

**DECISION
of the Fifth Board of Appeal
of 3 June 2022**

In case R 1839/2021-5

The Absolut Company Aktiebolag
SE-117 97 Stockholm
Sweden

Applicant / Appellant

represented by Greyhills Rechtsanwälte Partnerschaftsgesellschaft mbB Glombitza
Luckhaus Steinberg, Unter den Eichen 93, 12205 Berlin, Germany

APPEAL relating to European Union trade mark application No 18 023 659

THE FIFTH BOARD OF APPEAL

composed of V. Melgar (Chairperson and Rapporteur), R. Ocquet (Member) and
S. Rizzo (Member)

Registrar: H. Dijkema

gives the following

Decision

Summary of the facts

- 1 By an application filed on 15 February 2019, The Absolut Company Aktiebolag ('the applicant') claiming the priority of Swedish trade mark No 2019-00031 with a filing date of 3 January 2019, sought to register the 3D mark



as a European Union trade mark ('EUTM') for the following list of goods as limited on 5 April 2019.

Class 33 - Alcoholic beverages, namely vodka.

- 2 During the proceedings before the examiner, there have been several exchanges with the applicant concerning the distinctive character of the sign applied for. The Office maintained the position that the application lacks distinctive character pursuant to Article 7(1)(b) EUTMR whereas the applicant contends that the sign has sufficient distinctiveness complying with the main function of a trade mark enabling the consumers to identify the producer of the goods, namely 'vodka' (Class 33).
- 3 On 9 September 2021, the examiner took a decision ('the contested decision') entirely refusing the trade mark applied for, under Article 7(1)(b) EUTMR. The decision was based on the following main findings:
 - The Office based its examination on all the evidence on file. This includes both the examples provided by the applicant and those resulting from the Office's own research, knowledge and searches.
 - The relevant consumers would perceive the sign applied for, as a whole, as non-distinctive and not as the trade mark of a particular proprietor. The elements that appear on the sign are not outstanding or eye-catching as to create an overall impression, which would significantly depart from the customs and norm on the corresponding market.

- Since, despite the Office’s analysis based on such experience, the applicant claims that the trade mark applied for is distinctive, it is up to the applicant to provide specific and substantiated information to show that the trade mark applied for has distinctive character, either intrinsically or acquired through use; it is much better placed to do so, given its thorough knowledge of the market (05/03/2003, T-194/01, Soap device, EU:T:2003:53, § 48).
- The applicant argued that the trade mark applied for has distinctive character in the relevant market sector. In support of this, it provided arguments regarding the markets of alcoholic beverages in general (from the USA market, claiming that it applies to the EU market), and vodka, in particular. It submitted examples of bottles of alcoholic beverages, including vodka, and samples, explaining the different features of the mark applied for, providing examples of case-law and of EUTM applications and registrations to support its arguments. It also introduced an expert statement and information about the launch of the product.
- The Office analysed all of the arguments and evidence submitted and still considered them not sufficient to disprove the Office’s analysis. The Office’s reasoning has been clearly explained (using examples) and justified based on the established case-law and current practice. In particular, it has provided examples of shapes of bottles that have been refused registration.
- Finally, the Office examined the expert statements submitted by the applicant. The applicant’s view that ‘(...) if the EU public is accustomed to highly diverse product designs and packaging, it will naturally understand that such product designs, to the extent that they are particularly unique and stand out from the crowd, also serve as a source-identifier in trade (emphasis removed)’ and that the relevant public is used to paying attention to the shape, colour, surface and other elements of a bottle to determine the origin of its content, has not been reinforced by further evidence.
- Vodka is a mass-consumption good and the level of attention of the relevant consumers is average. All the evidence provided both by the Office and by the applicant shows that there is a great variety of shapes, forms, colours, and features, which are combined in different ways. Although the applicant’s bottle may be different in appearance from other shapes on the relevant market (differing from each of them in certain aspects, in combination with the features available on the market), this does not mean that the applicant’s application is unexpected and distinctive within such a competitive environment. The average consumer will perceive this packaging as a mere variation of a container. Following the cited case-law, this is not enough for this shape mark to be considered distinctive.
- For the abovementioned reasons, and pursuant to Article 7(1)(b) EUTMR, the application for European Union trade mark No 18 023 659 is hereby rejected for all the goods claimed.

- 4 On 29 October 2021, the applicant filed an appeal against the contested decision, requesting that the decision be entirely set aside. The statement of grounds of the appeal was received on 7 January 2022.

Grounds of appeal

- 5 The arguments raised in the statement of grounds may be summarised as follows:
- The examiner clearly applies a too strict examination standard and errs by concluding that the mark applied for, seen as a whole, would fail to differentiate itself from other shapes of bottles on the relevant market, and would be perceived merely as simple variations of such shapes pre-existing in the market environment, and that the mark applied for would thus not be apt to commit the target public's memory to a certain source origin and could not be understood as a badge of origin.
 - In particular, it is contested that the relevant consumers on the vodka market would perceive the sign applied for as non-distinctive and not as the trade mark of a particular proprietor. To support its standpoint, the Office bases its analysis of the allegedly common individual features of the mark applied for, mainly on its 'own acquired experience' rather than on the vast evidence provided by the applicant in the course of the application procedure and the witness statements provided from acknowledged experts in the field of bottle designs for alcoholic beverages.
 - While the examiner duly acknowledges – on the basis of the evidence provided both by the Office and by the applicant – that the shape mark applied for is different in appearance from other shapes on the relevant market, differing from each of them in relevant aspects, in particular as concerns the combination of features available on the vodka market for bottles, the Office nevertheless falsely considers that the subject matter of the application, viewed as a whole, would not be 'unexpected' and 'distinctive' in a competitive environment and that the average consumer would perceive the packaging at stake simply as a variation of such container.
 - To the extent that the Office asserts in the contested decision that consumers on the relevant market would be aware of the diversity of shapes, colors and individual features of vodka bottles and would therefore not realize that the shape and get-up of the container (bottle) applied for would function as a 'trade mark', i.e. to denote a particular source origin, the Office errs in law, considering that the mere fact that the relevant trade sector here concerned is characterized by a variety of product shapes, surface patterns and colors does not mean that a new unique possible combination of a bottle shape, surface pattern and color will necessarily be perceived as one of them.
 - In a supplemental notice of grounds for refusal issued on 5 November 2019, the Office submitted seven – barely legible – images of vodka bottles of third parties with a view to defining the market sector of vodka bottles deemed

relevant by the Office, and to support the EUIPO's earlier assertion that the contested EUTM would not be eligible for registration pursuant to Article 7 (1)(b) EUTMR.

Infringement of Article 7(1)(b) EUTMR

- It is in light of the applicable legal framework and the arguments and evidence presented by the applicant in support of registrability that it is necessary to examine whether the Office infringed Article 7(1)(b) EUTMR by nevertheless concluding that the mark applied for lacks distinctive character in respect of the goods (alcoholic beverages, namely vodka) it covers.
- First of all, it is evident both from the evidence initially submitted by the examiner itself and even more so from the evidence produced and filed by the applicant that the sector concerned with vodka is characterised by a variety of differently shaped and colored bottles, bottle closures, wrappers, labels and patterns applied to the glass structure of such vodka bottle, representations of which are shown in the applicant's submissions to the EUIPO.
- While the contested decision appears to concur with the applicant's view that the relevant market of vodka bottles is characterised by a variety of shapes, colors, glass patterns and structures of vodka containers, the Office already erred in its initial assumption that the majority of these bottles are commonplace containers serving merely the purpose of carrying a liquid. Specifically in the market environment of vodka bottles – and apart from more regularly shaped and colored containers – there exists a number of distinctive containers, which 'stand out from the crowd' and do not merely serve a functional purpose (namely of carrying the liquid [vodka] inside) but also the equally important further purpose of prompting the public concerned to the commercial origin of such products per se by using a memorable specific packaging.
- The averagely attentive and circumspect EU consumer of vodka products is well aware of this practice on the relevant market and is thus accustomed to attributing a main 'trademark function' (namely a trade source denoting function) to those product getups having a distinctive character as a complex 3D sign to the extent that it departs markedly from the norms and packaging customs of the sector concerned.
- As concerns the trade sector of vodka bottles, it is also relevant to note that – unlike in the sector of e.g. 'gin bottles' – which may have a different appearance overall, vodka bottles do in fact have some common aesthetics and features. The most commonly used colors on vodka bottles are white, blue and silver and transparent, symbolising coldness. Most vodka bottles are also cylinder shaped, while only some of them feature a relatively short narrow neck.

- In this factual situation, the mark applied for is not devoid of any distinctive character for the goods claimed in Class 33 (vodka). In assessing the protection-establishing uniqueness of a packaging shape as an indication of origin, it is important to ascertain whether packaging shapes are generally used for brand design in the sector of the goods claimed, here in the sector of vodka packaging, and whether these are understood by the target public as indicating origin and an industry practice has developed from this, as in the case of vodka packaging (cf. the German Federal Patent Court GRUR 1998, 584, 585 ‘small googly bottle’; EUIPO Marken R 1999, 366, 368; ‘GRANINI- Bottle’).
- It is therefore necessary to relate the degree of uniqueness of the packaging at hand, which indicates a specific trade origin, to the specific situation and practice in the respective field of goods. If, as in the case here, a comparable combination of shapes, colors of the bottle screw top closures and unique glass surface structures and getups cannot be found in the relevant sectors of the goods, where the deviations are not confined to smaller memorable nuances but rather striking and memorable overall, the public will typically consider the concrete design and getup of the product packaging as having a distinctive character within the meaning of Article 7(1)(b) EUTMR.
- In the field of vodka, a somewhat limited variety of different colors, ornaments/surface structures and shapes are common. To the extent that the bottles and shapes deviate, this is not least due to the peculiarity of the goods, which, firstly, as transparent liquids, have no fixed form and, secondly, their properties and origin are not apparent. In order to make the products distinguishable even when only glanced at from a distance and to draw attention to a particular product and to provide an incentive to buy, the external impression of the packaging must therefore be eye-catching, which leads to different packaging designs in this sector.
- Following the restriction of the list of goods to ‘alcoholic beverages, namely vodka’ in respect to the sought-after shape mark (EUTM), and according to the investigations and the conclusive evidence provided by the applicant, the variety of shapes with regard to certain design features is, however, in fact somewhat limited. In this range of goods, relatively tall, slim, elongated bottles are common and the colors blue, white/transparent, red and at most – very sporadically – gold or black for the bottles dominate. The use of a copper-colored screw cap is fully unusual here, in fact not found at all. A maze-like surface structure comparable to that of the mark applied for is, too nowhere to be found in the entire market environment of vodka bottles. The same is true for the unique rectangular bottom of the bottle. Bottle bodies in the market environment of vodka bottles tend to have rather very slim cylindrical shapes and not straight bottles shapes combined with a very short neck and a rectangular bottle bottom. The bottle caps in the market environment look different (except for the ABSOLUT® bottles of the applicant itself) and do not use the color copper in any case.

- The aforementioned design elements, which are peculiar to the applicant’s bottle design and refer to a source origin coming from the applicant, are not even present in isolation in the market environment of light spirits or vodka. The combination of these elements is all the more exceptional in that market environment and draws the viewer’s attention to the applicant’s product to a particular degree thereby denoting to the public a certain source origin of the product, for which only one single undertaking is responsible. Overall, the totality of these features therefore distinguishes the shape mark applied for so clearly from the usual shapes, forms and colors of vodka bottles that the relevant public can easily recognise the imaginative bottle getup of the applicant and will thus perceive the same as an indication of a particular manufacturing company responsible for the product at stake.
- Given that the target public is accustomed to the fact that extraordinary design elements of the nature here at issue do not only serve the purpose of mere product decoration or to carry the liquid inside but are specifically aimed at enabling consumers to distinguish products so designated from competing products on the same market with regards to the product source (by merely looking at the bottle getup from a distance disregarding any additional word marks attached), it is precisely the customs and norms in the trade of clear sprits and vodka in particular that will make consumers think of a particular product origin of the bottle container forming the sought-after subject matter of the refused EUTM. Therefore, the relevant public with a level of attention being at least average will be surprised by that easily memorable shape, eye-catching screw top (cap) coloring and the maze-like outer design/pattern applied to part of the body corpus, for which protection is sought, and will perceive the same as departing significantly from the norm and customs of the vodka sector capable of indicating the origin of the goods concerned.
- Accordingly, the EUIPO’s Examination Division erred in finding that the EUTM applied for did not have distinctive character within the meaning of Article 7(1)(b) EUTMR. This is especially true given that the examiner was plainly unable to make a reference to substantially similar bottle getups on the relevant market segment of vodka bottles, which even finally prompted him to no longer make any specific references to specific getups in the market environment at all. Indeed, he merely refers to the applicant very generally and broadly by allegedly acquired ‘experiences’ of the Office from which it could deduce that the product getup applied for would be commonplace and not markedly different from the pre-existing getups on that market.
- At least if the applicant, as in the present case, has specifically submitted information on the trade mark environment and has provided extensive evidence in this regard, the Office cannot abstractly rely on the Office’s allegedly acquired, deviating ‘experience’ in order to deny protection to an EUTM application on the basis of the claimed non-distinctiveness.

- From the point of view of the rule of law alone, the facts which lead the Office to refuse the mark on the basis of the absolute grounds for refusal must be legally plausible, verifiable and fully justiciable. If the Office ignores both the independent expert opinions as well as the evidence submitted by the applicant in the market environment in the vodka sector, it makes it virtually impossible for the latter to present suitable counter-arguments on protectability in order to rebut the rejection based on mere ‘acquired experience’ where the actual evidence provided by the applicant is in contradiction with the unsubstantiated assumptions made by the EUIPO on the basis of its own ‘acquired experience’. This is unlawful and cannot be upheld.
- Contrary to what has been stated in the contested decision of 6 September 2021, the Office’s reasoning and motivation has not been clearly explained by using examples and justified on the basis of established case-law and remains fully incomprehensible and in contradiction of established principles of case-law.
- To the extent that the examiner provided a limited number of examples of shapes of bottles that have been refused registration, these cases are not comparable to the present case as the shapes, colors, surface structures and other combinations thereof did not substantially depart from the customs and norms of the trade in these cases. While the examiner tried in vain to give examples of bottles in the segment of vodka bottles having the same color, he actually failed in doing so because he ignored the fact that the color that has been expressly claimed for the shape mark at issue, namely in respect of the screw top cap, is ‘copper’, that is to say, not ‘gold’. In this regard, the examiner failed to take into account the specific color ‘copper’ that has been claimed for the contested application alongside that the use of this color (for the bottle closure) is entirely unique and nowhere to be seen in the entire market segment of vodka bottles.
- The fact that the product getup applied for does not lack distinctive strength has also been underlined by the applicant by submitting a certificate of registration from the USA (USPTO) for precisely the same complex shape mark. Even though the EUIPO might not be bound by the USPTO’s decision, which affords protection to the same sought-after bottle shape/design, the subject registration in the US is nonetheless indicative of the mark’s capability to distinguish the goods so designated (vodka) in the marketplace.
- Finally, the examiner in charge has distorted the facts by clearly stating in the that the witness statement of Mr. Richard Michael Woodard (Exhibit 4) would actually ‘support’ the Office’s position on non-registrability.
- The examiner is plainly wrong in stating that the expert witness would have confirmed the Office’s position on non-registrability. While the expert witness confirmed that there is a tendency on the relevant market to use diverse designs, he clearly pointed out that the bottle getup at stake clearly stands out and comprises a number of unusual features, which – in

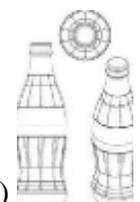
combination – are memorable overall and allow consumers to distinguish the bottle from other competing vodka getups on the same market by the mere reference to its shape color and overall appearance and without a need to read the label.

- In essence, the expert witness has clearly expressed that, based on his experience, the EUTM applied for may well serve, in trade, as a badge of origin and may well function as a trademark in its own right for the goods so designated, namely vodka. Given that Mr. Woodard was not involved in the design of the bottle at stake, his expert opinion as an independent witness has high probative value, which was not appropriately taken into account by the examiner at the EUIPO, who erred in law also in this regard.
- It is also inconceivable as to why the EU case-law cited by the applicant in support of registration and the references made in particular to:

- (21/12/2018, R 1737/2018-4, DEVICE OF A BOTTLE BEARING A



DECORATIVE DRAWING BENEATH A RED SEAL (fig.)



- (31/03/2014, R 525/2013-2, SHAPE OF A BOTTLE (3d))
- (20/10/2011, C-344/10 P & C-345/10 P, Botella esmerilada II,



EU:C:2011:680)

have been considered as ‘irrelevant’ by the examiner. Contrary to the observations made by the examiner, the market sectors are not different, at least not concerning the first decision referred to above pertaining to a three-dimensional spirits bottle getup from Bacardi claiming protection for ‘alcoholic beverages (except beers)’, which includes also ‘vodka’. In this case, as with the other two cases referred to above, it was concluded that the bottle getups are distinctive overall and should be allowed to proceed to registration as EUTMs.

- The aforementioned case and case-law would seem to be directly comparable to the present case. While the vodka packaging here at issue does not consist of a ‘red dot’ or ‘seal’-like emblem on the packaging, it, however, consists of a number of other very fanciful and unusual features, which, appreciated in

conjunction, are much more than the mere sum of their parts and directly enable the target public to perceive the sign applied for as an indication of commercial origin. To the extent that the examiner made reference to other forms of packaging in the relevant market sector of vodka bottles, it is evident that they look fully different and can therefore be distinguished with ease from the bottle getup applied for.

– Likewise, the examiner could not state any plausible reason as to why:

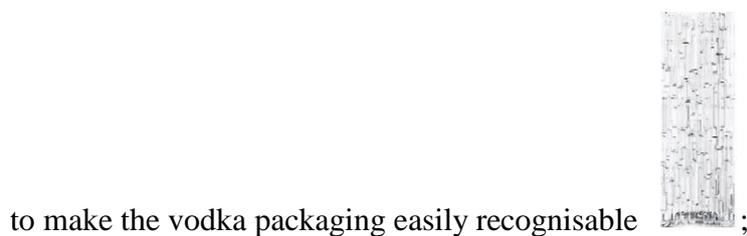
- the highly unusual bottle closure alongside the separated foil, each having the unusual colour ‘copper’ standing out in the relevant market



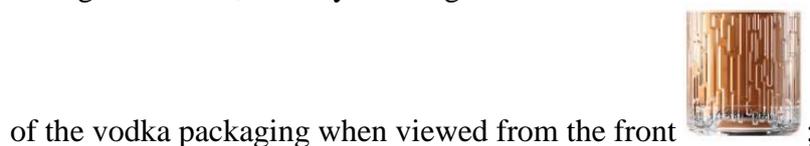
- the eye-catching frames, consisting of vertical and horizontal lines covering most of the back of the bottle shining through the bottle’s glass



- the innovative and exceptional maze-like surface structure applied to the bottle’s sides which is nowhere to be seen on the entire market and helps



- the ‘optical effect’ created by the copper-coloured back relief shining through and being perceived also from the front of the bottle due to the inside of the label on the back being in ‘copper’ colour as well, and shining through the transparent bottle and beverage and being ‘reflected’ through the relief, thereby creating a memorable and unusual impression



- the unusual ‘square shape’ of the bottom of the bottle departing from the norms and customs in the relevant trade (bottles in the sector of vodka are generally ‘cylindrical’ or ‘oval’ and do not contain a square-shaped bottom) and with a ‘look-through’ optical effect created by the ‘copper’-coloured cap ‘shining through’ the bottle; the transparent liquid inside



the bottom of the bottle should not be perceived as distinctive (trade-source indicating) arbitrary features of a vodka bottle get-up, when in fact each of the above arbitrary features referred to above alone, could serve in trade, as a trade mark.

- Moreover, all the arbitrary features of the sign applied for, viewed and appreciated as a whole and in conjunction, will be seen by the target public as a reference to the commercial origin of the goods so designated. The mere fact that singular elements of the mark applied for may also be used by others in trade cannot serve as ample ground for refusal of protection of the contested EUTM so long as this is not meant to show a norm or custom in this sector.
- Finally, as has been stated in the Board of Appeal case-law cited above, a sign may fulfil various functions at the same time. The mere fact that it may also have other functions, and may also serve decorative purposes in parts is not a ground for its refusal, unless it is found that those other functions predominate in such a way that the public would no longer perceive the sign as a reference to a commercial origin of the goods. The latter is, however, not the case here, as has been demonstrated and supported by ample expert witnesses statements.
- It follows that the relevant consumers will be able to repeat, or avoid, the experience of purchasing the goods so packaged (vodka) solely on the basis of the particular combination of the different arbitrary elements, of which the complex EUTM applied for consists. As the sign applied for is highly distinctive per se even in the absence of word elements and as the captioned sign corresponds to a combination of various fanciful features that, viewed and judged in conjunction, are more than the mere sum of its constituent parts, the mark does not incur the ground for refusal contained in Article 7(1)(b) EUTMR.

Conclusion

- The applicant therefore requests that the Board uphold the appeal, annul the contested decision and allow the EUTM to proceed for registration.

Reasons

- 6 All references made in this decision should be seen as references to the EUTMR (EU) No 2017/1001 (OJ 2017 L 154, p. 1), codifying Regulation (EC) No 207/2009 as amended, unless specifically stated otherwise in this decision.
- 7 The appeal complies with Articles 66, and 67, and Article 68(1) EUTMR. It is admissible.

The subject matter of the mark applied for pursuant to Article 3 EUTMIR

- 8 Following Article 3(2) EUTMIR, the representation of the trade mark shall define the subject matter of the registration. Consequently, the scope of protection of the present application extends to the sign as it has been filed. The sign has been filed as a ‘shape mark’ as follows:



- 9 It is clearly visible and striking that the elements which have a colour, in fact do not only have one colour but also different shades or nuances ranging from copper to brown or gold. Since these features are clearly shown on the representation of the mark applied for, forming thus the subject matter of the mark, the Board has to take this coloring into consideration when examining the mark applied for on the absolute grounds for refusal.
- 10 In this regard, the applicant’s view, as expressed before the examiner and also in the statement of grounds that the mark contains only one colour, namely ‘copper’, cannot convince having regard the representation of the mark as filed by the applicant.

Article 7(1)(b) EUTMR

- 11 In accordance with Article 4 EUTMR, a Community trade mark may consist of the shape of a product or its packaging, provided this shape can distinguish an undertaking’s goods from those of other undertakings.
- 12 Under Article 7(1)(b) EUTMR, ‘trade marks which are devoid of any distinctive character’ shall not be registered.
- 13 According to the case-law, the trade marks covered by Article 7(1)(b) EUTMR are in particular those which, from the point of view of the relevant public, are commonly used in trade for the presentation of the goods or services concerned or in connection with which there exists, at the very least, concrete evidence justifying the conclusion that they are capable of being used in that manner (20/11/2002, T-79/01 & T-86/01, Kit Pro / Kit Super Pro, EU:T:2002:279, § 19;

03/12/2003, T-305/02, Bottle, EU:T:2003:328, § 28). The signs referred to in that Article are incapable of performing the essential function of a trade mark, namely that of identifying the origin of the goods or services, thus enabling the consumer who acquired them to repeat the experience, if it proves to be positive, or to avoid it, if it proves to be negative, on the occasion of a subsequent acquisition (27.02.2002, T-79/00, Lite, EU:T:2002:42, § 26; 20.11.2002, T-79/01 & T-86/01, Kit Pro / Kit Super Pro, EU:T:2002:279, § 1930.04.2003, T-324/01 & T-110/02, Zigarrenform / Goldbarren, EU:T:2003:123, § 29; 03.12.2003, T-305/02, Bottle, EU:T:2003:328, § 28).

- 14 Furthermore, where three-dimensional trade marks are concerned, the fact is that the more closely the shape for which registration 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) EUTMR. In contrast, a trade mark which significantly departs from the norm or customs of the sector and thereby fulfils its essential original function is not devoid of distinctive character (12.02.2004, C-218/01, Perwoll, EU:C:2004:88, § 49; 29.04.2004, C-456/01 P & C-457/01 P, Tabs, EU:C:2004:258, § 39).
- 15 With regard to the assessment of the various components, it should be borne in mind that a sign consisting of a combination of elements, each of which is devoid of any distinctive character, may be distinctive provided that concrete evidence, such as, for example, the way in which the various elements are combined, indicates that the sign is greater than the sum of its parts (20.11.2002, T-79/01 & T-86/01, Kit Pro / Kit Super Pro, EU:T:2002:279, § 29; 03.12.2003, T-305/02, Bottle, EU:T:2003:328, § 40).
- 16 According to equally 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 marks (20.10.2011, C-344/10 P & C-345/10 P, Botella esmerilada II, EU:C:2011:680, and the case-law cited).
- 17 However, when those criteria are applied, account must be taken of the fact that the average consumer's perception 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 verbal or figurative mark consisting of a sign which is independent of the appearance of the products it denotes. 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 verbal or graphic 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 verbal or figurative mark (20.10.2011, C-344/10 P & C-345/10 P, Botella esmerilada II, EU:C:2011:680, § 46 and the case-law cited).
- 18 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 207/2009 (20.10.2011, C-344/10 P & C-345/10 P, Botella esmerilada II, EU:C:2011:680, § 47 and the case-law cited).

Relevant target group

- 19 The distinctiveness of a mark can only be assessed, first, in relation to the goods or services for which registration of the sign has been requested and, second, in relation to the perception the section of the public targeted has of those goods or services (27.02.2002, T-79/00, Lite, EU:T:2002:42, § 27, 20.11.2002, T-79/01 & T-86/01, Kit Pro / Kit Super Pro, EU:T:2002:279, § 20).
- 20 It should also be observed that the way in which the relevant public concerned perceives trade marks is influenced by its level of attention, which is likely to vary according to the category of goods or services in question (22.06.1999, C-342/97, Lloyd Schuhfabrik, EU:C:1999:323, § 26).
- 21 Since the mark applied for has no verbal elements, the assessment on the distinctiveness of the mark has to be carried out taking into consideration the consumers in the whole EU (12/9/2007, T-141/06, Glaverbel II, EU:T:2007:273, § 41; 15/11/2007, T-71/06, Windenergiekonverter, EU:T:2007:342, § 44).
- 22 The application regards ‘alcoholic beverages, namely vodka’ in Class 33. In the Scandinavian countries, it is well-known that high-graduated alcohol is quite expensive and has limited distribution channels. In those areas, the consumers’ attention might be higher. However, in other Member States as Spain or Portugal, alcoholic beverages as vodka are not expensive and are available in all kind of shops and selling points. In this regard, the consumers in these countries have an attentiveness ranging from low to average, at the best (18/07/2013, R 233/2012-G, PAPAGAYO ORGANIC, § 51).

On the distinctiveness of the sign applied for

- 23 The applicant’s view that the examination on the distinctiveness of the sign applied for has to be carried out with regard to the specific goods, ‘vodka’ may not be upheld.
- 24 Namely, it does not follow from that case-law (29/04/2004, C-456/01 P & C-457/01 P, Tabs (3D), EU:C:2004:258, § 39 ; 07/05/2015, C-445/13 P, Bottle, EU:C:2015:303, § 91, 12/12/2019, C-783/18P, FORM EINER FLASCHE (3D), EU:C:2019:1073, § 24) that it is necessary systematically to restrict the sector for the purposes of the examination if a shape departs significantly from the norm or customs of the actual goods in respect of which registration is sought. It cannot be excluded that the consumers of a given product may in certain cases be influenced, in their perception of the trade mark which the product bears, by the marketing methods used for other goods which they also use. Thus, depending on the nature of the goods in question and the trade mark applied for, it may be necessary, for the purposes of assessing whether or not the trade mark is devoid of any distinctive character, to take into consideration a wider sector (12/01/2006, C-173/04 P, Standbeutel, EU:C:2006:20, § 32).
- 25 In particular, when, as in the present case, the trade mark for which registration is sought consists of the three-dimensional shape of the packaging of the goods in question – a fortiori where the goods, because of their very nature, must be

packaged in order to be marketed, so that the packaging chosen imposes its shape on the goods and, for the purposes of examining an application for registration as a mark, must be assimilated to the shape of the product, the relevant norm or customs may be those which apply in the sector of the packaging of goods which are of the same type and intended for the same consumers as those goods in respect of which registration is sought (12/01/2006, C-173/04 P, Standbeutel, EU:C:2006:20, § 32).

- 26 In the ‘FORME D'UN TRESSAGE SUR UNE BOUTEILLE (3D)’ judgment, (13/05/2020, T-172/19, FORME D'UN TRESSAGE SUR UNE BOUTEILLE (3D), EU:T:2020:202, § 41), the General Court expressly stated that for the examination of the distinctive character of the shape of a bottle applied for, not only are the goods, ‘rum’ (Class 33), the norms and customs for rum relevant but also consumers of rum are influenced, in their perception of the mark with which it bears, by the marketing methods developed for other beverages of the same type and intended for the same consumers, among which are, in particular, ‘alcoholic beverages’ included in Class 33.
- 27 The applicant puts forward that the following elements of the sign applied for would render it distinctive:
- closure of the bottle in the colour ‘copper’;
 - rectangular body structure and further features as short neck, conical bottle shoulder, bottle structure and proportions;
 - surface design consisting of a very striking crystal-like structure;
 - design of the back of the bottle being entirely ‘copper’ colour, whereby the bottle’s relief appears to be copper colour. The colour ‘copper’ shines through the transparent vodka bottle (and the transparent beverage) and is thus reflected through the relief. This feature – also – constitutes a highly unusual and unique feature of the trade dress and bottle applied for and is per se distinctive and apt to denote a particular trade origin. Apart from the very unusual copper colour, which is not commonly used by the trade in relation to vodka bottles, the covering of merely one single rectangular side of the bottle in ‘copper’ and the shine-through-effect create therewith this particular unique effect, and does not correspond to the customs of the trade;
 - front label consists of a prominent frame in the unusual ‘copper’ colour;
 - the copper-colored neck foil (neck wrapper), alone, is striking and uncommon in the relevant market environment of vodka bottles. EU consumers will readily attribute a certain trade source to a vodka being packaged in such a bottle.
- 28 For the purpose of examining the distinctiveness of the sign applied for, the overall impression produced by it must be examined (11/11/1997, C-251/95, Sabèl, EU:C:1997:528, § 23). That is not incompatible with an examination of

each of the individual features in turn (29/04/2004, T-399/02, Botella Corona, EU:T:2004:120, § 24; 05/03/2003, T-194/01, Soap device, EU:T:2003:53, § 54).

A) Closure of the bottle in the 'copper' colour

- 29 First of all, the closure of the bottle is a normal closure, which has merely technical functions consisting in closing the bottle to protect the liquid. The applicant claims that the colour of that closure is 'copper', however the representation of the mark applied for shows different shades or nuances ranging from copper to brown or gold (see above under paragraphs 9 to 11).

B) Rectangular body structure and further features such as a short neck, conical bottle shoulder, bottle structure and proportions

- 30 Having regard to, in particular, the neighboring sector of the market for whisky and gin, rectangular bottle shapes are very common; the present rectangular shape is merely a slight variant of those shapes present on the market of strong alcoholic beverages.
- 31 Similarly, for the features such as the shorter neck, the conical bottle shoulder, the bottle structure and proportions, these elements are all present in many variants on the wide market of alcoholic beverages with the consequence that these features have no peculiarity, nor do they stand out.
- 32 In this context, the Board wants to stress that regarding the question whether rectangular bottle shapes form part of the market practice for whisky or gin, and if so, whether the mark applied for deviates significantly from those norms or habits, it should be noted that, in order to assess the intrinsic distinctive character of a mark applied for, the Board of Appeal may base its analysis on facts resulting from practical experience generally acquired from the marketing of products of wide consumption, which facts are likely to be known to any person and are known in particular to consumers of these products. In such a case, the Board of Appeal is not obliged to present examples of such practical experience (16/01/2019, T-489/17, DARSTELLUNG EINES FLASCHENVERSCHLUSSES (3D), EU:T:2019:9, § 30 and the case-law cited).
- 33 The rectangular shape is moreover a basic geometrical shape which is in general also common for bottles (19/04/2013, T-347/10, Getränkeflasche, EU:T:2013:201, § 26).

C) Surface design consisting of a very striking crystal-like structure

- 34 The examiner has shown that there are several producers of vodka who use a mazed structure on the glass of the bottles.
- 35 This shows that on the market of strong alcoholic beverages a mazed structure, such as the one included in the present application, is not new, original, astonishing or outstanding. On the contrary, the market and the consumers are also used to and accustomed to seeing such structures on bottles of vodka,

whisky, gin or rum. The surface design of the mark applied for has, therefore, an ornamental or esthetic function and does not enable the consumers to identify the origin of the goods.

- 36 Moreover, the surface design chosen by the applicant is very complex and changes depending on the perspective from which you see it. In this regard, the fact that the design claimed is complex and fanciful is not sufficient to establish that it is distinctive. Its complexity and fancifulness are attributable to the ornamental and decorative nature of the design's finish, rather than indicate the trade origin of the goods.
- 37 In addition, the complexity of the design overall, and the fact that it is applied to the external surface of the product, does not allow the design's individual details to be committed to memory or the design to be apprehended without the product's inherent qualities being perceived simultaneously. The design claimed is not therefore capable of being easily and instantly recalled by the target market as a distinctive sign (13/05/2020, T-172/19, *FORME D'UN TRESSAGE SUR UNE BOUTEILLE* (3D), EU:T:2020:202, § 60-61; 09/10/2002, T-36/01, *Glass Pattern*, EU:T:2002:245, § 28).

D) The design of the back of the bottle being entirely 'copper' colour

- 38 The back of the bottle contains two large rectangular shapes. Following the representation of the mark, there are different shades or nuances ranging from copper to brown or gold (see above under paragraphs 9 to 11). These two rectangular shapes extend from the shoulder of the bottle until its bottom part, occupying thus almost the whole back part of the bottle. As the applicant correctly stated, these rectangular shapes are visible from all sides and will not go unnoticed by the consumers.

E) Front label consists of a prominent frame in the unusual 'copper' colour

- 39 The front label is in white with a frame showing, irrespective of the applicant's view, different shades or nuances ranging from copper to brown or gold (see above under paragraphs 9 to 11). It bears some ornamental patterns.

F) The copper-colored neck foil (neck wrapper)

- 40 A wrapper appears on the neck of the bottle, which shows again different shades or nuances ranging from copper to brown or gold (see above under paragraphs 9 to 11).

Overall assessment

- 41 The Board considers that the first three elements (A) to C)) do not depart significantly from the available forms and customs on the market. However, the further elements (D) to F)) will not go unnoticed by the consumers. These additional elements have a strong impact on the perception of the whole shape of the bottle. In particular, these elements are colored in different shades or nuances

ranging from copper to brown or gold, and this coloring occupies a large part of the bottle. Thereby, the consumers are in a position to recall the design of the back of the bottle, which consists in two large rectangles, the front label and the neck wrapper, which have all the same aforesaid coloring.

- 42 The additional elements (D) to F)) cannot be considered as too complex in order to be remembered. They all have in common the same coloring consisting in the shades or nuances ranging from copper to brown or gold. Thus *e contrario* to the the General Court's reasoning in the 'Farben in Quadraten' judgment (12/11/2008, T-400/07, Farben in Quadraten, EU:T:2008:492, § 47), these aforesaid elements enable the public to establish a link with the producer of the vodka.
- 43 Having said that, the colour scheme in the elements (D) to F)) cannot be considered either as purely 'decorative'. The term 'decorative' is misconceived when applied to everything that has an appeal to the eye. A 'decorative' product or element 'decorates', embellishes. The colour scheme in issue will not be perceived as a purely aesthetic 'decoration' of the claimed goods but, due to its size and predominance, as eye-catching and striking.
- 44 The examiner did not analyse in detail all the elements at issue and in particular those indicated above (under D) to F)). In the contested decision, it has been merely stated that all the elements contained in the sign applied for would as a whole not be sufficient in order to significantly depart from the norms and customs in the corresponding market. There was no specific reasoning in particular as to the elements (D) to F)), which in the Board's view are not simply arbitrary but rather make the sign applied for distinguishable from the shapes of bottles available on the relevant market.
- 45 Even taking into consideration that a single colour normally is in itself not distinctive (06/05/2003, C-104/01, Libertel, EU:C:2003:244, § 65), it must be stressed that in the present case there are shades or nuances ranging from copper to brown or gold, and this coloring covers a significant part of the shape of the bottle applied for.
- 46 In conclusion, the relevant consumers will be able to repeat, or avoid, the experience of purchasing the goods solely on the basis of the particular combination of the different elements of which the mark consists, in particular due to the elements (D) to F)) and their homogenous coloring. Therefore, the Board concludes that the shape of the bottle applied for departs sufficiently from those available on the relevant market with the consequence that the sign applied for does not fall foul of Article 7(1)(b) EUTMR.

Order

On those grounds,

THE BOARD

hereby:

- 1. Annuls the contested decision;**
- 2. Allows the EUTM application to proceed to publication pursuant to Article 44 EUTMR.**

Signed

V. Melgar

Signed

R. Ocquet

Signed

S. Rizzo

Registrar:

Signed

p.o. P. Nafz

