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Press and Information

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Judgment of the Court of First Instance in Case T-28/08

*Mars Inc. v OHIM*

**THE SHAPE OF THE BOUNTY CHOCOLATE BAR MAY NOT BE REGISTERED AS  
A COMMUNITY TRADE MARK**

*The three-dimensional shape of the bar is devoid of any distinctive character and Mars has not proved that the shape has acquired distinctive character through use in the entire Community.*

According to the Community Trade Mark Regulation<sup>1</sup>, a trade mark which is devoid of any distinctive character may not as a general rule be registered. Nevertheless, such a mark may be registered if it has acquired, in respect of the goods or services for which registration is sought, distinctive character following the use made of it.

On 24 April 2003, following an application by Mars Inc., the manufacturer of the Bounty chocolate bar, OHIM, the Office which controls Community trade marks, registered the three-dimensional shape of that bar as a Community trade mark.

In December 2003, Ludwig Schokolade, a German chocolate maker, filed an application for a declaration that the Community trade mark was invalid on the ground that it was devoid of any distinctive character.

In October 2007, OHIM declared the registration of the trade mark in question invalid because the mark did not have the distinctive character required as its appearance does not depart significantly from the norms and customs of the relevant sector. Furthermore, it found that the documents submitted by Mars were insufficient to demonstrate distinctiveness acquired through use in connection with the goods concerned.

Mars brought an action against that decision before the Court of First Instance.

The Court points out that, for a three-dimensional mark, constituted merely by the shape of a product, to be registrable, that shape must depart significantly from the norms and customs of the sector to enable the average consumer to distinguish immediately and with certainty the product

<sup>1</sup> Council Regulation (EC) No 40/94 of 20 December 1993 on the Community trade mark (OJ 1994 L 11, p. 1), replaced by Council Regulation (EC) No 207/2009 of 26 February 2009 on the Community trade mark (OJ 2009 L 78, p. 1).

concerned from those of other undertakings. In the present case, the allegedly distinctive characteristics, namely the rounded ends of the bar and the three arrows or chevrons on top of it, cannot be sufficiently distinguished from other shapes commonly used for chocolate bars.

Furthermore, the Court states that the acquisition of distinctive character through use of a mark requires that at least a significant proportion of the relevant section of the public identifies the goods or services concerned as originating from a particular undertaking because of the mark. In addition, the acquisition of that distinctive character must be demonstrated in the part of the Community where the mark was initially devoid of any such character. Given that neither the market shares of the Bounty bar nor the rate of recognition of the product concerned are uniform throughout the Community, it is not possible to extrapolate to the rest of the Community market the results of the surveys carried out only in six of the then fifteen Member States, namely the United Kingdom, Belgium, France, Germany, Italy and the Netherlands.

In so far as the shape of a Bounty bar is not distinctive in the entire Community, Mars should have filed more evidence as regards the other nine States which were part of the Community at the time to show that the shape had acquired distinctive character through use in the entire Community.

**Accordingly, the Court dismisses the action.**

**REMINDER: An appeal, limited to points of law only, may be brought before the Court of Justice of the European Communities against a decision of the Court of First Instance, within two months of its notification.**

*Unofficial document for media use, not binding on the Court of First Instance.*

*Languages available: FR, CS, DE, ES, HU, EN, IT, NL, RO, PL, SK*

*The full text of the judgment may be found on the Court's internet site  
<http://curia.europa.eu/jurisp/cgi-bin/form.pl?lang=EN&Submit=rechercher&numaff=T-28/08>  
It can usually be consulted after midday (CET) on the day judgment is delivered.*

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*Pictures of the delivery of the judgment are available on EbS "Europe by Satellite",  
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