

JUDGMENT OF THE COURT OF FIRST INSTANCE (First Chamber)

12 September 2007*

In Case T-358/04,

Georg Neumann GmbH, established in Berlin (Germany), represented by R. Böhm,
lawyer,

applicant,

v

Office for Harmonization in the Internal Market (Trade Marks and Designs)
(OHIM), represented by G. Schneider, acting as Agent,

defendant,

ACTION brought against the decision of the Second Board of Appeal of OHIM of 17 June 2004 (Case R 919/2002-2), rejecting the application for registration of a three-dimensional mark in the form of a microphone head grill as a Community trade mark,

* Language of the case: German.

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

composed of J.D. Cooke, President, R. García-Valdecasas and I. Labucka, Judges,
Registrar: K. Andová, Administrator,

having regard to the application lodged at the Registry of the Court of First Instance
on 30 August 2004,

having regard to the response lodged at the Court Registry on 5 January 2005,

having regard to the reply lodged at the Court Registry on 1 April 2005,

further to the hearing on 28 November 2006,

gives the following

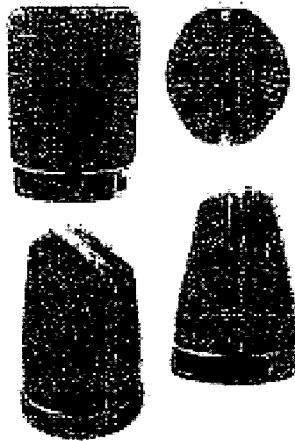
Judgment

Background to the dispute

- ¹ On 9 December 1996, the applicant filed an application for a Community trade mark at the Office for Harmonization in the Internal Market (Trade Marks and Designs)

(OHIM) 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 The trade mark in respect of which registration was sought is the three-dimensional shape reproduced below:



- 3 The mark referred to above takes the form of what is known as a microphone head grill which covers and protects the microphone capsule located at the end of a shaft, which contains the electric components and is used to hold the microphone.
- 4 The goods in respect of which registration of the trade mark was sought fall within Class 9 of the Nice Agreement of 15 June 1957 concerning the International

Classification of Goods and Services for the Purposes of the Registration of Marks, as revised and amended, and correspond to the following description: 'Microphones, in particular studio microphones, condenser microphones, pressure-gradient microphones and their parts (within Class 9)'.

- 5 The applicant claimed priority for the German trade mark No 39625644, lodged on 10 June 1996 and registered on 18 September 1996.

- 6 By letter of 28 November 2001, the examiner informed the applicant that its mark was not capable of registration on the ground that it lacked distinctive character within the meaning of Article 7(1)(b) of Regulation No 40/94. Images of similar microphones manufactured and marketed by other companies were attached to the objections of the examiner. Since the applicant waived its right to file further submissions, the examiner, by decision of 6 September 2002, maintained his objections and refused the application for registration.

- 7 On 6 November 2002, the applicant brought an appeal against that decision, relying on the fact that some of the microphones of similar design to which the examiner referred in his objections came from competing undertakings which, following the steps taken by the applicant, had stopped producing and marketing those microphones. It pointed out that some of the other competing undertakings marketing microphones of a similar design were from the Far East and manufactured low quality products which were not in direct competition with its own. It also claimed that the narrow band of consumers targeted by the goods at issue would notice that the specific shape of the microphone did not have any functional significance and that that shape, as a combination of aesthetic elements, produced an overall unique impression which imprinted itself in the memory. It further pointed out that the shape of the trade mark applied for had been registered as a trade mark in the United States.

- 8 By decision of 17 June 2004 ('the contested decision') the Second Board of Appeal of OHIM upheld the decision of the examiner. It took the view that the features which formed the microphone head grill were standard and that there was no additional feature such as to visibly distinguish it from the collection of currently used shapes, in such a way that it could, solely on account of its shape, be imprinted in the memory and be identified as the product of a specific undertaking. Therefore, it held that the registration of this mark could only possibly be considered by reason of a distinctive character acquired through the use which had been made of it, but that the applicant had not sought to rely on Article 7(3) of Regulation No 40/94. The Board of Appeal also took formal notice of the fact that the applicant had succeeded in preventing competing undertakings from marketing microphones of a similar design, but considered that the conduct of those undertakings was not sufficient to confer a distinctive character on the mark at issue.

Forms of order sought

- 9 The applicant claims the Court should:

- annul the contested decision;

- order OHIM to pay the costs.

- 10 OHIM claims the Court should:

- dismiss the action;

- order the applicant to pay the costs.

- 11 By letter lodged at the Registry of the Court of First Instance on 28 January 2005 and in its reply, the applicant requested measures of organisation of procedure and instructions aimed at establishing that the relevant public was accustomed to looking at the shape of the microphone head grill as an indication of the origin of the microphone and that that was the case for the shape at issue, which possessed an appearance that distinguished it from standard shapes.

Law

Arguments of the parties

- 12 By its only plea in law, the applicant claims that the Board of Appeal infringed Article 7(1)(b) of Regulation No 40/94 by carrying out an incorrect assessment of the distinctive character of the mark in respect of which registration was sought.
- 13 First, it asserts that the Board of Appeal erred in law in disregarding the fact that the relevant public in the present action pays particular attention to the shape of microphone head grills and notices in the detail of the given design — which may appear, to the layman, to have been dictated by the nature of the instrument — characteristics which make those microphones individual and enable their origin to be ascertained. There are three reasons for this.
- 14 First, the products covered by the trade mark applied for are expensive microphones, particularly studio microphones; this is confirmed by the fact that a microphone head grill is attached to protect them. The items in question are, therefore, not ordinary items, but expensive high-tech instruments, which are the subject of special attention.

- 15 In this regard, stating that ‘the microphones for which the trade mark was applied for are, in practice, exclusively high quality, high performance studio microphones’, the applicant, in its reply, requested that the list of products be limited from now on to ‘studio microphones and their component parts (in so far as they come within Class 9)’.
- 16 Secondly, the applicant asserts that the ability of the trade mark applied for to distinguish the product which it covers from products of other manufacturers must be assessed having regard to the relevant public. It points out that the relevant public was correctly defined by the Board of Appeal and that the products covered by the trade mark application are undeniably aimed at professionals and acoustic specialists, for whom microphones are an essential work tool to which they therefore give special attention.
- 17 Thirdly, the shape at issue is not in itself required to fulfil a specific function and can therefore be given a specific appearance which sets it apart. Furthermore, the shape of the microphone head grill, which forms the trade mark applied for, can be clearly detached from the rest of the microphone and its prominence automatically catches the observer’s attention, more so since the microphone’s appearance does not involve any other detachable parts.
- 18 Taking account of those circumstances, the applicant claims that ‘the general principles based on experience regarding the perception, by the consumer, of the shape of a product’, relied upon by OHIM in its response, have no relevance in the present proceedings. The principle referred to at paragraph 23 of the contested decision, according to which, in the case of a three-dimensional mark consisting of the shape of the product itself, the perception of the relevant public is not necessarily the same as in the case of a word, figurative or three-dimensional mark which does not consist of the shape of the product, depends upon the relevant public and its level of attention. Thus, in contrast with the present proceedings, the judgment of the Court in Case T-337/99 *Henkel v OHIM (white and red round tablet)* [2001] ECR II-2597, cited at paragraph 23 of the contested decision, dealt with everyday consumer items intended for consumers in general and it was for that

reason that it was appropriate, in that case, that in an assessment of the distinctive character of the mark in respect of which registration was sought, 'account must be taken of the presumed expectations of an average consumer who is reasonably well-informed and reasonably observant and circumspect' (*White and red round tablet*, paragraph 47).

19 In that regard, and in support of its request for measures of organisation of procedure and instructions (see paragraph 11 above) the applicant claimed, in the course of the hearing, that the question of the relevant public's perception, in the present case, could be resolved only by experts, namely sound specialists.

20 Secondly, the applicant asserts that the Board of Appeal based its assessment on an incomplete and inaccurate analysis of the characteristics of the trade mark applied for. The applicant agrees with the Board of Appeal on the fact that, like many other microphone head grills, the microphone head grill shape which forms the basis of the trade mark applied for is made up of a circular ring at the bottom of a protective grill, of a microphone capsule surrounded by wire mesh and of a frame over that and perpendicular to the circular ring (paragraph 25 of the contested decision). The applicant, however, disputes the claim that the trade mark applied for was 'lacking any additional feature capable of being regarded as striking, particular or original, and which might confer upon it (the trade mark applied for) the possibility to be clearly separated from the ordinary and everyday shape, in such a way that, purely on account of its shape, it can imprint itself in the memory and be identified, not just as any microphone head grill, but as the product of a specific undertaking' (paragraph 25 of the contested decision).

21 The symmetric flattening of the wire mesh on both sides of the frame constitutes an 'identifying imprint'. As a result of partial cutting along the plane of an essentially cylindrical body (of wire mesh), each surface has the unusual shape of a hyperbolic partial ellipse, which appears in the foreground and is therefore immediately visible (see the illustration at the top left in paragraph 2 above). The flattening is also

perpendicular and clearly visible from the side (see the illustration at the bottom right in paragraph 2 above).

- 22 The shape of the microphone head grill, forming the basis of the trade mark applied for, thus distinguishes itself significantly from the traditional and normal cylindrical or spherical shaped microphone head grills. The applicant asserts, furthermore, that this shape was conceived for it in the years 1960 to 1964 by Wilhelm Braun-Feldweg, the famous industrial designer, and Professor of Industrial Design at the Higher College of Visual Arts in Berlin.
- 23 Thirdly, the applicant contests the relevance of the examples of microphones referred to by the examiner in his objections of 28 November 2001. The applicant claims that in relation to those microphones with a head similar to that, the shape of which forms the basis of the trade mark applied for, their manufacturers were forced to discontinue their production and marketing following steps taken by the applicant as detailed before the Board of Appeal.
- 24 It is irrelevant, in the context of the present case, whether that discontinuance came about by reason of the rights derived from the German trade mark (the distinctive character of which was considered sufficient), which is the same as the trade mark applied for, by reason of the use of that mark (within the meaning of Paragraph 4(2) of the German Law on Trademarks) or by reason of competition law. What is decisive is that the use made by third parties, as referred to by the examiner, no longer exists and can therefore no longer compromise the distinctive character of the trade mark applied for. The observation made by the Board of Appeal at paragraph 29 of its contested decision therefore serves no purpose.
- 25 Fourthly, the applicant also raised the point, in the course of the hearing, that the contested decision erred in law since it was based on considerations rejected by the

Court of Justice in a judgment issued after the application in the present case had been lodged. In refusing the registration of the trade mark applied for on the ground that it had no distinctive character, the Board of Appeal confirmed, citing paragraph 36 of the judgment of the Court in Case T-323/00 *SAT.1 v OHIM (SAT.2)* [2002] ECR II-2839, at paragraph 22 of the contested decision, that the absolute grounds of refusal specified in Article 7(1)(b) to (e) of Regulation No 40/94 pursued a general interest objective, which required that the signs referred to should be for the free use of all, and that, in order to avoid creating an illegal competitive advantage for a single economic operator, it was necessary to exclude the creation of an exclusive right for a sign which should be left to the free use of all. However, by judgment of 16 September 2004 in Case C-329/02 P *SAT.1 v OHIM* [2002] ECR I-8317 the Court of Justice annulled the earlier decision, holding that the criterion mentioned in paragraph 36 of the judgment of the Court of First Instance was not relevant for the application of Article 7(1)(b) of Regulation No 40/94.

26 OHIM considers that the Board of Appeal acted correctly in law in rejecting the application for registration of the microphone head grill shape on the ground that it lacked distinctive character within the meaning of Article 7(1)(b) of Regulation No 40/94.

27 First, as regards the line of argument of the applicant according to which a public composed of sound specialists, as opposed to one composed of ordinary consumers, normally notices the shape of a microphone as an indication of its origin, OHIM contends that this in reality involves an argument of fact which is inconsistent with the general principles based on experience in regard to the perception, by the consumer, of the shape of a product, as expounded in Community case-law. Therefore, OHIM considers that this assertion does not match the reality. In addition, in the course of the hearing OHIM made the point that the applicant based its argument on studio microphones, whereas the description of the products covered in the application was broader and was not limited.

- 28 OHIM then disputes the assertion that the flattening of the metal wire mesh forms an unusual feature for microphones.
- 29 It contends, in this respect, that apart from its earlier national registrations and legal actions brought against competitors to stop the rights deriving from those national registrations being adversely affected, the applicant provided no evidence capable of calling into question the assertion of the examiner that the shape for which registration is sought is a standard shape. OHIM takes the view that the commencement of legal proceedings casts little light on the market circumstances and even less on the presumed perception of consumers. It makes the point that, just as a national registration cannot bind OHIM in its assessment, the outcome of an action for infringement based on national rights cannot have any influence on the assessment of distinctive character.
- 30 OHIM also contends that the applicant's line of argument clearly involves only Germany and the United States, whereas the examiner's finding is valid throughout the entire European Union, as it can be assumed that the competitors referred to also market their products in France, in the United Kingdom and in other Member States.
- 31 As regards the documents relating to the stylist Braun-Feldweg who conceived the shape for which registration is sought, OHIM contends that those documents have been produced for the first time before the Court. In any case, OHIM considers that the fact that Mr Braun-Feldweg was able to conceive a high-tech product 'which meets the need for beauty' confirms the aesthetic importance of the shape for which registration is sought, but not, in any sense, its distinctive character for the purposes of trade mark law. That was, moreover, already stated by the Board of Appeal, at paragraph 25 of the contested decision, when it acknowledged that consumers might regard the design of the microphone as being aesthetic without going so far as to provide it with a distinctive character.

Findings of the Court

- 32 It should be noted that the distinctive character of a trade mark for the purposes of Article 7(1)(b) of Regulation No 40/94 means that the mark must serve to identify the goods or services in respect of which registration is applied for as originating from a particular undertaking, and thus to distinguish those goods or services from those of other undertakings (Case C-136/02 P *Mag Instrument v OHIM* [2004] ECR I-9165, paragraph 29 and the case-law cited). Distinctive character must be assessed, first, by reference to the goods or services in respect of which registration has been applied for and, secondly, by reference to the perception of them by the relevant public, which consists of average consumers of the goods or services in question who are reasonably well informed and reasonably observant and circumspect (Case C-24/05 P *Storck v OHIM* [2006] ECR I-5677, paragraph 23 and the case-law cited).

The products in question

- 33 It is apparent from the arguments put forward by the applicant before the Court that it considers the products, in regard to which distinctive character must be assessed, to be exclusively expensive microphones, in particular, studio microphones. However, having regard to the list of products reproduced at paragraph 4 above, this view cannot be accepted. It is apparent from the use of the words 'in particular' in the description of the products that studio microphones, condenser microphones and pressure-gradient microphones were included only as examples and the list of products covered, therefore, microphones in general.
- 34 In that regard, it could be that the applicant produces only expensive, high-quality microphones which, therefore, are bought only by professionals and acoustic specialists. However, as is apparent from the Court's case-law, circumstances outside

of the right conferred by the Community trade mark, such as the concept of marketing and in particular the price of the relevant product, are not subject to registration and consequently cannot be taken into account in the course of the assessment of the distinctive character of a mark (see, to that effect, Joined Cases T-324/01 and T-110/02 *Axions and Belce v OHIM (Brown cigar shape and gold ingot shape)* [2003] ECR II-1897, paragraph 36 and the case-law cited).

35 It is not clear from the documents before the Court that the high quality or the expensive nature of the products covered by the application for registration are features necessarily imposed by the nature of those products (namely, microphones) or by the shape of the trade mark applied for, as reproduced at paragraph 2 above. On the contrary, the claim of the applicant that the affixing of a microphone head grill confirms that the product is of high value is contradicted by the arguments that the applicant itself put forward before the Board of Appeal to the effect that certain microphones of a similar design were low-quality products which were not in direct competition with those of the applicant. Nor is it clear from the documents before the Court that the shape of the mark applied for is able to be affixed only to studio microphones. On the contrary, the applicant confirms that, of itself, the head fulfils no function.

36 Furthermore, the Court takes the view that it should not accede to the request to limit the list of products covered by the application for registration, as reproduced at paragraph 4 above, to 'studio microphones and their parts', as the applicant pleaded, by way of alternative submission, in its reply. The Court considers that this request seeks to alter the relevant public, with regard to whom the Board of Appeal analysed the distinctive character of the trade mark applied for, and as a consequence necessarily seeks to alter the scope of the dispute. It should be recalled in this regard that under Article 135(4) of the Rules of Procedure of the Court of First Instance the parties' pleadings may not change the subject-matter of the proceedings before the Board of Appeal. The task of the Court in the present proceedings is to review the legality of the decisions of the Boards of Appeal (Case T-173/00 *KWS Saat v OHIM (Shade of orange)* [2002] ECR II-3843, paragraph 13, and Case T-164/03 *Ampafrance v OHIM — Johnson & Johnson (monBeBé)* [2005] ECR II-1401, paragraphs 20 and 21).

37 Accordingly, the distinctive character of the mark applied for must be assessed in regard to the products contained in the list set out at paragraph 4 above.

The relevant public

38 As regards the relevant public, it must be held that the relevant products are not, in principle, intended for a large section of the public, but for a narrow band of consumers. Consequently, the definition used by the Board of Appeal at paragraph 24 of the contested decision and not disputed by the applicant should be adopted. According to that definition, the relevant products cover 'the narrow band of people who have a particular knowledge concerning microphones'.

39 However, regard being had to the abovementioned factors regarding the relevant products, that definition should not be taken to cover 'exclusively professionals, in particular sound technicians for whom microphones are a work tool', as the applicant suggests. Microphones, understood without the limitation sought by the applicant in its reply, are certainly aimed at a broader public, including consumers who do not use them for professional purposes.

40 It should, moreover, be recalled that the relevant public's perception of the mark is influenced by its level of attention, which is likely to vary according to the category of goods or services in question (Case C-342/97 *Lloyd Schuhfabrik Meyer* [1999] ECR I-3819, paragraph 26). In the present case, it can be presumed that, as microphones are goods which are used less frequently and are of a higher value than everyday consumer items, the public is likely to have an increased level of attention in choosing the products in question.

Distinctive character

- 41 According to established case-law, the criteria for assessing the distinctive character of three-dimensional marks consisting of the appearance of the product itself are no different from those applicable to other categories of trade mark (Case C-24/05 P *Storck v OHIM*, paragraph 24 and the case-law cited). Therefore, the distinctive character of the mark applied for should be assessed with regard to the criteria mentioned at paragraph 32 above.
- 42 None the less, for the purpose of applying those criteria, the relevant public's perception is not necessarily the same in the case of a three-dimensional mark, which consists of the appearance of the product itself, as it is in the case of a word or figurative mark, which consists of a sign unrelated to the appearance of the products it describes. Average consumers are not in the habit of making assumptions about the origin of products on the basis of their shape or the shape of their packaging in the absence of any graphic or word element, and it could therefore prove more difficult to establish distinctiveness in relation to such a three-dimensional mark than in relation to a word or figurative mark (Case C-24/05 P *Storck v OHIM*, paragraph 25 and the case-law cited).
- 43 In those circumstances, only a mark which departs significantly from the norm or customs of the sector and thereby fulfils its essential function of indicating origin is not devoid of any distinctive character for the purposes of Article 7(1)(b) of Regulation No 40/94 (Case C-24/05 P *Storck v OHIM*, paragraph 26 and the case-law cited).
- 44 In the present case, it is necessary to examine, at the outset, the arguments concerning whether the relevant public is aware that the shape of a microphone head grill may indicate its origin.

45 In this regard, it must first be stated that, contrary to what the applicant asserts, the Board of Appeal did not err in law by stating, at paragraph 23 of the contested decision, that the perception of the relevant public is not necessarily the same in the case of a three-dimensional mark, made up of the shape of the product itself, as in the case of a word or figurative mark which involves a sign independent of the shape of the goods that it describes. In so doing, the Board of Appeal did not in any way decide that the consumer was, in principle, indifferent to the shape as an indication of the origin of the product, or that a microphone head grill could never have a distinctive character for the purposes of Article 7(1)(b) of Regulation No 40/94.

46 Secondly, as regards the relevant public's perception in the current case, the Court considers that the fact that the average consumer of the relevant products is endowed with a high level of attention does not suffice, on its own, to establish that he or she is used to recognising an indication of origin in the shape of the products. Although it is possible to presume that the relevant public may be more attentive to the different technical or aesthetic details of the product, that does not automatically imply that they may perceive it as having the role of a trade mark. The Court points out, in this regard, that the applicant has put forward no concrete evidence to establish the existence of a practice, in the relevant sector, which involves distinguishing products from different manufacturers on the basis of their shape. In the absence of such evidence the argument that the shape of a microphone head grill lends itself particularly well to individual identification of the relevant products is also insufficient.

47 It is necessary to add that, even if the average consumer of those products was fully able to perceive the shape of microphone head grills as being an indication of their origin, this finding would not mean that every shape of microphone head grill has the distinctive character required to enable it to be registered as a Community trade mark. To find, in such a scenario, that the mark applied for has distinctive character, it would also be necessary to examine if the shape in question has good enough characteristics to retain the public's attention (see, to that effect, Case T-393/02 *Henkel v OHIM (Shape of a white and transparent bottle)* [2004] ECR II-4115, paragraph 34 and the case-law cited).

48 As regards the question of determining whether the mark applied for is or is not lacking distinctive character, it is necessary to take into consideration the overall impression that it creates, which is not incompatible with a successive examination of the different presentational features used by this mark. It may be useful, in the course of the overall assessment, to examine each of the constituent features of the trade mark (Case C-286/04 P *Eurocermex v OHIM* [2005] ECR I-5797, paragraphs 22 and 23 and the case-law cited).

49 According to the applicant's description of the mark applied for, which seems correct with regard to the reproduction of that mark at paragraph 2 above, that mark is characterised by the following features:

- a circular metal ring;

- a metal frame perpendicular to the metal ring;

- two wire mesh half heads opposite each other, going from the metal ring to the metal frame;

- the flattening of the two half heads converging towards the tip of the head in the form of hyperbolic partial ellipses.

50 While the applicant agrees with the Board of Appeal that the first three abovementioned features equally characterise numerous other microphone head

grills, it maintains that the shape of the microphone head grill forming the mark applied for is markedly distinguishable from those of normal and traditional microphone head grills by reason of the symmetrical flattening of the wire mesh on either side of the frame. Owing to the partial cutting along the plane of an essentially cylindrical body, each surface has the unusual shape of a hyperbolic partial ellipse which is clearly visible in the foreground as well as from the side and constitutes an 'identifying imprint' of the mark applied for. It claims that the Board of Appeal failed to take account of this characteristic and therefore based its assessment of the distinctive character on an incomplete analysis of the mark at issue.

- 51 Clearly, in this regard, the Board of Appeal, in its description of the features comprising the mark applied for, detailed in paragraph 25 of the contested decision, did not mention the flattening of the wire mesh. However, it is equally clear from this paragraph that it based its finding, namely that the mark applied for was lacking any additional feature such as to make it capable of imprinting itself in the memory and of being identified, as such, as a product from a specific undertaking, on an examination of the documents produced by the examiner.
- 52 Analysis of the Board of Appeal's documents in the case confirms that several microphone head grills referred to by the examiner are characterised by the flattening of the wire mesh so that their surfaces have a 'hyperbolic partial ellipse' shape. In addition, the applicant itself admits that, among the examples given by the examiner, there were microphone head grills in an 'analogous' or 'similar' shape. In any case, it is clear from the Board of Appeal's documents in the case that the measures taken, by the applicant, with regard to certain of those undertakings were based on the fact that they were manufacturing or marketing microphone head grills with an identical or practically identical design to that of the applicant's mark.
- 53 The Court holds, in those circumstances, that the abovementioned finding of the Board of Appeal is not called into question by the incomplete nature of the description of the features comprising the mark applied for. In any case, it is

necessary to state that, according to the scheme of Regulation No 40/94, the registration can take effect only on the basis of, and within the limits of, the application for registration filed by the applicant with OHIM. It follows that the description of the mark applied for, given by the Board of Appeal, is irrelevant as regards the assessment of the distinctive character of the shape at issue, since only the shape as reproduced at paragraph 2 above can be the object of the assessment (see, to that effect, Case T-12/04 *Almdudler-Limonade v OHIM (Shape of a bottle of lemonade)*, not published in the ECR, paragraph 42, and Case T-15/05 *De Waele v OHIM (Shape of a sausage)* [2006] ECR II-1511, paragraph 36).

54 It is necessary to make clear that, aside from the flattening of the wire mesh in the shape of hyperbolic partial ellipses, the applicant sets out no characteristic of the shape forming the mark applied for which, taken alone or in combination with others, would allow the relevant public to distinguish those products from products of other undertakings. From this the Court must conclude, that the potential differences between the shape forming the mark applied for and other microphones, characterised by the flattening of the wire mesh in the shape of hyperbolic partial ellipses, which are described in the documents of the Board of Appeal, are not such as to attract the attention of the relevant public as an indicator of the origin of the products at issue. Furthermore, the fact that the relevant public is likely to have an increased level of attention in choosing the products at issue does not cast doubt on that finding, when account is taken of the degree of similarity between the mark applied for and the other shapes examined.

55 Moreover, the fact that the shape of the microphone head grill comprising the mark applied for has no function, of itself, is also not such as to cast doubt on that finding. In so far as the relevant public perceives the sign as an indication of the commercial origin of the goods or services, whether or not it serves simultaneously a purpose other than that of indicating commercial origin, for example a technical purpose, is unrelated to its distinctiveness (Case T-173/00 *Shade of orange*, paragraph 30).

- 56 As regards the applicant's argument that the mark applied for is markedly distinguishable from ordinary and traditional microphone head grills having cylindrical or spherical shapes, it must be noted that the relevant public, as defined by the Board of Appeal, having a special knowledge in the relevant sector will have knowledge not only of the ordinary and traditional shapes of the products at issue but also of less typical forms which might seem unusual to the layman. However, the Court takes the view that the examples included in the Board of Appeal's documents show, to the requisite legal standard, that the relevant public is accustomed to the presence of microphone head grills having the characteristic which the applicant considers as being an 'identifying imprint' of the mark applied for, and therefore that this kind of microphone head grill is part of the norm or customs of the market.
- 57 It is noted, however, that the applicant contests the relevance of the examiner's examples. It makes the point that, as regards the microphones relied on by the examiner, which had an analogous head to that of the shape of the mark applied for, their manufacturers were forced to give up their production and marketing, as it detailed before the Board of Appeal. The uses mentioned by the examiner can no longer compromise the distinctive character of the mark applied for as they no longer exist.
- 58 In this regard, first, the Court considers that the factual claims of the applicant have not been sufficiently established for legal purposes. As OHIM observed at the hearing, it is not clear from the grounds of appeal, or its annexes, that protective measures have been successfully undertaken concerning all the analogous shapes mentioned by the examiner. In particular, regarding the Røde microphone, it appears that protective measures have been taken only with regard to the German distributor of its products, Kotec Music Electronic.
- 59 Secondly, it is clear from the Board of Appeal's documents that the applicant took protective measures with regard to certain analogous shapes after the date on which

the application for registration was lodged. In those circumstances, to reject the relevance of those examples of shapes on the grounds that the competitors of the applicant have relinquished their use could lead to the registration of a trade mark which was lacking intrinsic distinctive character at the time of the lodging of the application. Such an outcome cannot, however, be accepted (see, to that effect, Case T-128/01 *DaimlerChrysler v OHIM (Calandre)* [2003] ECR II-701, paragraph 41).

60 Thirdly, and in any event, the Court considers that the Board of Appeal was correct in law to hold, at paragraph 29 of the contested decision, that the behaviour adopted, rightly or wrongly, by competing undertakings is not enough in the present case to confer a distinctive character on the mark applied for.

61 Indeed, as has been pointed out above, the relevant public is already accustomed to analogous shapes to that comprising the mark applied for, and the mark applied for is for that reason lacking in distinctive character. There is no reason to imagine that the fact that competing undertakings have been forced to give up producing or marketing products with an analogous shape to that comprising the mark applied for has brought about a sudden change in the norms or customs of the sector.

62 It must also be added that the relevance of the examples of analogous shapes for the purposes of assessing the distinctive character of the mark applied for, within the meaning of Article 7(1)(b) of Regulation No 40/94, cannot be denied on the ground that the conduct of third parties producing or marketing those products having those analogous shapes may possibly infringe national laws relating to unfair competition (see, to that effect, Case T-12/04 *Shape of a bottle of lemonade*, paragraph 51) or trade mark rights. It is recalled that the Community trade mark regime is an autonomous system, comprising a set of rules and pursuing objectives which are peculiar to it, and it applies independently of any national system. Consequently, the registrability of a sign as a Community trade mark is to be assessed on the basis of the relevant Community legislation alone (Case T-88/00 *Mag Instrument v OHIM (Shape of torches)* [2002] ECR II-467, paragraph 41, and

Case T-393/02 *Shape of white and transparent bottle*, paragraph 45). Moreover, the applicant has not established that the shapes mentioned by the examiner do not reflect the norms or real customs of the relevant sector.

63 In those circumstances, the relevance of the examples relied on by the examiner, for the purposes of the assessment of the distinctive character of the mark applied for, cannot be placed in doubt.

64 Further, as regards the evidence intended to demonstrate the excellent design of the shape at issue, it must be recalled that the fact that goods benefit from a high quality of design does not necessarily mean that a mark consisting of the three-dimensional shape of those goods enables ab initio those goods to be distinguished from those of other undertakings for the purposes of Article 7(1)(b) of Regulation No 40/94 (Case C-136/02 P *Mag Instrument v OHIM*, paragraph 68). Consequently, the Board of Appeal was entitled to hold that it was possible that consumers would regard the design of the mark applied for as aesthetic, but that it was unlikely that they would see in it a reference to the origin of the products (paragraph 25 of the contested decision).

65 Moreover, the argument first put forward by the applicant at the hearing, according to which the Board of Appeal, at paragraph 22 of the contested decision, wrongly referred itself to paragraph 36 of the judgment in *SAT.2*, which was annulled by the Court of Justice (see paragraph 25 above), can be rejected without any need to examine its admissibility. It is clear from the contested decision that the Board of Appeal found a lack of distinctive character on the ground that the mark applied for could not, on account solely of its shape, imprint itself in the memory of the relevant public and be identified, not as some kind of microphone head grill shape, but as the product of a specific undertaking (paragraph 25 of the contested decision). Therefore, the Board of Appeal did not rely on the wording formulated in paragraph 36 of the *SAT.2* judgment, but attempted to determine whether the mark applied for would allow the relevant public to distinguish the applicant's products from those of

another source. Therefore, notwithstanding the wording in paragraphs 22 and 27 of the contested decision, the Board of Appeal reached its decision by correctly applying the relevant criteria, in accordance with the case-law mentioned at paragraph 32 above.

66 Finally, the request for measures of organisation of procedure and instructions (see paragraph 11 above) must also be rejected. It is recalled, in that regard, that it is for the Court of First Instance to assess the usefulness of such measures (Case C-199/99 P *Corus UK v Commission* [2003] ECR I-11177, paragraph 67, and Case T-1/90 *Pérez-Mínguez Casariego v Commission* [1991] ECR II-143, paragraph 94). In the present case, the Court takes the view that the proceedings as a whole have provided it with sufficient information. The documents of the Board of Appeal contain, as is clear from the earlier findings, sufficient evidence to establish the merits of the grounds for refusal upheld under Article 7(1)(b) of Regulation No 40/94.

67 In the light of all the foregoing the action must be dismissed.

Costs

68 Under Article 87(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the applicant has been unsuccessful, it must be ordered to pay the costs in accordance with the form of order sought by OHIM.

On those grounds,

THE COURT OF FIRST INSTANCE (First Chamber)

hereby:

- 1. Dismisses the action;**

- 2. Orders Georg Neumann GmbH to pay the costs.**

Cooke

García-Valdecasas

Labucka

Delivered in open court in Luxembourg on 12 September 2007.

E. Coulon

Registrar

J.D. Cooke

President