

Case T-305/04

Eden SARL

v

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

(Community trade mark — Olfactory mark: Smell of ripe strawberries — Absolute ground for refusal — Sign not capable of being represented graphically — Article 7(1)(a) of Regulation (EC) No 40/94)

Judgment of the Court of First Instance (Third Chamber), 27 October 2005 II - 4708

Summary of the Judgment

- 1. Community trade mark — Definition and acquisition of the Community trade mark — Signs capable of constituting a mark — Signs not capable of being perceived visually — Included — Condition — Signs which can be represented graphically — Olfactory signs (Council Regulation No 40/94, Art. 4)*

2. *Community trade mark — Definition and acquisition of the Community trade mark — Absolute grounds for refusal — Signs not capable of constituting a mark — Olfactory sign — Smell of ripe strawberries*
(Council Regulation No 40/94, Arts 4 and 7(1)(a))

1. Article 4 of Regulation No 40/94 on the Community trade mark must be interpreted as meaning that a trade mark may consist of a sign which is not in itself capable of being perceived visually, provided that it can be represented graphically, particularly by means of images, lines or characters, and that the representation is clear, precise, self-contained, easily accessible, intelligible, durable and objective. A graphic representation of a sign must enable the sign to be precisely identified in order to ensure the sound operation of the trade mark registration system. Consequently, the requirements relating to the validity of a graphic representation may not be modified or relaxed in order to facilitate the registration of signs whose nature makes their graphic representation more difficult.

be the subject of a description which satisfies all the requirements laid down by Article 4 of Regulation No 40/94.

(see paras 24-25, 28, 39)

2. An olfactory sign which is not perceived visually, described by the words 'smell of ripe strawberries' and consisting of the colour image of a ripe strawberry is not capable of constituting a Community trade mark within the meaning of Articles 4 and 7(1)(a) of Regulation No 40/94 if it has not been represented graphically.

As regards olfactory signs, it cannot be ruled out that such a sign might possibly

Since the description 'smell of ripe strawberries' could refer to several varieties of strawberries and therefore to several distinct smells, it is neither unequivocal nor precise and does not eliminate all elements of subjectivity in the process of identifying and perceiving the sign claimed.

Moreover, since the image of a strawberry represents only the fruit which emits a smell supposedly identical to the olfactory sign at issue, and not the smell claimed, that does not amount to a graphic representation of the olfactory sign. In addition, since strawberries, or at least some of them, have a different smell according to their variety, the image of a strawberry whose variety is not specified does not enable the olfactory sign claimed to be identified with clarity and precision.

graphic representation is not able to satisfy those requirements and at least one of the elements in the representation must satisfy all the requirements. Consequently, since the description in words and the image of a ripe strawberry do not satisfy the conditions required of graphic representation, their combination does not constitute a valid graphic representation.

Finally, a combination of methods of representation not capable, in themselves, of satisfying the requirements of

(see paras 33, 40-41, 45)