

Bottle shape held to lack distinctive character European Union - Casalonga Avocats

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In *Research and Production Company "Melt Water" UAB v Office for Harmonisation in the Internal Market (OHIM)* (Case T-70/14, January 14 2015), the General Court has dismissed the applicant's appeal and confirmed a decision of the Fifth Board of Appeal of OHIM finding that the three-dimensional (3D) mark depicted below was devoid of distinctive character for goods in Class 32 of the [Nice Classification](#).



In its decision, the General Court reiterated the now established standards for the registration of 3D marks consisting of the shape of the packaging - namely:

- the trademark must distinguish the goods of a particular undertaking from those of other undertakings;
- the criteria for assessing the distinctive character of a mark consisting of the appearance of the product itself is no different from those applicable to other categories of trademarks;
- since 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, it may be more difficult to establish distinctive character in relation to a 3D mark than in relation to a word or figurative mark; and
- therefore, only a mark that departs significantly from the norm or customs of the sector, thereby fulfilling its essential function of indicating origin, is not devoid of distinctive character.

In its appeal, the applicant asserted that the Board of Appeal had not examined the characteristics of the mark that rendered it unique - namely:

- its size (ie, it is higher than average bottles);
- the narrowing at the top of the bottle, which creates the appearance of a sculpture; and
- the hexagonal shape of the upper part, which evokes the shape of a diamond.

The General Court examined and rejected these arguments. First, it considered that the applicant had failed to demonstrate, by providing comparative data, that the bottle at issue was higher than other bottles on the market. Further, with respect to the narrowing of the upper part of the bottle, the court considered that this was common to most bottles. Finally, regarding the hexagonal shape of the upper part of the bottle, the court considered that this was not sufficiently unusual to distinguish it from other bottles.

Furthermore, the court considered that the fact that the bottle was the result of artistic and creative activity was irrelevant in assessing its distinctive character. Therefore, the applicant's argument that the bottle had been created by a professional designer was considered to be irrelevant.

The court also rejected the applicant's argument that the board's decision was discriminatory in light of the registration of prior 3D marks and, therefore, did not comply with the principles of proportionality, equity and justice. The court considered that the application of these principles must be reconciled with the principle of legality. Therefore, the applicant could not rely on unlawful acts committed in favour of another in order to obtain an identical decision.

This decision is another reminder that the registration of 3D signs as Community trademarks, particularly in cases where the shape consists of the product packaging, remains very challenging.

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