



Reports of Cases

JUDGMENT OF THE GENERAL COURT (Third Chamber)

25 November 2020*

(EU trade mark – International registration designating the European Union –
Three-dimensional sign – Shape of a dark bottle – Absolute ground for refusal – No distinctive
character – Article 7(1)(b) of Regulation (EU) 2017/1001)

In Case T-862/19,

Brasserie St Avoild, established in Saint-Avoild (France), represented by P. Greffe, D. Brun and
F. Donaud, lawyers,

applicant,

v

European Union Intellectual Property Office (EUIPO), represented by A. Folliard-Monguiral
and V. Ruzek, acting as Agents,

defendant,

ACTION brought against the decision of the Fourth Board of Appeal of EUIPO of
21 October 2019 (Case R 466/2019-4), concerning the international registration designating the
European Union of a three-dimensional sign consisting of the shape of a dark bottle,

THE GENERAL COURT (Third Chamber),

composed of A.M. Collins, President, V. Kreuzsitz and G. Steinfatt (Rapporteur), Judges,

Registrar: J. Pichon, Administrator,

having regard to the application lodged at the Registry of the General Court on 18 December 2019,

having regard to the response lodged at the Registry of the General Court on 28 February 2020,

further to the hearing on 10 September 2020,

gives the following

* Language of the case: French

Judgment

Background to the dispute

- 1 On 16 March 2018, the applicant, Brasserie St Avold, designated the European Union in international registration No 1408065 of a three-dimensional sign consisting of the shape of a dark bottle. The trade mark which is the subject of the international registration designating the European Union is the three-dimensional sign reproduced below:



- 2 The goods in respect of which the protection of the trade mark was sought are in Classes 32 and 33 of the Nice Agreement Concerning the International Classification of Goods and Services for the Purposes of the Registration of Marks of 15 June 1957, as revised and amended, and correspond to the following description:
 - Class 32: ‘Beers; mineral waters (beverages); aerated waters; fruit-based beverages; fruit juices; syrups for beverages; preparations for making beverages; lemonades; fruit nectars; soda water; aperitifs, non-alcoholic’;
 - Class 33: ‘Alcoholic beverages (except beer); wine; wines of protected appellation of origin; wines of protected geographical indications’.
- 3 By decision of 25 January 2019, the examiner at the European Union Intellectual Property Office (EUIPO) refused protection of the international registration on the basis of Article 7(1)(b) of Regulation (EU) 2017/1001 of the European Parliament and of the Council of 14 June 2017 on the European Union trade mark (OJ 2017 L 154, p. 1).

- 4 On 20 February 2019, the applicant filed a notice of appeal with EUIPO, pursuant to Articles 66 to 71 of Regulation 2017/1001, against the examiner’s decision.
- 5 By decision of 21 October 2019 (“the contested decision”), the Fourth Board of Appeal of EUIPO dismissed the appeal on the ground that the sign at issue was devoid of any distinctive character within the meaning of Article 7(1)(b) of Regulation 2017/1001.
- 6 To reach that conclusion, in the first place, the Board of Appeal considered that, since the sign at issue corresponded to one of the most obvious shapes of packaging for the alcoholic and non-alcoholic beverages covered by the application for protection, namely the bottle, it could be regarded as distinctive only if it departs significantly from the norm or customs of the sector. Those differences should be specific, memorable and perceived by the public as indicators of the commercial origin of the goods.
- 7 In the second place, the relevant public is composed of purchasers of beverages, be they alcoholic or not, in the whole of the European Union.
- 8 In the third place, the shape of the dark-coloured bottle, with a capped top, is usual in the beverages sector. As regards the white label, which is wrapped in an irregular manner around the body of the bottle, the specific examples noted by the examiner show that this is a characteristic which is not unusual in the sector concerned, whether the label covers the bottle fully or partly. Those specific examples support the conclusion that the public concerned is more inclined to identify the commercial origin of beverages, be they alcoholic or not, by reference to the word elements on the labels rather than by reference to the shape or position of those labels. The public concerned would not perceive the sign at issue as an indicator of origin, whether the label is perceived as the representation of a bishop’s mitre or as a napkin folded into a triangle. The sign at issue is not capable of being easily and instantly memorised by the relevant public as a distinctive sign. Moreover, the label may be perceived as having the function of stopping drips when the liquid is poured.
- 9 Therefore, the sign at issue consists only of a combination of elements that are typical of the goods concerned, namely a bottle and a label, the shape and positioning of which do not differ substantially from certain basic shapes of those goods, but rather look like a mere variant of them. The alleged differences from the norms of the sector are perceptible only following a much closer inspection, which the average consumer does not carry out, and therefore they are not perceived as indications of the commercial origin of the goods concerned. That consumer will perceive the sign at issue as an ornamental, decorative or functional finish on the goods concerned, which, moreover, does not differ substantially from the norms of the sector.
- 10 In the fourth place, the Board of Appeal stated that the registrations obtained in France and the United States could not be binding on its assessment.

Forms of order sought

- 11 The applicant claims that the Court should:
- annul the contested decision;
 - order EUIPO to pay the costs.

12 EUIPO contends that the Court should:

- dismiss the action;
- order the applicant to pay the costs.

Law

The admissibility of evidence adduced for the first time before the Court

- 13 Paragraph 43 of the application contains two photographs which supposedly represent, respectively, a shelf of bottles with labels that are consistent with the alleged norm of the sector and a shelf of the applicant's products bearing the mark applied for.
- 14 Those documents, produced for the first time before the Court, cannot be taken into consideration. The purpose of actions before the Court is to review the legality of decisions of the Boards of Appeal of EUIPO for the purposes of Article 72 of Regulation 2017/1001, so it is not the Court's function to review the facts in the light of documents produced for the first time before it. Accordingly those documents must be excluded, without it being necessary to assess their probative value (see, to that effect, judgment of 24 November 2005, *Sadas v OHIM – LTJ Diffusion (ARTHUR ET FELICIE)*, T-346/04, EU:T:2005:420, paragraph 19 and the case-law cited).

Substance

- 15 In support of the action, the applicant raises a single plea in law, alleging infringement of Article 7(1)(b) of Regulation 2017/1001.
- 16 That plea is divided into three parts. In the first place, the applicant submits that the Board of Appeal has misunderstood the characteristics and the nature of the sign at issue. In the second place, the Board of Appeal, in essence, applied incorrect criteria for the purposes of assessing the distinctive character of the sign at issue. In the third place, the Board of Appeal erred in concluding that the sign at issue was devoid of any distinctive character.

The first part, alleging a misunderstanding of the characteristics and the nature of the trade mark applied for

- 17 In essence, the applicant puts forward three complaints in connection with this part. First, it complains that the Board of Appeal incorrectly defined the sign at issue. That sign is composed of the label positioned in a specific way on a bottle, but the bottle does not form part of the sign at issue. Secondly, it submits that the shape and positioning of that label on the bottle depart very significantly from the norm and customs of the sector. Thirdly, that label has no functional aspect.
- 18 Since the arguments put forward in connection with the latter two complaints concern the specific assessment of whether the sign at issue has distinctive character and supplement the arguments put forward in connection with the third part, they will be taken into consideration in the context of that third part.

- 19 As regards the first complaint, the applicant submits that the sign at issue is composed of the following elements:
- a label in the shape of a right-angled triangle;
 - the specific affixing of that label to a bottle: its hypotenuse is at the base of the bottle and the label wraps fully around the cylindrical body of the bottle in such a way that its height varies around the circumference of the bottle, forming a pointed peak on one side and a trough in the shape of an uppercase ‘V’ on the opposite side, thus evoking a bishop’s mitre; the height of the label is such that it projects beyond the cylindrical body of the bottle and therefore, at the level of the peak, it does not follow the shape of the bottle.
- 20 It is therefore of little importance that ‘the dark bottle with the cap seal [is] the usual packaging for the goods in question’, since the applicant is claiming rights in respect of a specific label which is affixed to a bottle in a distinctive way, and not in respect of the container itself. Consequently, examining the characteristics of the bottle is irrelevant and it is incorrect to describe the sign at issue, as the Board of Appeal has done, as ‘the three-dimensional representation from four angles of a dark bottle with a cap seal ... with a white label wrapped around the lower part of that bottle’. On the contrary, the Board of Appeal should have examined whether the combination of the elements of the label set out in paragraph 19 above, as a whole, formed a distinctive sign.
- 21 EUIPO disputes the applicant’s arguments.
- 22 In that regard, in response to a question put by the Court at the hearing, the applicant stated that the sign in respect of which registration was sought was indeed a three-dimensional sign, as represented in paragraph 2 of the application and in the application for protection, namely a bottle with a cap seal and a label.
- 23 Therefore, the Board of Appeal was right to take into consideration the overall impression given by all of those elements.
- 24 Moreover, it is clear *inter alia* from paragraphs 16, 17, 20, 22, 23 and 25 of the contested decision that the Board of Appeal duly took account of all of the elements which shape the perception of the sign at issue on the part of the consumer concerned.
- 25 Therefore, and subject to the clarification in paragraph 18 above, the first part must be rejected.

The second part, alleging the application of incorrect criteria for the purposes of assessing the distinctive character of the sign at issue

- 26 Referring to the judgment of 27 February 2002, *Eurocool Logistik v OHIM (EUROCOOL)* (T-34/00, EU:T:2002:41, paragraph 39), the applicant submits that a minimum degree of distinctive character is sufficient to render Article 7(1)(b) of Regulation 2017/1001 inapplicable. The sign at issue is composed of a combination of elements which distinguish it clearly from other shapes offered on the market for the goods concerned, and therefore, viewed as a whole, it has the required minimum degree of distinctive character.
- 27 According to the applicant, that conclusion is confirmed by the judgment of 3 October 2018, *Wajos v EUIPO (Shape of a container)* (T-313/17, not published, EU:T:2018:638, paragraph 26), in accordance with which, in the food sector, which is highly competitive, there is a considerable

incentive for operators to make their products identifiable in relation to those of their competitors, particularly as regards their appearance and the design of their packaging, in order to attract consumers' attention. It therefore appears that the average consumer is quite capable of perceiving the shape of the packaging of the goods concerned as an indication of their commercial origin, in so far as that shape presents characteristics which are sufficient to hold his or her attention.

- 28 The applicant maintains that the Board of Appeal disregarded case-law in paragraph 11 of the contested decision by taking the view, in essence, that it could prove more difficult to establish distinctive character in relation to a three-dimensional mark, which consists of the appearance of the product itself or of its packaging, than in relation to a word or figurative mark. Therefore, by requiring that the sign at issue have a higher degree of distinctive character, the Board of Appeal erred in law.
- 29 EUIPO disputes the applicant's arguments.
- 30 In that regard, in accordance with Article 4 of Regulation 2017/1001, an EU trade mark may consist of the shape of goods or their packaging, provided that that shape is capable of distinguishing the goods of one undertaking from those of other undertakings.
- 31 In accordance with Article 7(1)(b) of Regulation 2017/1001, trade marks which are devoid of any distinctive character are not to be registered.
- 32 According to settled case-law, for a trade mark to possess distinctive character, for the purposes of that latter provision, it must serve to identify the product or the service in respect of which registration is sought as originating from a particular undertaking, and thus to distinguish that product from those of other undertakings (see judgments of 20 October 2011, *Freixenet v OHIM*, C-344/10 P and C-345/10 P, EU:C:2011:680, paragraph 42 and the case-law cited, and of 24 September 2019, *Fränkischer Weinbauverband v EUIPO (Shape of an ellipsoidal bottle)*, T-68/18, not published, EU:T:2019:677, paragraph 15 and the case-law cited).
- 33 That distinctive character must be assessed, first, by reference to the goods or services in respect of which registration is sought and, secondly, by reference to the perception of the relevant public (see judgments of 20 October 2011, *Freixenet v OHIM*, C-344/10 P and C-345/10 P, EU:C:2011:680, paragraph 43 and the case-law cited, and of 16 January 2014, *Steiff v OHIM (Fabric tag with metal button in the middle section of the ear of a soft toy)*, T-434/12, not published, EU:T:2014:6, paragraph 19 and the case-law cited).
- 34 It should also be borne in mind that, in order to assess whether or not a trade mark has any distinctive character, the overall impression given by it must be considered. That does not mean, however, that one may not first examine each of the individual features of the get-up of that mark in turn. It may be useful, in the course of the overall assessment, to examine each of the components of which the trade mark concerned is composed (see judgment of 16 January 2014, *Fabric tag with metal button in the middle section of the ear of a soft toy*, T-434/12, not published, EU:T:2014:6, paragraph 18 and the case-law cited).
- 35 Moreover, a minimum degree of distinctive character is sufficient to render the absolute ground for refusal set out in Article 7(1)(b) of Regulation No 207/2009 inapplicable (judgment of 25 September 2015, *Bopp v OHIM (Representation of a green octagonal frame)*, T-209/14, not published, EU:T:2015:701, paragraph 45 and the case-law cited).

- 36 According to settled case-law, the criteria for assessing the distinctive character of three-dimensional trade marks consisting of the shape of the product itself are no different from those applicable to other categories of trade mark. However, when those criteria are applied, the perception of the average consumer is not necessarily the same in relation to a three-dimensional mark consisting of the appearance of the product itself as it is in relation to a word or figurative mark consisting of a sign which is independent of the appearance of the products it designates. 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 distinctive character in relation to such a three-dimensional mark than in relation to a word or figurative mark (see judgments of 20 October 2011, *Freixenet v OHIM*, C-344/10 P and C-345/10 P, EU:C:2011:680, paragraphs 45 and 46 and the case-law cited, and of 24 September 2019, *Shape of an ellipsoidal bottle*, T-68/18, not published, EU:T:2019:677, paragraph 17 and the case-law cited; see also, by analogy, judgment of 8 April 2003, *Linde and Others*, C-53/01 to C-55/01, EU:C:2003:206, paragraph 48).
- 37 More specifically, since liquid goods must of necessity be packaged for sale, the average consumer will perceive the packaging first and foremost simply as a form of container. A three-dimensional trade mark consisting of such a container is not distinctive unless it permits the average consumer of the goods concerned, who is reasonably well informed and reasonably observant and circumspect, to distinguish those goods from the goods of other undertakings without any detailed examination or comparison and without being required to pay particular attention (see judgment of 24 September 2019, *Shape of an ellipsoidal bottle*, T-68/18, not published, EU:T:2019:677, paragraph 18 and the case-law cited; see also, by analogy, judgment of 12 February 2004, *Henkel*, C-218/01, EU:C:2004:88, paragraph 53).
- 38 In those circumstances, the more closely the shape for which registration as a trade mark is sought resembles the shape most likely to be taken by the product in question, the greater the likelihood of the shape being devoid of any distinctive character for the purposes of Article 7(1)(b) of Regulation 2017/1001. Only a trade 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 2017/1001 (see judgments of 29 April 2004, *Henkel v OHIM*, C-456/01 P and C-457/01 P, EU:C:2004:258, paragraph 39; and of 12 December 2019, *EUIPO v Wajos*, C-783/18 P, not published, EU:C:2019:1073, paragraph 24 and the case-law cited; see, also, by analogy, judgment of 12 February 2004, *Henkel*, C-218/01, EU:C:2004:88, paragraph 49).
- 39 Similarly, it is important to point out that novelty or originality are not relevant criteria in the assessment of the distinctive character of a trade mark. Accordingly, for a three-dimensional mark to be registered, it is not enough that it is original, but it must differ substantially from the basic shapes of the goods in question, commonly used in trade, and not look like a mere variant, or even a possible variant of those shapes. Furthermore, it is not necessary to provide evidence of the usual character of the shape in trade to establish the lack of distinctive character of the trade mark applied for (see judgment of 7 October 2015, *The Smiley Company v OHIM (Shape of a face in the form of a star)*, T-244/14, not published, EU:T:2015:764, paragraph 38 and the case-law cited; see, to that effect, judgment of 28 June 2019, *Gibson Brands v EUIPO – Wilfer (Shape of a guitar body)*, T-340/18, not published, EU:T:2019:455, paragraph 39).
- 40 The Court has also held that the presence on the market of a significant number of shapes encountered by consumers made it unlikely that they would regard a particular shape as belonging to a specific manufacturer rather than being just one of the variety of shapes

characterising the market. The broad range of shapes with an original or fanciful appearance already present on the market limits the likelihood of a particular shape being considered as departing significantly from the prevailing norms on that market and, therefore, from being identified by consumers solely on the basis of its specificity or its originality (judgment of 28 June 2019, *Shape of a guitar body*, T-340/18, not published, EU:T:2019:455, paragraph 36).

- 41 It follows that, where a three-dimensional mark is constituted by the shape of the product for which registration is sought or by the shape of that product's packaging, the mere fact that that shape is a variant of a common shape of that type of product or of the packaging of that type of product is not sufficient to establish that the trade mark is not devoid of any distinctive character for the purposes of Article 7(1)(b) of Regulation 2017/1001. It must always be determined whether such a trade mark permits the average consumer of that product, who is reasonably well informed and reasonably observant and circumspect, to distinguish the product concerned from those of other undertakings without conducting an analytical examination and without paying particular attention (see judgment of 12 December 2019, *EUIPO v Wajos*, C-783/18 P, not published, EU:C:2019:1073, paragraph 25 and the case-law cited).
- 42 In the present case, in paragraphs 8 to 13 of the contested decision, the Board of Appeal set out the applicable case-law in respect of the examination as to whether a three-dimensional mark, consisting of the shape of the product itself or of its packaging, has distinctive character. It recalled inter alia the requirement that a trade mark of that kind had to depart significantly from the norm or customs of the sector. In paragraphs 14 to 27 of the contested decision, it applied that case-law to the sign at issue and concluded, in paragraphs 25 to 27 of that decision, first, that that sign consisted only of a combination of elements that were typical of the goods concerned, namely a bottle and a label, the shape and positioning of which did not differ substantially from certain basic shapes of those goods, but rather looked like a mere variant of those shapes, secondly, that the alleged differences from the norms of the sector are perceptible only following a much closer inspection, which the average consumer does not carry out, and therefore they are not perceived as indications of the commercial origin of the goods concerned and, thirdly, that that consumer will perceive the trade mark as an ornamental, decorative or functional finish on the goods covered by it, which, moreover, does not differ substantially from the norms of the sector.
- 43 It is true that it follows from paragraph 26 of the judgment of 3 October 2018, *Shape of a container* (T-313/17, not published, EU:T:2018:638), to which the applicant refers, that, in the food sector, which is highly competitive, there is considerable incentive for operators to make their goods identifiable in relation to those of their competitors, particularly as regards their appearance and the design of their packaging, in order to attract consumers' attention, and therefore it appears that the average consumer is quite capable of perceiving the shape of the packaging of the goods concerned as an indication of their commercial origin, in so far as that shape presents characteristics which are sufficient to hold his attention.
- 44 However, first, it should be recalled that, since the judgment of 8 April 2003, *Linde and Others* (C-53/01 to C-55/01, EU:C:2003:206, paragraph 48), which was delivered in connection with the application of First Council Directive 89/104/EEC of 21 December 1988 to approximate the laws of the Member States relating to trade marks (OJ 1989 L 40, p. 1), but whose principles can be transposed to the present case, it has been settled case-law that 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 distinctive character in relation to such a three-dimensional mark than in relation to a word or figurative mark (see paragraph 36 above).

- 45 Secondly, in paragraph 26 of the judgment of 3 October 2018, *Shape of a container* (T-313/17, not published, EU:T:2018:638), the General Court referred to its judgment of 3 December 2003, *Nestlé Waters France v OHIM (Shape of a bottle)* (T-305/02, EU:T:2003:328, paragraph 34), which had been delivered before the Court of Justice had specified, in its judgments of 12 February 2004, *Henkel* (C-218/01, EU:C:2004:88, paragraph 49), of 29 April 2004, *Henkel v OHIM* (C-456/01 P and C-457/01 P, EU:C:2004:258, paragraph 39), and of 7 October 2004, *Mag Instrument v OHIM* (C-136/02 P, EU:C:2004:592, paragraph 31), that, as regards three-dimensional trade marks consisting of the shape of the product itself or of its packaging, only a trade mark which significantly departed from the norm or customs of the sector and thereby fulfilled its essential original function was not devoid of any distinctive character for the purposes of Article 7(1)(b) of Regulation 2017/1001 (see paragraph 38 above).
- 46 Accordingly, the rule emerging from paragraph 34 of the judgment of 3 December 2003, *Shape of a bottle* (T-305/02, EU:T:2003:328), must be interpreted in the light of the subsequent case-law of the Court of Justice (see paragraphs 36 and 38 above). Therefore, the premiss that the average consumer is quite capable of perceiving the shape of the packaging of the goods concerned as an indication of their commercial origin, in so far as that shape presents characteristics which are sufficient to hold his or her attention, must be understood in the sense that it covers a situation where the three-dimensional mark applied for, which consists of the shape of the product itself or of its packaging, departs significantly from the norm or customs of the sector.
- 47 This is a fortiori the case since, in its judgment of 3 October 2018, *Shape of a container* (T-313/17, not published, EU:T:2018:638, paragraph 28), the General Court specified that, in order to assess the distinctive character of a three-dimensional mark, consisting of the shape of the product itself or of its packaging, it was necessary to ascertain whether the trade mark applied for differed significantly from the norm or customs of the sector. In its judgment of 12 December 2019, *EUIPO v Wajos* (C-783/18 P, not published, EU:C:2019:1073, paragraphs 24, 26 and 30), the Court of Justice expressly confirmed the application in that case of the test as to the ‘significant departure from the norm and customs of the sector concerned’.
- 48 It follows that the applicant is wrong to claim that the Board of Appeal applied incorrect criteria for the purposes of assessing the distinctive character of the trade mark applied for.
- 49 The second part of the plea must therefore be rejected.

The third part, alleging that the Board of Appeal wrongly concluded that the sign at issue was devoid of any distinctive character

- 50 Having regard to the clarification in paragraph 18 above, the applicant raises two complaints in connection with this third part. First, it submits, in essence, that the Board of Appeal incorrectly defined the norm and customs of the sector. Secondly, the shape and positioning of the label on the bottle have no functional aspect and depart significantly from the norm and customs of the sector.

– The first complaint, alleging an error in the definition of the norm and customs of the sector

- 51 The applicant submits that the examples mentioned by the Board of Appeal are not representative of the norm and customs of the sector. In the food sector and, more specifically, the alcoholic beverages sector, the norm is to affix to the bottle a label which is usually rectangular and fully attached to a part of the cylindrical body of the bottle.
- 52 EUIPO disputes the applicant's arguments.
- 53 In that regard, it is clear from settled case-law that, if an applicant claims that a trade mark applied for is distinctive, despite EUIPO's analysis, it is for that applicant to provide specific and substantiated information to show that the trade mark applied for has an intrinsic distinctive character (see judgments of 28 September 2010, *Rosenruist v OHIM (Representation of two curves on a pocket)*, T-388/09, not published, EU:T:2010:410, paragraph 37 and the case-law cited, and of 21 November 2018, *Bopp v EUIPO (Representation of an equilateral octagon)*, T-460/17, not published, EU:T:2018:816, paragraph 53 and the case-law cited).
- 54 It should also be recalled that the Board of Appeal is not required to indicate, in a general and abstract manner, all of the norms and customs of the sector concerned (see judgment of 13 May 2020, *Cognac Ferrand v EUIPO (Shape of braiding on a bottle)*, T-172/19, not published, EU:T:2020:202, paragraph 49 and the case-law cited).
- 55 In the present case, by endorsing the examiner's analysis regarding the range of shapes of labels on drinks bottles, including in respect of their positioning, and by reproducing some of them in paragraph 17 of the contested decision, the Board of Appeal established that the norm and the customs of that sector were characterised by a wide variety of forms of presentation (see, to that effect, judgment of 28 June 2019, *Shape of a guitar body*, T-340/18, not published, EU:T:2019:455, paragraphs 38 and 39).
- 56 Therefore, even if the shape of the majority of labels for the goods in question is, as the applicant claims, a rectangle, which is fully attached to a part of the cylindrical body of the bottle, the norm and the customs of the sector cannot be reduced, as EUIPO correctly submits, to the single shape that is statistically the most widespread, but include all of the shapes that the consumer is used to seeing on the market.
- 57 It follows that the first complaint must be rejected.

– The second complaint, alleging an error in the assessment of the functional nature of the label and the significant departure from the norm and customs of the sector

- 58 First, the applicant submits that the shape of the label and the way in which it wraps around the bottle are very specific. The sign at issue is characterised by its label in the shape of a right-angled triangle the hypotenuse of which is at the base of the bottle and whose height varies around the circumference of the bottle in such a way as to form a pointed peak on one side and a trough in the shape of an uppercase 'V' on the opposite side, thus evoking a bishop's mitre. The height of the label projects beyond the cylindrical body of the bottle and therefore, at the level of the peak, the label does not follow the shape of the bottle.

- 59 By contrast, in almost all of the examples provided by the Board of Appeal, the label is crumpled and not smooth. Those labels follow the body of the bottle wholly or partially. The only example given in the contested decision representing a label that wraps around the body of the bottle was a rectangular label, however, and the height of that label was the same around the whole circumference of the bottle, and was not a label the uneven height of which creates a pointed peak.
- 60 Accordingly, the sign at issue is very different from those examples and, therefore, from the norm of the sector. None of the examples noted by the Board of Appeal reproduces a bottle with a label that has the distinctive characteristics of the sign at issue. The specific aspect of that sign is perceptible even at a distance. The relevant public will not perceive it as a traditional variant of possible shapes for the goods concerned, but as an indication of origin that is easy to remember and that enables that public, without even seeing the wording on the label, to distinguish immediately the applicant's products from those of different commercial origins.
- 61 Secondly, the Board of Appeal's assertion in paragraph 20 of the contested decision that the pointed peak of the label may not be visible or noticed if the person consuming the liquid from the bottle holds the bottle by placing his hand over that part is surprising. On the one hand, the peak is not at the level of the body of the bottle, that is to say the lower part which the consumer holds when he or she wishes to consume the liquid, but at the level of the neck of the bottle, and therefore the consumer does not cover it with his or her hand when he or she drinks. On the other, there is no requirement that, in order to be distinctive, a sign must be permanently visible to the consumer. Otherwise, no trade mark could be protected since any sign affixed to a product may have to be concealed temporarily depending on the way in which it is stored or used.
- 62 Thirdly, contrary to what the Board of Appeal states in paragraph 24 of the contested decision, the label to which the applicant refers has no functional aspect and is not intended to catch the drop of liquid that remains on the bottle neck immediately after the drink has been poured into a glass or has been drunk directly from the bottle. It is not a napkin, but a label made of thin paper which has no absorbent properties. A drop which travels down the length of the bottle, be it on the side of the pointed peak or the side of the 'V'-shaped trough, will not be contained by the label referred to any better than by any other paper label.
- 63 EUIPO disputes the applicant's arguments.
- 64 In that regard, first, it should be recalled that the sign at issue consists of the three-dimensional representation from four different angles of a dark bottle with a cap seal. A white label is wrapped around the lower part of the bottle in an irregular manner, with the exception of a peak that points upwards and does not follow the shape of the body of the bottle in that part. On the other side of the bottle, the label forms a trough in the shape of an uppercase 'V'.
- 65 Both the Board of Appeal and the examiner have demonstrated that the food and beverages sector is characterised by a wide variety of shapes of labels and methods for their positioning on bottles. There are, *inter alia*, crumpled or smooth labels, such as the one at issue here, and labels which fully cover the bottle or wrap around only part of it, like the label at issue here. In some cases, the whole label is stuck to the bottle, whereas in others, such as that at issue, part of the label is not attached to it. Similarly, there are rectangular or round labels, or those which, like the label at issue, use other geometric shapes. Although it cannot be ruled out that a label such as that covered by the application for registration, or even a very similar label, is not yet present on the market for the goods concerned, it must however be recalled that novelty or originality are not relevant criteria in the assessment of the distinctive character of a trade mark. The appearance

and positioning of the label in question on the bottle are in line with the shapes that the consumer may usually see on the market. Accordingly, as is apparent, in essence, from inter alia paragraphs 17 to 25 of the contested decision, far from departing significantly from the norm or customs of the sector, that label is merely a possible variant of shapes that already exist.

- 66 As the Board of Appeal rightly found, in particular in paragraphs 23 and 26 of the contested decision, in order to perceive the differences between the label covered by the sign at issue and the other shapes of label commonly seen on the market, a close examination must be carried out, which the average consumer of the goods in question will not do. Therefore, those differences will not grab his or her attention and will not be memorised by him or her as a distinctive sign (see the case-law cited in paragraphs 37 and 41 above).
- 67 In any event, a simple departure from the norm or customs of the sector is not sufficient to hold that the sign at issue has distinctive character (judgment of 13 May 2020, *Shape of braiding on a bottle*, T-172/19, not published, EU:T:2020:202, paragraph 55).
- 68 Secondly, as is clear from paragraphs 18, 19, 22 and 27 of the contested decision, and as EUIPO correctly submits, average consumers will expect the label to be the medium for conveying information on the products in question, including designating their commercial origin, but will not expect the label itself, thus in the absence of any graphic or word element, to indicate the provenance of those products. The applicant also acknowledges that the label will be covered with word elements (see paragraph 60 above). Consumers may also perceive the label as an ornamental finish. In the absence of information of such a kind as to alert those consumers to the fact that that sign is supposed to designate the origin of the goods concerned, they will not be able to imagine that the sign in question is supposed to designate a specific producer and will not pay particular attention to it (see, by analogy, judgments of 9 October 2002, *Glaverbel v OHIM (Glass-sheet surface)*, T-36/01, EU:T:2002:245, paragraph 28, and of 21 November 2018, *Representation of an equilateral octagon*, T-460/17, not published, EU:T:2018:816, paragraph 63).
- 69 Accordingly, the sign at issue is not capable of designating the origin of the goods in question. Therefore, it does not have the required minimum degree of distinctive character.
- 70 That conclusion is not called into question by the applicant's arguments.
- 71 First, the applicant has not demonstrated that the average consumer will understand the label as alluding to a bishop's mitre, which would contribute to distinguishing it from the norm and customs of the sector. On the one hand, unlike that label, a bishop's mitre usually has two points, one at the front and the other at the back. On the other, consumers across the European Union taken as a whole would have to understand the meaning of the label as a bishop's mitre. A pointed mitre is usually worn only by bishops in Catholic and Anglican churches and in other less common churches. It is not used in Orthodox or Evangelical churches, which, however, are widespread in a number of Member States. In any event, the applicant stated at the hearing that it is of little importance whether consumers recognise the label as alluding to a mitre.
- 72 Secondly, the Board of Appeal's finding in paragraph 20 of the contested decision, in accordance with which, in essence, consumers may not perceive that the peak of the label is detached from the top part of the bottle, depending on how they hold it when they consume its contents, must be understood in the light of the case-law cited in paragraphs 37 and 41 above, as recalled and applied in particular in paragraphs 12, 22, 23 and 26 of the contested decision, in accordance with which the public in question, which is reasonably well informed and reasonably observant,

will not, in general, pay particular attention when acquiring the goods concerned, and therefore the label in question and the way in which it is affixed to the bottle will not really grab its attention. Similarly, the Board of Appeal did not hold that no consumers would perceive that element. Therefore, it merely suggested the possibility that a consumer who is reasonably observant may not perceive that particular feature if he or she holds the bottle in a certain way. Such a situation cannot be ruled out since the bottle may be held by both the lower part and the upper part, even if this is likely to happen only rarely.

- 73 Moreover, it is clear from, inter alia, paragraphs 17 to 19, 21, 22 and 27 of the contested decision that that particular feature of the label will not be perceived by consumers as an element capable of conferring distinctive character on it. First, it represents only a slight aesthetic or decorative variation compared to the shapes present on the market. Secondly, average consumers will expect the label to be the medium for conveying information on the products in question, including designating their commercial origin, but will not expect the label itself, thus in the absence of any graphic or word element, to indicate the provenance. Therefore, the reasons contained in paragraph 20 of the contested decision were in fact superfluous.
- 74 Thirdly, although the reasons contained in paragraphs 24 and 27 of the contested decision, relating to the alleged anti-drip function of the label in question, are less convincing, as EUIPO has also acknowledged, they are, in any event, superfluous. Not only does it follow from the foregoing that the other grounds set out in the contested decision are already sufficient to justify the finding that the sign at issue is devoid of any distinctive character, the findings in question are introduced by the expressions ‘similarly’ or indeed ‘or even’, which confirm that they are of secondary importance in the Board of Appeal’s reasoning. It follows that the applicant’s arguments seeking to challenge that reasoning must be rejected, since they are, in the present case, ineffective (see, to that effect, judgment of 29 January 2020, *Vinos de Arganza v EUIPO – Nordbrand Nordhausen (ENCANTO)*, T-239/19, not published, EU:T:2020:12, paragraph 51).
- 75 The consumers of the goods concerned will therefore not perceive the sign at issue as designating the commercial origin of those goods, and therefore that sign does not have the minimum degree of distinctive character for the purposes of Article 7(1)(b) of Regulation 2017/1001.
- 76 The finding that the sign does not have the minimum degree of distinctive character for the purposes of that provision is all the more valid since, in addition to the label in question, the sign at issue consists of a dark bottle together with its cap which is quite common compared with the norm of the sector as established by the Board of Appeal, a finding which has not been disputed by the applicant. The sign at issue is therefore merely a variant of the forms of presentation present on the market.
- 77 It follows from all of the foregoing that the applicant has not demonstrated that the sign at issue departed significantly from the norm or customs of the sector in a market which is characterised by a wide variety of shapes of packaging. Therefore, the second complaint of the third part must also be rejected.
- 78 It follows from all of the foregoing that the single plea in law must be rejected and, therefore, the action must be dismissed in its entirety.

Costs

- 79 Under Article 134(1) of the Rules of Procedure of the General Court, 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 EUIPO.

On those grounds,

THE GENERAL COURT (Third Chamber)

hereby:

- 1. Dismisses the action;**
- 2. Orders Brasserie St Avold to pay the costs.**

Collins

Kreuschitz

Steinfatt

Delivered in open court in Luxembourg on 25 November 2020.

[Signatures]