Court should dismiss the appeal and order the appellant to pay the costs.

The first part of the first plea

Arguments of the parties

15 By the first part of its first plea, the appellant submits that the Court of First Instance failed to have regard to the sector of the goods in respect of which registration was sought and, as a result, the shapes of packaging which must be used for comparison in assessing the distinctive character of the trade marks requested.

16 The appellant submits that, in the beverages sector, contrary to the arbitrary assumption made in paragraph 38 of the judgment under appeal, consumers have for a long time been used to seeing in the packaging of a product an indication of its origin. Thus, the shape of drinks packaging constitutes a means of identification which is understood by the average consumer as an indication of origin and therefore as a trade mark.

17 It follows that, in accordance with established case-law, the shape of drinks packaging which departs significantly from the norm or customs of the sector fulfils its essential function of indicating origin.

18 According to the appellant, the Court of First Instance itself held that there is no evidence of use of stand-up pouches for fruit drinks and fruit juices. On the European market, with the exception of the appellant's goods, fruit drinks and fruit juices are packaged solely in glass bottles or in cartons. Consequently, those pouches do not constitute a usual form of packaging for those drinks and their distinctive character should have been recognised.

19 The Court of First Instance erred in law in its assessment of the normal character of those pouches by taking account not of the customs in the sector of fruit drinks and fruit juices at European level, but of the customs in the sector of liquids for human consumption in general or worldwide.

20 The Court of First Instance also erred in law by classifying the stand-up pouches in question as 'basic geometric shapes'. Since, apart from those used by the appellant, stand-up pouches are not used on the European market of fruit drinks and fruit juices, there could be no 'basic shape' for such a pouch for those goods.

21 OHIM contends that, according to established case-law, when assessing the distinctive character of the shape of packaging, it should be checked whether the average consumer is actually in a position to notice that shape, over and above its function as a container, as an indication of the commercial origin of the goods in question. In that regard, a mark fulfils its function of indicating origin when it departs significantly from the norm or customs of the sector.

22 When it refers to the departure of a shape from the norm or customs of the sector, that case-law defines a wider field of comparison than that of the normal shapes of the goods covered by the trade mark application. According to OHIM, if a consumer has already become accustomed to seeing a particular type of packaging for a particular product, when first he sees the same type of packaging used for a different product, he will still think of it only as a type of packaging and not as an indication of the origin of the other product. Accordingly, it would be wrong to assess the public's perception by taking into consideration solely packaging already in existence for only those goods referred to in the application for trade mark registration.

23 Thus, the Court of First Instance did not err in law by taking into consideration the packaging of liquids for human consumption other than those for which registration of the trade marks was sought.

24 Furthermore, the manner in which the Court of First Instance defined in concrete terms the items for comparison necessary to the assessment of the public's perception is a question of finding and appraisal of the facts and cannot be subject to review by the Court as part of an appeal.

Findings of the Court

25 In accordance with established case-law, the distinctive character of a trade mark, within the meaning of Article 7(1)(b) of Regulation No 40/94, must be assessed, firstly, by reference to the goods or services in respect of which registration has been applied for and, secondly, by reference to the perception of them by the relevant

public, which consists of average consumers of the goods or services in question, who are reasonably well informed and reasonably observant and circumspect (see Joined Cases C-456/01 P and C-457/01 P *Henkel* v *OHIM* [2004] ECR I-5089, paragraph 35 and case-law cited).

26 In the present case, it is not disputed that registration of the marks in question is sought in respect of fruit drinks and fruit juices and that the relevant public consists of all end consumers, as the Court of First Instance held in paragraphs 34 and 36 of the judgment under appeal.

27 According to equally established case-law, the criteria for assessing the distinctive character of three-dimensional marks consisting of the shape of the product itself are no different from those applicable to other categories of trade mark (see *Henkel* v *OHIM*, paragraph 38, and Case C-136/02 P *Mag Instrument* v *OHIM* [2004] ECR I-9165, paragraph 30).

28 None the less, as the Court of First Instance correctly noted in paragraph 37 of the judgment under appeal, for the purpose of applying those criteria, the relevant public's perception is not necessarily the same in the case of a three-dimensional mark consisting of the appearance of the product itself as it is in the case of a word or figurative mark consisting of a sign unrelated to 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, inter alia, *Henkel* v *OHIM*, paragraph 38, and *Mag Instrument* v *OHIM*, paragraph 30).

29 With regard, in particular, to three-dimensional trade marks consisting of the packaging of goods, such as liquids, which are packaged in trade for reasons linked

to the very nature of the product, the Court has held that they must enable average consumers of the goods in question, who are reasonably well informed and reasonably observant and circumspect, to distinguish the product concerned from those of other undertakings without conducting an analytical or comparative examination and without paying particular attention (see, to that effect, with regard 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), which provision is identical to Article 7(1)(b) of Regulation No 40/94, Case C-218/01 *Henkel* [2004] ECR I-1725, paragraph 53).

30 The Court of First Instance did not therefore err in law by holding, in paragraph 38 of the judgment under appeal, that the average consumer will see the form of drinks packaging as an indication of the product's commercial origin only if that form may be perceived immediately as such an indication. Moreover, in the same paragraph of the judgment under appeal, the Court of First Instance in no way held that the consumer would, as a matter of principle, be indifferent to the shape as an indication of origin or that the packaging of liquid goods could never have a distinctive character within the meaning of Article 7(1)(b) of Regulation No 40/94.

31 According to established case-law, only a 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 Article 7(1)(b) of Regulation No 40/94 (*Henkel* v *OHIM*, paragraph 39, and *Mag Instrument* v *OHIM*, paragraph 31).

32 First, it does not follow from that case-law that it is necessary systematically to restrict the sector for the purposes of comparison to the actual goods in respect of which registration is sought. It cannot be excluded that the consumers of a given product may in certain cases be influenced, in their perception of the trade mark which the product bears, by the marketing methods used for other goods which they also use. Thus, depending on the nature of the goods in question and the trade mark

applied for, it may be necessary, for the purposes of assessing whether or not the trade mark is devoid of any distinctive character, to take into consideration a wider sector.

33 In particular, when, as in the present case, the trade mark for which registration is sought consists of the three-dimensional shape of the packaging of the goods in question — a fortiori where the goods, because of their very nature, must be packaged in order to be marketed, so that the packaging chosen imposes its shape on the goods and, for the purposes of examining an application for registration as a mark, must be assimilated to the shape of the product (*Henkel*, supra, paragraph 33) —, the relevant norm or customs may be those which apply in the sector of the packaging of goods which are of the same type and intended for the same consumers as those goods in respect of which registration is sought.

34 It cannot be excluded that the average consumer, who is accustomed to seeing various products from different undertakings packaged in the same type of packaging, does not at first identify the use of that type of packaging by an undertaking for the marketing of a given product as being, of itself, an indication of origin, when the same product is marketed by competitors of that undertaking in other types of packaging. In that regard, it should be noted that the average consumer, who does not make a study of the market, will not know in advance that only one undertaking markets a given product in a certain type of packaging whilst its competitors use other types of packaging for that product.

35 Second, restriction of the sector in which the comparison is to be made falls within the appraisal of the facts. As is clear from Article 225 EC and the first paragraph of Article 58 of the Statute of the Court of Justice, an appeal lies on a point of law only. The Court of First Instance thus has exclusive jurisdiction to find and appraise the relevant facts and to assess the evidence. The appraisal of those facts and the

assessment of that evidence thus does not, save where they distort the evidence, which is not claimed in this case, 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, and *Mag Instrument* v *OHIM*, paragraph 39).

36 Accordingly, the Court of First Instance was able, without erring in law, to take into consideration the types of packaging used on the European market for liquids for human consumption in general in order to determine whether the use of one or other of the eight stand-up pouches in question enables the average consumer of fruit drinks and fruit juices to distinguish, without conducting an analytical or comparative examination and without paying particular attention, the appellant's goods from those of other undertakings.

37 Similarly, the Court of First Instance could legitimately refer, in paragraphs 47, 48 and 52 of the judgment under appeal, to the 'standard shape', the 'basic shape', the 'standard form' or the 'standard appearance' of the stand-up pouches, which shapes and appearance it was able to determine on the basis of stand-up pouches used for the marketing of liquids for human consumption on the European market.

38 The first part of the first plea must therefore be rejected.

The second plea

Arguments of the parties

39 By the first part of the second plea, the appellant submits that the Court of First Instance set too high a requirement for the three-dimensional trade marks having

regard to the low degree of distinctive character needed to fulfil the requirements of Article 7(1)(b) of Regulation No 40/94. The Court of First Instance should have applied the same practice as that developed for two-dimensional trade marks, according to which marks that depart only slightly from simple geometric shapes may nevertheless be registered.

40 Even if it were accepted that stand-up pouches constitute normal forms of packaging for fruit drinks and fruit juices on the European market, the three-dimensional shapes of the pouches in respect of which registration as Community trade marks is sought have sufficient design features to be able to fulfil their function of indicating origin.

41 By the second part of the same plea, the appellant submits that where, as in the present case, OHIM has already allowed registration of other trade marks of the same type in the same sector and, at the same time, the marks applied for have already been registered in a number of Member States as national trade marks, it is for OHIM and the Court of First Instance to justify why those trade marks would not be perceived by the average consumer as an indication of the origin of the goods. The Court of First Instance has not provided such justification in the judgment under appeal.

42 In response to the first part of the second plea, OHIM submits that the Court of First Instance did not apply more stringent requirements with regard to the distinctiveness of three-dimensional trade marks, but merely recalled established case-law, according to which the perception of the public is not necessarily the same in relation to a three-dimensional mark consisting of the appearance of the product as it is in relation to a word mark or a figurative mark.

43 OHIM adds that, in an appeal, the appellant cannot validly challenge the factual assessment made by the Court of First Instance in paragraph 52 of the judgment under appeal, according to which the design features of the trade marks applied for are too insignificant to be retained by the relevant public.

44 With regard to the second part of that plea, OHIM takes the view that the complaint alleging a lack of reasoning is clearly unfounded. The fact that a trade mark has been registered at national level creates no obligation on the Court of First Instance to give specific reasons where it intends to give a decision different from that of a national authority. The Court of First Instance is merely required to give reasons for its application of the law.

Findings of the Court

45 With regard to the first part of the plea, 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 goods or services in respect of which registration is applied for as originating from a particular undertaking, and thus to distinguish the goods or services from those of other undertakings (see *Henkel* v *OHIM*, paragraph 34, and *Mag Instrument* v *OHIM*, paragraph 29).

46 Firstly, inasmuch as it complains that the Court of First Instance held, in paragraphs 37 and 38 of the judgment under appeal, that the perception of the relevant public is not necessarily the same in the case of a three-dimensional trade mark, consisting of the appearance of the product itself, as in the case of a word or figurative mark, and that the average consumer perceives the shape of drinks packaging as an indication of the commercial origin of the product only if that shape is likely to be perceived from the outset as such an indication, that part of the plea is unfounded for the reasons set out in paragraphs 28 to 30 of the present judgment.

47 Secondly, inasmuch as it complains that the Court of First Instance held, in paragraphs 44 to 52 of the judgment under appeal, that the three-dimensional shapes of the pouches in respect of which registration is sought as Community trade marks do not have a sufficient number of design features to fulfil their function of indicating origin, that part of the plea seeks to challenge the factual assessment made by the Court of First Instance and must be declared inadmissible for the reasons set out in paragraph 35 of the present judgment.

48 With regard to the second part of the second plea, it is necessary to point out, first of all, that decisions concerning registration of a sign as a Community trade mark which the Boards of Appeal of OHIM are called on to take under Regulation No 40/94 are adopted in the exercise of circumscribed powers and are not a matter of discretion. Accordingly, as the Court of First Instance essentially held in paragraph 55 of the judgment under appeal, the legality of those decisions must be assessed solely on the basis of that regulation and not on the basis of a previous decision-making practice of those boards (Case C-37/03 P *BioID* v *OHIM* [2005] ECR I-7975, paragraph 47).

49 Secondly, the Court of First Instance was correct in holding, in paragraph 56 of the judgment under appeal, that registrations already made in 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 (see, to that effect, with regard to registration of national trade marks in various Member States by application of Directive 89/104, *Henkel*, paragraphs 62 and 63). It is appropriate to add that there is no provision in Regulation No 40/94 requiring OHIM or, on appeal, the Court of First Instance, to come to the same conclusions as those arrived at by national authorities in similar circumstances (see, to that effect, *DKV* v *OHIM*, paragraph 39).

50 Accordingly, it must be held that the Court of First Instance, which set out at length the reasons why the trade marks applied for come under the ground for refusal of registration in Article 7(1)(b) of Regulation No 40/94, gave sufficient reasons for its decision.

51 The second plea must be rejected.

The second part of the first plea and the third plea

Arguments of the parties

52 By the second part of the first plea and the third plea, which it is appropriate to consider together, the appellant submits, essentially, that the Court of First Instance erred in assessing the distinctive character of the trade marks applied for, within the meaning of Article 7(1)(b) of Regulation No 40/94, in the light of the interest of possible competitors in being able to use stand-up pouches for their own goods.

53 It recalls that, in accordance with the case-law of the Court, each of the grounds for refusal of registration listed in Article 7(1) of Regulation No 40/94 is independent of the others and calls for separate examination. In addition, it is appropriate to interpret those grounds for refusal in the light of the general interest underlying each of them.

54 In the present case, the Court of First Instance assessed the distinctive character of the trade marks applied for from the point of view of fictitious basic shapes and of the possible use, in future, of stand-up pouches for the goods concerned. However, the question whether stand-up pouches may be used by competitors for fruit drinks and fruit juices is outside the assessment of distinctive character within the meaning of Article 7(1)(b) of Regulation No 40/94, but falls solely under Article 7(1)(c).

55 The general interest which underlies Article 7(1)(b) of Regulation No 40/94 includes the interest of the average consumer in being able to recognise the goods covered by a trade mark and in associating them with a particular manufacturer. The interest of competitors is sufficiently taken into account under Article 7(1)(c) of Regulation No 40/94 — which provision has not been relied on against the applications for registration of the trade marks at issue.

56 In the alternative, the appellant claims that, in the assessment of the interest of possible competitors in being able to use stand-up pouches for their own goods, the Court of First Instance wrongly failed to take into consideration the fact that for years the appellant has used such pouches to package its goods without being imitated.

57 OHIM submits that, where a trade mark is devoid of distinctive character, the general interest of consumers cannot preclude registration of that trade mark being refused pursuant to Article 7(1)(b) of Regulation No 40/94. By definition, consumers do not identify that trade mark as an indication of the origin of the goods. Accordingly, the appellant's arguments in that regard are without any legal basis and must be rejected as manifestly unfounded.

58 Furthermore, it follows from paragraph 54 of the judgment under appeal that the Court of First Instance did not make the risk of creating a monopoly in stand-up pouches a criterion for application of Article 7(1)(b) of Regulation No 40/94, such that there is no need in the present case to consider whether such a risk truly exists.

Findings of the Court

59 According to established case-law, each of the grounds for refusal to register listed in Article 7(1) of Regulation No 40/94 is independent of the others and requires separate examination. Moreover, it is appropriate to interpret those grounds for refusal in the light of the general interest which underlies each of them. The general interest to be taken into consideration when examining each of those grounds for refusal may or even must reflect different considerations according to the ground for refusal in question (*Henkel* v *OHIM*, paragraphs 45 and 46; Case C-329/02 P *SAT.1* v *OHIM* [2004] ECR I-8317, paragraph 25, and *BioID* v *OHIM*, paragraph 59).

60 Article 7(1)(b) of Regulation No 40/94 is intended to preclude registration of trade marks which are devoid of distinctive character which alone renders them capable of fulfilling the essential function of a trade mark, which is to guarantee the identity of the origin of the marked product or service to the consumer or end-user by enabling him, without any possibility of confusion, to distinguish the product or service from others which have another origin (see, in particular, Case 102/77 *Hoffmann-La Roche* [1978] ECR 1139, paragraph 7; Case C-299/99 *Philips* [2002] ECR I-5475, paragraph 30, and *SAT.1* v *OHIM*, paragraph 23).

61 In view of the extent of the protection afforded to a trade mark by Regulation No 40/94, the public interest underlying Article 7(1)(b) of that regulation is, manifestly, indissociable from the essential function of a trade mark (*SAT.1* v *OHIM*, paragraph 27, and *BioID* v *OHIM*, paragraph 60).

62 By prohibiting the registration as Community trade marks of signs or indications which may serve, in trade, to designate characteristics of the goods or services in respect of which registration is sought, Article 7(1)(c) of Regulation No 40/94 pursues an aim which is in the public interest, namely that such signs or indications

may be freely used by all. That provision accordingly prevents such signs and indications from being reserved to one undertaking alone because they have been registered as trade marks (see Case C-191/01 P *OHIM* v *Wrigley* [2003] ECR I-12447, paragraph 31, and orders in Case C-326/01 P *Telefon & Buch* v *OHIM* [2004] ECR I-1371, paragraph 27, and Case C150/02 P *Streamserve* v *OHIM* [2004] ECR I-1461, paragraph 25).

63 In those circumstances, as the Court has already held, the criterion according to which trade marks which are capable of being commonly used, in trade, for the presentation of the goods or services in question may not be registered is relevant in the context of Article 7(1)(c) of Regulation No 40/94 but it is not the yardstick by which Article 7(1)(b) must be interpreted (*SAT.1* v *OHIM*, paragraph 36, and *BioID* v *OHIM*, paragraph 62).

64 In paragraph 31 of the judgment under appeal, the Court of First Instance held that trade marks devoid of any distinctive character within the meaning of 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 with regard to which there exists, at the very least, concrete evidence justifying the conclusion that they are capable of being used in that manner'. Moreover, it held, in the final sentence of paragraph 41 of the same judgment, that there is concrete evidence that stand-up pouches 'are capable of being used' in trade for presentational purposes for the products concerned and, in the final sentence of paragraph 42 of that judgment, that 'the expected development of this type of packaging confirms ... that its use is unexceptional'.

65 Clearly, however, despite those findings in the judgment under appeal, the Court of First Instance did not base its decision on the criterion mentioned in paragraph 63 of the present judgment.

66 It is apparent from the first and second sentences of paragraph 42 of the judgment under appeal that, irrespective of whether stand-up pouches are capable of being used for fruit drinks and fruit juices, the Court of First Instance found that the trade marks applied for were devoid of any distinctive character on the ground that that form of packaging is already in general use in the Community for liquids for human consumption and that, therefore, it is not sufficiently unusual for the average consumer to perceive it, per se, as an indication of the specific commercial origin of a product within that category.

67 The Court of First Instance thus reached that conclusion on the basis not of the possibility that stand-up pouches may be commonly used in future in the sector of liquids for human consumption — which it used as the framework for its analysis — but of the finding that they are already commonly used. In so doing, the Court of First Instance based its conclusion on a proper criterion.

68 It was therefore merely for the sake of completeness that the Court of First Instance held in addition, in the final sentences of paragraphs 41 and 42 of the judgment under appeal, that stand-up pouches were capable of being used in future by competitors of the appellant for fruit drinks and fruit juices.

69 Furthermore, it should be observed that, in paragraph 32 of the judgment under appeal, the Court of First Instance correctly stated that '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 patterns 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'.

70 In fact, in the analysis of the trade marks applied for which it carried out in paragraphs 44 to 54 of the judgment under appeal, the Court of First Instance did not in any way base its findings on the interest of possible competitors, but limited itself to determining whether those trade marks enable the average consumer of fruit drinks and fruit juices to distinguish, without any possibility of confusion, the goods of the appellant from those of a different commercial origin.

71 Consequently, the second part of the first plea and the third plea must also be rejected and, as a result, the appeal must be dismissed.

Costs

72 Under Article 69(2) of the Rules of Procedure, which apply to the procedure on appeal by virtue of Article 118 thereof, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since OHIM applied for the appellant to be ordered to pay the costs and the appellant has been unsuccessful, it must be ordered to pay the costs.

On those grounds, the Court (First Chamber) hereby:

1. Dismisses the appeal;

2. Orders Deutsche SiSi-Werke GmbH & Co. Betriebs KG to pay the costs.

[Signatures]