

# Case T-399/02

Eurocermex SA

v

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

(Community trade mark — Three-dimensional trade mark — Shape of a bottle — Long-neck bottle in the neck of which a slice of lemon has been plugged — Absolute grounds for refusal — Distinctive character — Article 7(1)(b) of Regulation (EC) No 40/94)

Judgment of the Court of First Instance (Second Chamber), 29 April 2004 II - 1394

## Summary of the Judgment

- 1. Community trade mark — Definition and acquisition of Community trade mark — Absolute grounds for refusal — Marks devoid of any distinctive character — Three-dimensional trade marks — Form of drinks packaging (Council Regulation No 40/94, Art. 7(1)(b))*

2. *Community trade mark — Definition and acquisition of Community trade mark — Absolute grounds for refusal — Marks devoid of any distinctive character, descriptive or customary marks — Exception — Acquisition of distinctive character through use — Assessment criteria*

(Council Regulation No 40/94, Art. 7(3))

1. A three-dimensional trade mark in the shape of a clear bottle, filled with a yellow liquid, with a long neck in which a slice of lemon with a green skin has been plugged, for which registration is sought for beers, mineral and aerated waters and fruit juices within Class 32 of the Nice Agreement, and for restaurants, bars and snack bars within Class 42 of that agreement, is devoid of any distinctive character within the meaning of Article 7(1)(b) of Regulation No 40/94 on the Community trade mark where the mark consists of a combination of features, each of which is capable of being commonly used, in trade, for the presentation of the products and services referred to in the application for registration, and therefore lacks any distinctive character in relation to those products and services, and the manner in which those elements are combined is also not capable of giving the mark a distinctive character.
2. The acquisition of a distinctive character through use of the Community trade mark referred to in Article 7(3) of Regulation No 40/94 requires, first, that at least a significant proportion of the relevant section of the public identifies products or services as originating from a particular undertaking because of the mark. However, the circumstances in which the condition as to the acquisition of a distinctive character through use may be regarded as satisfied cannot be shown to exist by reference to general, abstract data such as predetermined percentages.

Secondly, in order to have the registration of a mark accepted under Article 7 (3) of Regulation No 40/94, the distinctive character acquired in consequence of the use of that mark must be demonstrated in the substantial part of the Community where it was devoid of any such character under Article 7(1) (b), (c) and (d) of that regulation.

(see paras 30, 32, 35, 36)

Thirdly, in assessing, in a particular case, whether a mark has become distinctive through use, account must be taken of factors such as inter alia the market share held by the mark, how intensive, geographically widespread and long-standing use of the mark has been, and the amount invested by the undertaking in promoting the mark. Appropriate evidence in that regard includes statements from chambers of commerce and industry or other trade and professional associations and opinion polls.

Fourthly, a mark must have become distinctive through use before the application for registration was filed.

(see paras 42-45)