

Case T-270/06

Lego Juris A/S

v

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

(Community trade mark — Application for a three-dimensional Community trade mark — Red Lego brick — Absolute ground for refusal — Sign which consists exclusively of the shape of goods which is necessary to obtain a technical result — Article 7(1)(e)(ii) of Regulation (EC) No 40/94 — Offers of evidence)

Judgment of the Court of First Instance (Eighth Chamber), 12 November
2008 II - 3120

Summary of the Judgment

1. *Community trade mark — Appeals procedure — Appeals before the Community judicature — Legality of a decision of a Board of Appeal (Council Regulation No 40/94, Art. 63)*

2. *Community trade mark — Definition and acquisition of the Community trade mark — Absolute grounds for refusal — Signs which consist exclusively of the shape of goods which is necessary to obtain a technical result*
(Council Regulation No 40/94, Art. 7(1)(e)(ii))
3. *Community trade mark — Definition and acquisition of the Community trade mark — Absolute grounds for refusal — Signs which consist exclusively of the shape of goods which is necessary to obtain a technical result*
(Council Regulation No 40/94, Art. 7(1)(e)(ii))

1. The purpose of the action before the Court of First Instance is to review the legality of decisions of the Boards of Appeal of the Office for Harmonization in the Internal Market (Trade Marks and Designs) within the meaning of Article 63 of Regulation No 40/94 on the Community trade mark. It is therefore not the Court's function to re-evaluate the factual circumstances in the light of evidence adduced for the first time before it. To admit such evidence is contrary to Article 135(4) of the Rules of Procedure of the Court of First Instance, according to which the parties' pleadings may not change the subject-matter of the proceedings before the Board of Appeal.

national judgment into account but that it infringed a provision of Regulation No 40/94, with case-law cited in support of that plea.

(see paras 22, 24)

2. Article 7(1)(e)(ii) of Regulation No 40/94 on the Community trade mark provides that 'signs which consist exclusively of ... the shape of goods which is necessary to obtain a technical result ... shall not be registered'.

Neither the parties nor the Court of First Instance itself can however be precluded from drawing on Community, national or international case-law for the purposes of interpreting Community law. That possibility of referring to national judgments is not covered by the case-law where the plea is not that the Board of Appeal failed to take the factual aspects of a specific

The word 'exclusively', which appears in that article, must be read in the light of the expression 'essential characteristics which perform a technical function', used in paragraphs 79, 80 and 83 of Case C-299/99 *Philips* [2002] ECR I-5475. It is apparent from that expression that the addition of non-essential characteristics

having no technical function does not prevent a shape from being caught by that absolute ground of refusal if all the essential characteristics of that shape perform such a function.

The expression ‘necessary to obtain a technical result’, which appears in that article, does not mean that that absolute ground of refusal applies only if the shape at issue is the only one which could achieve the intended result. Accordingly, in order for that absolute ground of refusal to apply, it is sufficient that the essential characteristics of the shape combine the characteristics which are technically causal of, and sufficient to obtain, the intended technical result, even if that result can be achieved by other shapes using the same or another technical solution.

(see paras 36, 38, 39, 43)

3. The determination of the essential characteristics which perform a technical function of a shape is carried out, in the framework of Article 7(1)(e)(ii) of Regulation No 40/94 on the Community trade

mark, with the specific aim of examining the functionality of the shape at issue. The perception of the target consumer is not relevant to the analysis of the functionality of the essential characteristics of a shape. The target consumer may not have the technical knowledge necessary to assess the essential characteristics of a shape and therefore certain characteristics may be essential from his point of view even though they are not essential in the context of an analysis of functionality and vice versa. Accordingly, it must be held that the essential characteristics of a shape must be determined objectively for the purposes of applying Article 7(1)(e)(ii) of Regulation No 40/94, on the basis of its graphic representation and any descriptions filed at the time of the application for the trade mark.

When analysing the functionality of the essential characteristics thus determined, there is nothing to prevent the Office for Harmonization in the Internal Market (Trade Marks and Designs) from taking account of any relevant evidence.

(see paras 70, 78)