

# Case T-173/00

KWS Saat AG

v

Office for Harmonisation in the Internal Market  
(Trade Marks and Designs) (OHIM)

(Community trade mark — Regulation (EC) No 40/94 — Colour  
(shade of orange) — Absolute ground for refusal — Distinctive character —  
Statement of reasons)

Judgment of the Court of First Instance (Second Chamber), 9 October 2002 II-3847

## Summary of the Judgment

1. *Community trade mark — Registration procedure — Withdrawal, restriction and amendment of the trade mark application — Application to restrict the list of goods and services — Detailed rules — Application made orally before the Court of First Instance — Application that does not comply with those rules and having the effect of altering the subject-matter of the dispute*  
(Council Regulation No 40/94, Art. 44; Commission Regulation No 2868/95, Art. 1, Rule 13)

2. *Community trade mark — Definition and acquisition of the Community trade mark — Signs capable of constituting a trade mark — Colours or colour combinations — Condition — Distinctive character*  
(Council Regulation No 40/94, Art. 7(1)(b))
3. *Community trade mark — Definition and acquisition of the Community trade mark — Absolute grounds for refusal — Marks devoid of any distinctive character — Signs consisting of colours or colour combinations — Distinctive character — Assessment criteria*  
(Council Regulation No 40/94, Art. 7(1)(b))
4. *Community trade mark — Definition and acquisition of the Community trade mark — Absolute grounds for refusal — Marks devoid of any distinctive character — Shade of orange HKS7*  
(Council Regulation No 40/94, Art. 7(1)(b))
5. *Community trade mark — Procedural provisions — Statement of reasons for decisions — Purpose*  
(Council Regulation No 40/94, Art. 73)

1. Under Article 44 of Regulation No 40/94 on the Community trade mark, and Rule 13 of Regulation No 2868/95 implementing it, on the applicant's right to restrict the list of goods or services specified in the application, the list may be restricted only in accordance with certain detailed rules. Where an application made by the applicant orally at the hearing before the Court of First Instance does not comply with those rules, it cannot be considered to be an application for amendment within the meaning of those provisions. Furthermore, to allow such an application would be tantamount to changing the subject matter of the dispute pending before the Court and so infringe the principle of *audi alteram partem*. That does not

preclude the possibility of a partial withdrawal, however.

(see paras 11-13)

2. Colours or colour combinations *per se* may constitute Community trade marks within the meaning of Regulation No 40/94 in so far as they are capable of distinguishing the goods or services of one undertaking from those of another. 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 that regulation in relation to a particular product or service.

Furthermore, in so far as the relevant public recognises the sign as an indication of the commercial origin of the goods or services, the fact that it serves several purposes simultaneously, other than that of indicating commercial origin, including a technical or decorative function, is immaterial to its distinctive character.

(see paras 25-26)

(see paras 29-30)

3. Whilst Article 7(1)(b) of Regulation No 40/94, which provides that 'trade marks which are devoid of any distinctive character' are not to be registered, does not draw any distinction between different types of sign, the relevant public's perception is not necessarily the same in the case of a sign composed of a colour or colour combination *per se* as it is in the case of a word or figurative mark, where the sign is independent of the appearance of the goods which it identifies. While the public is accustomed to perceiving word or figurative marks immediately as signs identifying the commercial origin of the goods, the same is not necessarily true where the sign forms part of the external appearance of the goods or where the sign is composed merely of a colour or colours used to signal services.
4. Under Article 7(1)(b) of Regulation No 40/94 on the Community trade mark, 'trade marks which are devoid of any distinctive character' are not to be registered. With regard to the registration sought in respect of the shade of orange *per se* with standard reference HKS7 for agricultural, horticultural and forestry goods, the colour is not distinctive. The use of colours, including the shade of orange claimed or very similar shades, for those goods is not rare for such goods, in particular as regards seeds. The sign applied for will therefore not enable the relevant public immediately and with certitude to distinguish the goods of the undertaking in question from those of other undertakings which are coloured other shades of orange.

Nor is the sign distinctive for seed treatment installations. Being commonplace, the colour orange will not enable the relevant public to distinguish immediately and with certainty the installations of the undertaking in question from machines in similar shades of orange with a different commercial origin. It will thus perceive the colour claimed as merely an element of the finish of the goods in question.

origin of the service. Secondly, in so far as it has not been established that the colour fulfils other more immediate functions, the colour is easily and instantly memorable to the relevant public as a distinctive sign for the services specified.

(see paras 33, 40, 42, 44, 46)

On the other hand, as regards the registration sought for technical and business consultancy in the area of plant cultivation, in particular in the seed sector, the sign composed of the shade of orange *per se* is capable of enabling the relevant public to distinguish the services concerned from those of a different commercial origin when they come to make a choice on the occasion of a subsequent purchase. First, since a colour does not attach to the service itself, services by nature having no colour, nor does it confer any substantive value, the relevant public can distinguish between use of a colour as mere decoration and its use as an indication of the commercial

5. The duty of the Office for Harmonisation in the Internal Market (Trade Marks and Designs) to state the reasons on which its decisions are based, which is laid down in the first sentence of Article 73 of Regulation No 40/94 on the Community trade mark, must enable the applicant, if need be, to take cognisance of the reasons for refusing its application for registration and to challenge the contested decision effectively.

(see paras 54-55)