

# Joined Cases T-324/01 and T-110/02

Axions SA and Christian Belce

v

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

(Community trade mark — Three-dimensional marks — Brown cigar shape and gold ingot shape — Absolute grounds for refusal — Distinctive character — Article 7(1)(b) of Regulation (EC) No 40/94)

Judgment of the Court of First Instance (Fourth Chamber), 30 April 2003 II-1900

## Summary of the Judgment

1. *Community trade mark — Definition and acquisition of the Community trade mark — Absolute grounds for refusing registration — Marks devoid of distinctive character — Assessment of the distinctiveness of a mark — Whether factors which are not the subject of the registration may be taken into account — Not included (Council Regulation No 40/94, Art. 7(1)(b))*

2. *Community trade mark — Definition and acquisition of the Community trade mark — Absolute grounds for refusal — Marks devoid of distinctive character — Three-dimensional mark — Shape of a brown cigar and shape of a gold ingot (Council Regulation No 40/94, Art. 7(1)(b))*

1. Factors which will not be the subject of the registration, such as the price of the product concerned or a particular spatial positioning of the product the shape of which constitutes the mark, cannot be taken into consideration in assessing a trade mark's distinctiveness within the meaning of Article 7(1)(b) of Regulation No 40/94 on the Community trade mark, unless that product is ordinarily presented with that positioning.

bearing on the assessment of the mark's registrability.

(see paras 36, 40)

For the purposes of assessing the registrability of a sign in respect of a particular category of goods and/or services, whether the applicant for the trade mark in question is contemplating or is actually using a particular marketing concept is immaterial because the existence of a marketing concept is a factor that is extrinsic to the right conferred by the Community trade mark and because, since a marketing concept is purely a matter of choice for the undertaking concerned, it is liable to be altered after the Community trade mark has been registered and cannot therefore have any

2. The three-dimensional marks in the shape of a brown cigar and of a gold ingot for which registration is sought in respect of 'chocolate, chocolate goods; pastry and confectionery' (Class 30 of the Nice Agreement); 'chocolate, chocolate goods' (Class 30); and 'cardboard packaging in the form of a gold ingot for chocolate and chocolate goods' (Class 16) are devoid of distinctive character within the meaning of Article 7(1)(b) of Regulation No 40/94 on the Community trade mark because they do not differ substantially from certain basic shapes, commonly used in the trade, of the products concerned but are, rather, a variant of those shapes, which is concrete evidence justifying the conclusion that they are capable of being commonly used in trade for the presentation of the products covered by the applications and because those marks, as perceived by

an average consumer who is reasonably well informed and reasonably observant and circumspect, are therefore incapable of differentiating the products concerned or of distinguishing

them from those of a different trade origin.

(see paras 44-45)