

JUDGMENT OF THE COURT OF FIRST INSTANCE (Second Chamber)
19 September 2001 *

In Case T-129/00,

Procter & Gamble Company, established in Cincinnati, Ohio (United States of America), represented by C.J.J.C. van Nispen and G. Kuipers, lawyers, with an address for service in Luxembourg,

applicant,

v

Office for Harmonisation in the Internal Market (Trade Marks and Designs) (OHIM), represented by A. von Mühlendahl, D. Schennen and C. Røhl Søberg, acting as Agents,

defendant,

* Language of the case: English.

APPLICATION brought against the decision of the First Board of Appeal of the Office for Harmonisation in the Internal Market (Trade Marks and Designs) of 8 March 2000 (Case R-508/1999-1), which was notified to the applicant on 13 March 2000,

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

composed of: A.W.H. Meij, President, A. Potocki and J. Pirrung, Judges,

Registrar: D. Christensen, Administrator,

having regard to the application lodged at the Court Registry on 12 May 2000,

having regard to the response lodged at the Court Registry on 27 July 2000,

further to the hearing on 5 April 2001,

gives the following

Judgment

Background to the dispute

- 1 On 7 October 1998, the applicant filed an application for a Community trade mark at the Office for Harmonisation in the Internal Market (Trade Marks and Designs) (hereinafter '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 As can be seen from its graphic representation provided by the applicant, the three-dimensional trade mark in respect of which registration was sought is in the form of a rectangular tablet with chamfered edges and slightly rounded corners and with speckles and a dark triangular depression in the centre of its upper surface. 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: 'washing and bleaching preparations and other substances for laundry use; cleaning, polishing, scouring

and abrasive preparations; preparations for the washing, cleaning and care of dishes; soaps; perfumery, essential oils, cosmetics, hair lotions; dentifrices’.

- 4 By decision of 17 June 1999, 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.

- 5 On 13 August 1999, the applicant appealed to the Office under Article 59 of Regulation No 40/94 against the examiner’s decision.

- 6 The appeal was dismissed by decision of 8 March 2000 (hereinafter ‘the contested decision’).

- 7 In essence, the Board of Appeal considered that the trade mark applied for was devoid of any distinctive character. It pointed out first that it is clear from Article 4 of Regulation No 40/94 that the shape of a product may be registered as a Community trade mark, provided that the shape displays certain features that are sufficiently unusual and arbitrary to enable the relevant consumers to recognise the product, purely on the basis of its appearance, as emanating from a specific undertaking. Given the advantages offered by products put up in tablet form for washing laundry and dishes, the Board of Appeal went on to point out that the applicant’s competitors must also remain free to make such products using the simplest geometrical shapes. After describing the trade mark applied for, the Board of Appeal stated that the tablet’s rectangular shape did not make it distinctive. The basic geometric shapes (square, round, or rectangular) were the most obvious shapes for such tablets and there was nothing arbitrary or fanciful about selecting a rectangular tablet for the manufacture of solid detergents. The

additional features relied on by the applicant, namely the ‘shouldered’ corners, bevelled edges and concave centre, were mundane variations on the normal get-up of the products. Those features did not enable the shape claimed to be registered as a trade mark, since a consumer who focused his attention on them would not be able to ascertain the product’s origin therefrom. The use of dark shading for the concave centre failed to add distinctive character to the shape claimed. The use of different colours was commonplace and, the decorative aspect aside, was likely to indicate the presence of various active ingredients. The Board of Appeal added that the Office could certainly take account of decisions of national authorities but was not bound by them.

Forms of order sought by the parties

8 The applicant claims that the Court should:

- annul the contested decision;

- order the Office to pay the costs.

9 The Office contends that the Court should:

- dismiss the application;

— order the applicant to pay the costs.

Admissibility

Arguments of the parties

- 10 At the hearing, the applicant explained that the present action and those brought in parallel Cases T-117/00 to T-121/00 and T-128/00 essentially seek clarification of the legal position regarding the registrability of the marks applied for. It considers that the marks concerned do not warrant protection under Regulation No 40/94. However, since trade mark applications seeking protection for shapes similar to the one claimed in the present case and the parallel cases referred to above have been filed on behalf of certain undertakings active on the market, all the manufacturers are, it says, obliged to try to obtain equivalent protection for their own products.
- 11 The Office contends that the applicant is thus essentially asking the Court to dismiss its application. It raises the question whether in those circumstances the applicant has sufficient legal interest to bring proceedings.

Findings of the Court

- 12 It is settled case-law that an action for annulment brought by an individual or a legal person is not admissible unless the applicant has an interest in seeing the

contested measure annulled. Such an interest exists only if annulment of the measure is of itself capable of having legal consequences (Joined Cases T-480/93 and T-483/93 *Antillean Rice Mills and Others v Commission* [1995] ECR II-2305, paragraph 59, and the cases cited). The same applies to an action brought under Article 63 of Regulation No 40/94.

- 13 In the present case, the applicant applied for registration of a three-dimensional trade mark in tablet form. That application was refused by the examiner, whose refusal was upheld by the Board of Appeal. The applicant's interest in annulment of that decision, which refuses its claims, is not affected by any opinion which the applicant may have as to whether or not it is desirable for trade mark law to protect the shape selected for the three-dimensional mark applied for. Consequently, the applicant's legal interest in bringing proceedings cannot be denied in the present case.

Substance

- 14 The applicant advances essentially two pleas in law. The first alleges infringement of Article 7(1)(b) of Regulation No 40/94. The second alleges breach of the obligation to state reasons. Since those two pleas are closely related in the present case, it is appropriate to examine them together.

Arguments of the parties

- 15 The applicant asserts, first, that the trade mark applied for, taken as a whole, is unusual and fanciful and has the minimum degree of distinctiveness required for it to be registered.

- 16 It goes on to make observations concerning the shape and pattern of the mark applied for and the fact that, when a trade mark application is assessed, the mark must be considered as a whole. Finally, the applicant develops an argument concerning the need for a uniform application of Regulation No 40/94.
- 17 As regards the mark's shape, the applicant states that it is clear from Article 4 of Regulation No 40/94 that there is no prohibition on trade marks consisting of the shape of the goods.
- 18 The applicant criticises the Board of Appeal for having taken account of the fact that all traders have an interest in freely using the shape claimed. According to the applicant, consideration of that interest is irrelevant where the question is to ascertain whether a trade mark is devoid of distinctive character for the purposes of Article 7(1)(b) of Regulation No 40/94 and is relevant only for the purposes of an examination of the trade mark application under Article 7(1)(e) of that regulation.
- 19 In so far as the Board of Appeal, in the argument concerning Article 7(1)(b) of Regulation No 40/94, alluded to the ground of refusal under Article 7(1)(e), the applicant points out that other tablet shapes, such as a round shape, may be selected, and that they seem even preferable. In addition, detergents may be presented in other forms, such as powder or liquid.

- 20 In the case of tablets, a different impression can be created, not only by using different basic shapes and, in the case of a rectangular shape, by varying the ratio of length to width, but also by varying the thickness of the tablet. The applicant concludes from this that, in the present case, the shape of the tablet alone may be considered unusual and fanciful for a detergent in comparison with the other tablets on the market at the time when the trade mark application was filed. More compellingly, the mark applied for has a distinctive character resulting from the inlay in the centre of the tablet — which is darker than the tablet as a whole — and from its other features.
- 21 As regards the assessment of the mark, the applicant points out that distinctiveness should be assessed by reference to the mark considered as a whole. Even if the components of the mark, taken individually, were found not to be sufficiently unusual or fanciful to give the mark a distinctive character, the particular combination of the components (shape, pattern and colour) creates a distinctive and registrable sign. According to the applicant, there have, until now, been no detergents on the market with a shape resembling that claimed in the present case.
- 22 The Board of Appeal's argument that the basic shape of the tablets should be available for use by all operators cannot therefore be accepted as a bar to registration of the mark applied for. Even if such an argument were deemed relevant in relation to an objection under Article 7(1)(b) of Regulation No 40/94 — which is disputed by the applicant — it is not relevant here, since the mark applied for does not consist of that element alone.
- 23 The applicant points out that its applications for trade marks are made only to obtain exclusive rights with respect to the specific combination of the features of

each of the marks and not to block other traders from using, for example, the rectangular shape for their detergents. It declares that it is willing to include disclaimers to that effect if the Court should consider it necessary. It adds that it is clear from the many trade mark applications made to the Office for three-dimensional marks for detergents in tablet form that the number of different ways in which such tablets can be presented is almost unlimited.

- 24 As regards, finally, the observations on the need for a uniform application of Regulation No 40/94, the applicant argues that three-dimensional trade marks similar to its own have been accepted in a number of Member States whose trade mark law has been harmonised on the basis of the 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), including France, the United Kingdom, Belgium, the Netherlands and Luxembourg, in the case of the last three states registration of the marks having been carried out by the Bureau Benelux des Marques (Benelux Trademarks Office). Likewise, the Office has published trade mark application no. 924 829, filed in the name of the applicant for a trade mark in the form of a rectangular tablet coloured blue, green and white.
- 25 In response to a question asked by the Court, the applicant stated that its trade mark application does not relate solely to products in tablet form for washing machines and dishwashers but to all the products referred to in its application, which are not only from its home-care division but also from its beauty-care division. So far as the beauty products are concerned, the three-dimensional mark applied for does not necessarily equate to the shape of the product itself but may, for example, form an advertising gadget accompanying the product. The applicant also submits that the Office did not state its reasons for refusing to register the mark applied for in so far as it concerned beauty products.

- 26 The Office states that the three-dimensional mark applied for relates to washing or dishwashing preparations in tablet form and that the mark applied for is the product itself.
- 27 For the purposes of assessing whether the Community trade mark applied for should be granted for this new product, the Office first gives an account of the development of the different ways in which washing and dishwashing products have been marketed and the advantages of presenting them in tablet form.
- 28 Second, the Office explains the principles governing the registration of three-dimensional marks, referring to the various grounds for refusal which may come into play in that context.
- 29 According to the Office, a trade mark has distinctive character for the purposes of Article 7(1)(b) of Regulation No 40/94 if it enables the goods or services in respect of which registration of the mark is sought to be distinguished by reference to their origin and not by reference to their properties or other features.
- 30 According to the Office, consumers do not normally make any connection between the shape of a product and its origin. In order for consumers to view the actual shape of the product as a means of identifying its origin, the Office contends that the shape must have some striking 'feature', whatever it may be, which attracts consumers' attention.

- 31 The Office states that the assessment of the distinctive character of a product's shape must take place in three stages. First, it is necessary to check the shapes in which the relevant product already exists. Second, it is necessary to ascertain whether, from the consumer's point of view, the shape applied for is noticeably different. Finally, it is necessary to determine whether that particular shape is capable of denoting the origin of the product.
- 32 The Office points out that, for the purposes of the third stage of the analysis, the type of product and the way in which the consumer uses it are important. In the case of washing machine and dishwasher tablets, the consumer takes them out of their packaging and puts them straight into the washing machine or dishwasher and thus uses the product's packaging, which bears the manufacturer's word mark, and not the exact shape and colour of the product itself, to recognise the product when he makes a purchase.
- 33 According to the Office, the legal criteria for assessing the distinctive character of three-dimensional marks consisting, as in the present case, of the shape of the product itself are no different from, and no more rigorous than, those applying to other marks. However, the Office states that a product's shape is not indicative of its origin in the same way as words or figurative images applied to the product or its packaging.
- 34 Third, the Office undertakes an analysis of the trade mark in respect of which registration is sought.
- 35 The Office contends that the rectangular shape of the mark applied for is neither unusual nor fanciful but commonplace and current on the market.

- 36 The Office considers that, since there is no colour graphic representation of the mark applied for and since no colour has been claimed, the mark's distinctiveness must be assessed by reference to various shades of grey, which cannot be thought of as different colours. The grey shades are not distinctive and the consumer will perceive them as an indication of the presence of an additional active ingredient. Grey is not a colour likely to confer distinctiveness on a functional object. At the hearing, the Office stated that where a trade mark application gives no indication of colour, the mark's distinctiveness is assessed without account being taken of the possibility that a coloured version of the mark might be used. It added that, in the event of such a mark being registered, the owner may — in the majority of cases — none the less object to third parties using a coloured version of the mark.
- 37 As regards the other features of the mark applied for, the Office asserts that the bevelled edges will not be noticed by consumers, that they have a functional role and that they are commonplace for tablets of this kind. The depression, which is almost impossible to discern, is merely an insert containing the additional active ingredient and is a darker shade of grey than the rest of the tablet.
- 38 As regards the assessment of the mark as a whole, the Office considers that the combination of all these non-distinctive features does not make the trade mark applied for distinctive. Distinctiveness cannot be inferred from, in particular, the fact that all the tablets are different from one another.
- 39 The Office submits that the argument that the applicant should not be the only undertaking authorised to sell washing machine and dishwasher products in tablet form is relevant in the context of Article 7(1)(b) of Regulation No 40/94.

The fact that the Board of Appeal used that argument does not mean that it applied a separate ground for refusal in this case, based on the need to keep a trade mark available for general use ('Freihaltebedürfnis'). If a trade mark application were to be refused on that ground, the Office would have to show that competitors have a specific and concrete legitimate interest in using the same mark. In the present case, the Office emphasises that the Board of Appeal merely pointed out that registration of the shape claimed as a Community trade mark would have undesirable consequences for the functioning of the market. The Office contends that it is necessary to consider, when applying Article 7(1)(b) of Regulation No 40/94, the consequences of registering certain basic and commonplace words, signs or shapes. Denying this would amount to denying the essential function of the system of trade marks and industrial property, which is to foster fair competition.

40 Fourth, as regards the alleged inconsistency of the contested decision with other decisions of the Office, the latter asserts that it has refused all the applications for washing or dishwashing tablets in round or rectangular form and that those refusals have been upheld by the Boards of Appeal in all the decided cases. The Office states that trade mark application no. 924 829 was published in the Community Trade Marks Bulletin but that the mark concerned was not accepted for registration. Furthermore, the Office argues that, even supposing that it had actually registered that trade mark, the decision would be incorrect and the applicant could not rely on it to ask for a decision which would repeat the error.

41 As to the practice of national offices, the Office recognises that registration in the applicant's name, in many or all Member States, of a trade mark identical to the one applied for in this instance constitutes one factor which, without being decisive, may be taken into consideration for the purposes of registering a Community trade mark. In that regard, the Office maintains that the applicant has never claimed to have obtained registration of the mark applied for in the present case in Member States of the European Community.

- 42 As to the registration by national offices in the Member States of marks similar to the one applied for in the present case, the Office states that the practices of those offices are not uniform.
- 43 The Office submits that, even if the applicant had been the first to market washing machine and dishwasher products in tablet form, it is established that the rectangular shape is now commonplace. Even if that shape became commonplace only after the date on which the Community trade mark application was filed, it may not be registered. In that regard, it points out, first, that using a mundane or commonplace shape for the first time does not in itself render the shape distinctive and, second, that the product must be distinctive at the time of registration as well.
- 44 Lastly, it having been explained by the applicant that its trade mark application also covers beauty products, the Office stated at the hearing that it is prepared to review the grounds of refusal as regards these other products referred to in the application.

Findings of the Court

- 45 The distinctive character of a trade mark must be assessed in relation to the goods or services in respect of which registration of the mark is sought.
- 46 In the present case, as regards the household goods referred to by the applicant in its application for a Community mark, namely 'washing and bleaching

preparations and other substances for laundry use; cleaning, polishing, scouring and abrasive preparations; preparations for the washing, cleaning and care of dishes; soaps,' falling within class 3 of the Nice Agreement, the mark applied for consists of the shape and pattern of the product itself. By contrast, as regards products intended for personal care, in respect of which registration of the mark has been sought and which also fall within class 3, under the heading 'perfumery, essential oils, cosmetics, hair lotions; dentifrices', it is difficult to see how the mark applied for could consist of the shape of the product itself.

- 47 As regards household goods, it is clear from Article 4 of Regulation No 40/94 that a product's shape falls 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.
- 48 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).
- 49 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.

- 50 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.
- 51 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.
- 52 It is appropriate to point out that the household goods in respect of which the trade mark was sought in the present case are widely used consumer goods. The public concerned, in the case of these goods, 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).

- 53 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). The level of attention given by the average consumer to the shape and pattern of washing machine and dishwasher tablets, being everyday consumer goods, is not high.
- 54 In order to ascertain whether the combination of the shape of the tablet at issue and its pattern 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.
- 55 Since the applicant has not claimed colour in the present case, the mark applied for cannot enable the products to be identified by reference to their origin unless the average consumer, when he sees a rectangular tablet with chamfered edges, speckles and a triangular inlay, will recognise it irrespective of its colour and associate all products presented in that way with the same origin.
- 56 The three-dimensional shape for which registration has been sought, namely a rectangular tablet, is one of the basic geometrical shapes and is an obvious one for a product intended for use in washing machines or dishwashers. The slightly rounded corners of the tablet are dictated by practical considerations and are not likely to be perceived by the average consumer as a distinctive feature of the shape claimed, capable of distinguishing it from other washing machine or dishwasher

tablets. Likewise, the chamfered edges are a barely perceptible variant on the basic shape and have no impact on the overall impression made by the tablet.

- 57 As regards the presence of speckles and a darker triangular inlay in the centre of the tablet, it is appropriate to examine, first, the applicant's claim that the Board of Appeal failed to consider the speckles. Although it is the case that the Board of Appeal did not specifically consider them in the contested decision, it nevertheless remarked, when dealing with the triangular inlay, that the use of different colours was commonplace for the goods in question (paragraph 18). That statement demonstrates that the Board of Appeal took the view that the speckles were not capable of rendering the mark applied for distinctive, since what was involved was a commonplace feature. The contested decision is therefore sufficiently reasoned in that regard.
- 58 Further, the public concerned is used to seeing light and dark features in detergent preparations. Powder, the form in which such products are traditionally presented, is usually very light grey or beige and appears almost white. As the applicant itself explained at the hearing, powder often contains particles of one or more colours, which may be darker or lighter than the product's basic colour. The advertising carried out by the applicant and other manufacturers of detergents tends to highlight the fact that those particles indicate the presence of various active ingredients. Those 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 of refusal is inapplicable that light and dark features 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 light and dark features as a suggestion that the product has certain qualities, and not as an indication of its origin, there is no distinctive character.
- 59 As regards the fact that, as well as the speckles, the tablet at issue features a triangular inlay in the centre of its upper surface, the Board of Appeal's finding

that the presence of such an inlay is not sufficient for the tablet's appearance to be perceived as indicative of the product's origin is justified. Where various ingredients are to be combined in a washing machine or dishwashing product in tablet form, adding an inlay to the middle of the tablet is one of the most obvious solutions. The fact that the inlay consists of a slight depression in the tablet's centre does not change the tablet's appearance significantly and is therefore not likely to influence consumers' perception.

- 60 Nor is the fact that a triangular shape has been selected for the inlay sufficient to confer distinctiveness on the mark applied for. Associating two basic geometric shapes in such a way as is seen in the tablet at issue is one of the most obvious variations on the get-up of the product concerned. In the absence of any additional features, capable of having an impact on consumers' perception, that combination of shapes does not enable the public concerned to distinguish the products presented in that way from those having a different trade origin.
- 61 The fact that consumers may nevertheless get into the habit of recognising the product from such a combination of shapes is not enough, on its own, 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.
- 62 It does not matter in that regard that the specific combination of geometric shapes mentioned above is not currently used for washing machine or dishwasher products. By varying the basic geometric shapes and adding inlays and speckles, different combinations of those features may be obtained. The ensuing differences in the appearance of the various tablets are not sufficient to enable each of those

tablets to function as an indication of the product's origin, inasmuch as those differences are, as in the present case, obvious variations on the product's basic shapes.

- 63 Given the overall impression created by the combination of the shape and pattern of the tablet in question, the mark applied for does not enable consumers to distinguish the products concerned from those having a different trade origin when they come to select a product for purchase.
- 64 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.
- 65 Next, as regards the applicant's arguments concerning the practices of national trade mark offices, it must be reiterated that registrations already made in the Member States are only one factor which may be taken into consideration, without being given decisive weight, in the registration of a Community trade mark (Case T-122/99 *Procter & Gamble v OHIM* (Soap shape) [2000] ECR II-265, paragraph 16; and Case T-24/00 *Sunrider v OHIM* (VITALITE) [2001] ECR II-449, paragraph 33). Furthermore, the applicant has not claimed that a trade mark identical to the one applied for has been registered by any national office. It is clear from the Office's answers to the Court's questions that, more generally, the practices of the national trade mark offices, as regards three-dimensional marks consisting of washing machine and dishwasher tablets, are not uniform. Consequently, any criticism that the Board of Appeal has failed to have regard to those practices is groundless.

- 66 As far as the practice of the Office itself is concerned, it is clear from the Office's replies to the Court's questions that the Community trade mark application whose publication is relied on by the applicant has not resulted in registration and that it is anticipated that registration will be refused. In those circumstances, the argument based on the publication of that application has become otiose in any event.
- 67 The applicant's arguments concerning the practices of the Office and certain national offices must therefore be dismissed.
- 68 It follows that the Board of Appeal was right to hold that the three-dimensional mark applied for is devoid of any distinctive character as regards products falling within class 3 of the Nice Agreement and corresponding to the following description: 'washing and bleaching preparations and other substances for laundry use; cleaning, polishing, scouring and abrasive preparations; preparations for the washing, cleaning and care of dishes; soaps'.
- 69 As regards the applicant's arguments concerning the Board of Appeal's consideration of the need to keep the shape of the tablet at issue available, it must be observed that the absolute grounds for refusal set out in Article 7(1)(b) to (e) of Regulation No 40/94 address the concern of the Community legislature to prevent the grant to one operator alone of exclusive rights which could hinder competition on the market for the goods or services concerned (see, as regards the ground of refusal relating to the descriptive nature of the sign, the judgment of the Court of Justice in Joined Cases C-108/97 and C-109/97 *Windsurfing Chiemsee* [1999] ECR I-2779, paragraph 25). However, 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. Article 7(1)(b) of Regulation No 40/94, in excluding the registration of signs devoid of any distinctive character, protects any interest there may be in keeping available various alternatives for a product's design only to the extent to which the design of the product in respect of which registration is sought is not capable, a priori and irrespective of the use made of it within the meaning of Article 7(3) of Regulation No 40/94, 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.

70 Although the Board of Appeal referred in the contested decision to the interest in preventing trade mark law from giving rise to a monopoly on a product, it does not, however, follow that in this case the Board failed to have due regard to the criteria applicable in assessing the distinctiveness of the mark applied for. In paragraph 11 of the contested decision, the Board of Appeal states that a product's shape may be registered as a Community trade mark 'provided that the shape displays certain features that are sufficiently unusual and arbitrary to enable the relevant consumers to recognise the product, purely on the basis of its appearance, as emanating from a specific undertaking'. Its consideration in paragraph 18 of the contested decision of the relevant public's perception of the features of the mark applied for is therefore consonant with the principles set out above.

71 Finally, as regards products falling within class 3 of the Nice Agreement under the heading 'perfumery, essential oils, cosmetics, hair lotions; dentifrices', the Board of Appeal does not state reasons in the contested decision in support of its finding that the mark applied for is devoid of any distinctive character.

72 It follows that the Court is not in a position in the present case to review the legality of the contested decision in relation to the latter products. It must

therefore be held that the contested decision is vitiated in that regard on account of breach of the requirement to state reasons prescribed by Article 73 of Regulation No 40/94. The fact that the applicant pleaded breach of that requirement only at the hearing does not preclude the Court from considering it, since a failure to state reasons is a matter of public policy which must be raised of the Court's own motion (see Case C-367/95 P *Commission v Sytraval* [1998] ECR I-1719, paragraph 67).

- 73 Consequently, the contested decision must be annulled in so far as it concerns products falling within class 3 of the Nice Agreement corresponding to the description 'perfumery, essential oils, cosmetics, hair lotions; dentifrices', and the remainder of the action must be dismissed.

Costs

- 74 Under Article 87(3) of the Rules of Procedure, the Court may rule that costs are to be shared or that each party is to bear its own costs where each party succeeds on some and fails on other heads, or where the circumstances are exceptional. Since the contested decision is to be partially annulled, it is appropriate to order the parties to bear their own costs.

On those grounds,

THE COURT OF FIRST INSTANCE (Second Chamber)

hereby:

1. **Annuls the decision of the First Board of Appeal of the Office for Harmonisation in the Internal Market (Trade Marks and Designs) of 8 March 2000 (Case R-508/1999-1) in so far as it concerns products falling within Class 3 of the Nice Agreement corresponding to the description 'perfumery, essential oils, cosmetics, hair lotions; dentifrices';**
2. **Dismisses the remainder of the action;**
3. **Orders the parties to bear their own costs.**

Meij

Potocki

Pirrung

Delivered in open court in Luxembourg on 19 September 2001.

H. Jung

Registrar

A.W.H. Meij

President