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Marek Salamonowicz
University of Warmia and Mazury in Olsztyn, Poland
ORCID: 0000-0001-6934-2154
m.salamonowicz@uwm.edu.pl

Product's Shape Distinctiveness as a Condition for the Registration of a Three-Dimensional European Union Trademark: Partially Approving Commentary on the Judgment of the General Court of the European Union of 14 July 2021 in Case T-488/20 *Guerlain v European Union Intellectual Property Office (EUIPO)* (OJ C 320, 28.9.2020)*

Zdolność odróżniająca kształtu produktu jako warunek uzyskania prawa ochronnego na trójwymiarowy znak towarowy Unii Europejskiej. Glosa częściowo aprobująca do wyroku Sądu Unii Europejskiej z dnia 14 lipca 2021 r. w sprawie T-488/20 Guerlain przeciwko Urzędowi Unii Europejskiej ds. Własności Intelektualnej (EUIPO) (Dz.Urz. C 320, 28.09.2020)

ABSTRACT

The study is a partially approving commentary on the judgment of the General Court of the European Union in case T-488/20 *Guerlain v European Union Intellectual Property Office (EUIPO)*. The issue in the case was the assessment of the distinctiveness of a sign applied for, comprising a lipstick

CORRESPONDENCE ADDRESS: Marek Salamonowicz, PhD, Dr. Habil., Associate Professor, University of Warmia and Mazury in Olsztyn, Faculty of Law and Administration, Obitza 1, 10-725 Olsztyn, Poland.

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Data: 24/04/2024 19:36:03

in the shape of a boat hull. In the light of its findings, the Court of the European Union referred to recognised criteria for assessment, such as, i.a., a significant deviation of the design from the accepted norms and customs in the given industry sector, including the aesthetic value and originality of the design, as well as the reference of the applied shape to the relevant public. However, the case lacked evidence of secondary distinctiveness, as well as an analysis of the aspect related to the aesthetic functionality of the product and protection of market competition. The General Court came to the debatable conclusion that the shape in question is atypical for lipsticks and differs significantly from all other shapes on the market and consequently has a feature of inherent distinctiveness. This has resulted in a certain liberalisation of standards in obtaining protection for three-dimensional trademarks without word elements. In sectors where design is diverse, a new and unusual variant of the product's shape or its packaging may, in light of the commented judgment, be protected as an EU trademark. This will probably encourage entrepreneurs to file applications for such signs. For the doctrine of law, the judgment is an interesting source of inspiration for the discourse on the systemic role of legal protection of trademarks and industrial designs.

Keywords: three-dimensional mark; inherent distinctiveness; aesthetic functionality; unusual variant of the product's shape

LEGAL NATURE OF THE DISPUTE AND ITS SIGNIFICANCE

The judgment of the General Court of the European Union of 14 July 2021 in case T-488/20 *Guerlain v European Union Intellectual Property Office (EUIPO)* brings some new and liberalising elements to the existing line of case law on the distinctiveness of three-dimensional trademarks. From this perspective, it seems justified to analyse it and try to assess its impact on further practice of law enforcement.

The exclusive rights conferred by registration of a European Union trademark may be particularly attractive for entrepreneurs. This is due, in particular, to the possibility of unlimited renewal of protection for successive periods of ten years and also a wide territorial scope of protection, which covers the entire area of the European Union. Also the scope of subject matter defined by selected classes of goods and services and covering similar goods may be extended "beyond the limits of similarity" in a situation when a trademark acquires reputation.[1] These advantages mean that, although demonstrating the distinctiveness of the shape of a product or its packaging is not a simple task, entrepreneurs often try to obtain such protection.[2] This should not be considered *a priori* as a negative phenomenon, but it creates the need to clearly specify the rules for granting protection to three-dimensional trademarks.

[1] T. Cook, *Three Dimensional Trade Marks in the European Union*, "Journal of Intellectual Property Rights" 2014, vol. 19, p. 426; M. Bohaczewski, *Naruszenie prawa ochronnego na renomowany znak towarowy*, Warszawa 2019, p. 121; J. Sitko, *Naruszenie prawa do znaku towarowego renomowanego. Studium prawnoporównawcze*, Warszawa 2019, p. 232.

[2] Z.M. Petrović, *Legal Conditions for the Protection of Three Dimensional Signs in Trademark Law*, "Pravo – teorija i praksa" 2021, vol. 38(2), p. 64.

Pobrane z czasopisma Studia Iuridica Lublinensia **http://studiaiuridica.umcs.pl**
Data: 24/04/2024 19:36:03

The case under comment concerned an application for registration of a three-dimensional sign consisting of an oblong, conical and cylindrical form of lipstick as a European Union trademark.[3] The applicant was the company Guerlain, established in Paris. The application for registration of the European Union trademark with the European Union Intellectual Property Office (EUIPO) was filed on 17 September 2018 and covered goods belonging to Class 3 of the Nice Classification, specifically lipsticks.[4] The applicant filed the application on the basis of Regulation (EU) 2017/1001 of the European Parliament and of the Council of 14 June 2017 on the European Union trade mark,[5] referring in the alternative to Article 7 (3) of the said Act, the so-called secondary distinctiveness.

Citing lack of distinctiveness, based on Article 7 (1) (b) of Regulation 2017/1001, the EUIPO examiner issued a decision to refuse registration of the mark, which took place on 21 August 2019. The appeal filed by Guerlain was dismissed by the decision of the First Board of Appeal of EUIPO of 2 June 2020. According to the Board of Appeal, the sign applied for "does not differ significantly" from lipsticks on the market and, moreover, "they were all cylindrical in shape and consumers were used to oval-shaped containers". Consequently, it was concluded that in the absence of a significant deviation in shape from the norms and customs of the sector, the sign was not distinctive. In view of the above, the said entity filed an action to the General Court of the European Union on 5 August 2020, in which it requested, i.a., that the contested decision be annulled. The General Court of the European Union, upholding the applicant's claim, annulled the decision of the First Board of Appeal of the EUIPO of 2 June 2020 (case R-2292/2019-1). The most substantively relevant statement of the General Court, which can be identified as its basic thesis, was that "the shape at issue is atypical for lipsticks and differs from all other shapes on the market".[6] It also seems crucial to state that "the mere fact that a shape is a 'variant' of one of the shapes typical of a given type of goods is not sufficient to consider that said shape is devoid of distinctive character, and the fact that in a given industry there is a great variety of shapes of goods does not yet mean that a possible new shape will inevitably be perceived as one of them".[7]

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[3] G. Maienza, *General Court Rules That Guerlain's Shape of Rouge G Lipstick Enjoys Trade Mark Protection*, "Journal of Intellectual Property Law & Practice" 2021, vol. 16(10), p. 1030.

[4] See InfoCuria, https://curia.europa.eu/juris/document/document.jsf?text=&docid=244146&pageIndex=0&doclang=FR&mode=lst&dir=&occ=first&part=1&cid=4924773 (access: 8.6.2022).

[5] OJ L 154/1, 16.6.2017, hereinafter: Regulation 2017/1001. Cf. Article 4 (4) of Directive (EU) 2015/2436 of the European Parliament and of the Council of 16 December 2015 to approximate the laws of the Member States relating to trade marks (OJ L 336/1, 23.12.2015).

[6] Judgment of the General Court of 14 July 2021, T-488/20 *Guerlain, Paris v European Union Intellectual Property Office (EUIPO)* (OJ C 320, 28.9.2020), para. 49.

[7] *Ibidem*, para. 50.

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Data: 24/04/2024 19:36:03

ANALYSIS OF THE GENERAL COURTS' REASONING AS TO DISTINCTIVE CHARACTER

According to Article 4 of Regulation 2017/1001, a trademark may consist of any signs, in particular the shape of goods or their packaging. However, a condition for protection is that such a sign should be distinctive, i.e. capable of distinguishing the goods or services of one undertaking from those of other undertakings.[8] Secondly, it must be capable of being represented in the EU trademarks register in such a way as to enable the competent authorities and the public to ascertain unequivocally and precisely the subject matter of the protection granted to the proprietor of the trademark. In the commented judgment, the issue was whether or not the sign applied for is distinctive. If a sign is characterised by a lack of distinctiveness, and therefore according to Article 7 (1) (c) of Regulation 2017/1001, the sign is devoid of any distinctive character, there is then an absolute obstacle to registration. The criteria for assessing the inherent, concrete distinctiveness of a three-dimensional trademark do not differ from those relating to other types of trademarks. It is undisputed that in making such an assessment, the goods covered by the trademark application, as well as the manner in which the mark is perceived by the relevant public of the products concerned, should be taken into account.[9] It should therefore be determined whether the specific features of the shape covered by the trademark application even minimally cause or are likely to cause in the minds of the relevant public associations between that shape and the commercial origin of the product.[10]

The shape, a product form or its packaging can serve a variety of functions. Here, functional and aesthetic values should be pointed out, and the function of distinction may also be distinguished. The commented case shows how difficult it is to distinguish these aspects in practice and how much they may overlap. A three-dimensional trademark can be perceived by the public both with the sense of sight and touch. The former should be given priority. The problem is that the shape of the product or its packaging may be perceived by the public from different angles and perspectives. Moreover, it is impossible to perceive the form of the product from all

[8] R. Skubisz, *Prawo z rejestracji znaku towarowego i jego ochrona. Studium z zakresu prawa polskiego na tle prawno-porównawczym*, Lublin 2018, p. 63.

[9] E. Wojcieszko-Głuszko, *Pojęcie znaku towarowego. Rodzaje oznaczeń. Kategorie znaków towarowych*, [in:] *System Prawa Prywatnego*, vol. 14B: *Prawo własności przemysłowej*, ed. R. Skubisz, Warszawa 2017, p. 508; T. Cook, *op. cit.*, p. 425; judgment of the Court of 29 April 2004, C-456/01 P and C-457/01 P *Henkel v OHIM*, EU:C:2004:258, para. 35 and the case law cited therein.

[10] E. Wojcieszko-Głuszko, *Zdo Zdolność rejestrowa wspólnotowych przestrzennych znaków towarowych (przegląd orzecznictwa)*, „Zeszyty Naukowe Uniwersytetu Jagiellońskiego. Prace z Prawa Własności Intelektualnej" 2010, no. 4, p. 134 and the judgments cited therein; K. Szczepanowska-Kozłowska, *Bezwzględne przeszkody rejestracji znaku towarowego*, [in:] *System Prawa Prywatnego…*, p. 671.

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Data: 24/04/2024 19:36:03

sides at the same time. In the present case, the General Court correctly recognised that lipsticks could be presented to the public from both horizontal and vertical perspectives. In turn, depending on the manner of presentation, the features of the product's shape determining its character "departs significantly from the norms and customs of the sector"[11] could become apparent. In the case in question, the product could not be placed vertically due to its oval base. The shape of the boat allowed it to be placed only horizontally. However, this did not prevent the advertising message from showing vertical representations of the lipstick. It should be noted that the sign in question did not contain any word or colour elements, which, on the one hand, would affect the analysis of distinctiveness and, on the other hand, would narrow the scope of protection.[12] Additionally, the party subsidiary referred to the so-called secondary distinctiveness, whereas no evidence of this type of distinctiveness was presented. And it should be noted that this type of argumentation refers to the situation, set out in Article 7 (3) of Regulation 2017/1001, where the mark has acquired distinctiveness so-called secondary meaning, through use in relation to the goods or services for which registration is sought, could be effective.

NORMS AND CUSTOMS OF THE SECTOR AND THE ATYPICAL CHARACTER OF A SIGN – NOVELTY, ORIGINALITY, ARTISTIC VALUE

The General Court examined whether the trademark applied for as a whole departs significantly from the norms and customs of the relevant sector. This criterion has been formulated in earlier decisions of the Court of Justice of the European Union (CJEU) in, i.a., *Hickies*[13] *and Standbeutel* cases.[14] According to this criterion, a three-dimensional trademark depicting the form of the product applied for may be considered distinctive only if it "departs substantially from the norm or customs of the sector". The fulfilment of this criterion means that, according to the CJEU, the sign fulfils its essential function of indicating origin.[15] The *Brasserie St Avold* judgment concerning the shape of a coloured bottle, provides important

[11] Judgment of the General Court of 14 July 2021, T-488/20, para. 43.

[12] J. Konikowska-Kuczyńska, *Admissibility of Unconventional Trade Marks Registration within the European Court of Justice Statements*, "Studia Iuridica Lublinensia" 2020, vol. 29(4), p. 126; J. Malarczyk, *Znaki towarowe zawierające elementy geograficzne (casus „Nałęczowianki")*, "Studia Iuridica Lublinensia" 2004, vol. 3, p. 131.

[13] Judgment of the General Court of 5 February 2020, T-573/18 *Hickies/EUIPO (Shape of a shoelace)*, EU:T:2020:32, para. 64.

[14] Judgment of the CJEU of 12 January 2006, C-173/04 P *Standbeutel*, EU:C:2006:20, para. 29, 31.

[15] Judgment of the CJEU of 7 May 2015, C-445/13 P *Bottle*, EU:C:2015:303, paras 90–91; L.H. Porangaba, *Acquired Distinctiveness in the European Union: When Nontraditional Marks Meet a (Fragmented) Single Market*, "The Trademark Reporter" 2019, vol. 109(3), p. 637.

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Data: 24/04/2024 19:36:03

guidance for interpreting the concept of the norms or customs of the sector.[16] According to the position expressed therein, norms and customs cover all shapes that a consumer normally encounters on the market, and not just the statistically most common shape. This is a pertinent observation and was also taken into account by the General Court in the commented case.

Based on the *Wajos* judgment of the CJEU,[17] it is possible to identify certain factors that should be taken into account when deciding whether the criterion in question is met. The aesthetic result and aesthetic value should be indicated here. The condition here is that these factors relate to the production of an "objectively unusual visual effect resulting from the design of the shape".[18] The statement, that the mere novelty of a product's shape does not necessarily imply distinctiveness, should be accepted.[19] Thus, a high aesthetic or design quality of the goods does not determine whether a certain shape makes it possible to immediately distinguish those products from the goods of other undertakings. Moreover, the General Court, citing the *Hickies* case, has pointed out that the distinctive character of an EU trademark is not assessed on the basis of the originality or the absence of use of the said mark in the field covered by the goods and services concerned.[20] By contrast, the case at hand shows that the General Court took into account the aesthetic aspect of the sign examined, as it affects the objective and original visual effect it has on the relevant public, also taking into consideration the specificity of the sector. The General Court therefore notes that the functions of industrial design protection, in which the novelty and individual character of the product's form or its parts are a condition for obtaining protection, are different.[21] In this case, the primary role is played by the overall impression made by the design on an informed user. On the other hand, the judicial authority refers to elements related to the aesthetics, originality of the product's form as factors influencing its ability to perform the function of a designation of origin. It should be emphasised, that the sign covered by the application presented only a general elongated, cylindrical, oval shape, which, as the Board of Appeal rightly pointed out, that it has only a decorative character, not being perceived as an indication of origin.[22] However, the high aesthetic value, beauty and novelty of the product

[16] Judgment of the General Court of 25 November 2020, T-862/19 *Brasserie St Avold/EUIPO (Shape of a coloured bottle)*, EU:T:2020:561, para. 56.

[17] Judgment of the Court of Justice of 12 December 2019, C-783/18 P *EUIPO v Wajos*, not published, EU:C:2019:1073, para. 32.

[18] *Ibidem*, para. 32.

[19] Judgment of the General Court of 5 February 2020, T-573/18, para. 62.

[20] See *ibidem*, para 63 and the case law cited therein; D. Moreau, I. Diakomichali, *Distinctiveness of Three-Dimensional Trade Marks*, "Managing Intellectual Property" 2017, vol. 269, p. 18.

[21] M. Kropiwnicka, *Evidence Evaluation Relating to the Public Disclosure of the Community Design on the Internet*, "Studia Iuridica Lublinensia" 2021, vol. 30(4), p. 354.

[22] Judgment of the General Court of 14 July 2021, T-488/20, para. 36.

Pobrane z czasopisma Studia Iuridica Lublinensia **http://studiaiuridica.umcs.pl**
Data: 24/04/2024 19:36:03

can only be assessed by analysing features that were not included in the application. This raises the issue of whether specific marketing conditions should be a relevant factor in this respect. It seems that the General Court should in its assessment review whether such a mark enables the average consumer of that product, who is reasonably well informed and reasonably observant and circumspect, to distinguish the goods in question from goods from other undertakings without analysis and without paying particular attention.[23] Such control may have affected the assessment of inherent distinctiveness.[24] In the analysed judgment, the General Court made direct reference to this factor, which seems to be appropriate.

The main contradiction between the positions of the Board of Appeal and the General Court concerned the assessment of whether the shape at issue was atypical for lipsticks and different from all other shapes on the market. The Board of Appeal answered in the negative, while the General Court considered that this condition was fulfilled. This was apparently due to a different analysis of the norms and customs of the relevant sector.[25] Both the Board of Appeal and the General Court found that the lipstick sector was characterised by a wide variety of shapes from the "classic lipstick" oval shape, a cuboid elongated shape with rounded edges, an oval shape with elongations, and finally a cylindrical shape. In doing so, it was found that some of the present designs have a cylindrical part and an elongated part with a flat oval surface. The examined mark consists of two overlapping parts, the dividing line of which in the first quarter of its length is surmounted by a small oval shape, slightly convex. It does not present any straight line and its upper part is slightly convex, while the lower part has only a flat surface. In addition, there is a rectangular indentation on one of its sides, which can be seen as a hinge showing the position of the opening. The General Court rightly did not argue with the EUIPO in finding that the aforementioned indentation does not give rise to the conclusion that the said hinge opens onto a rotating hood and a double mirror. These functional elements were not made visible in the application and should not be included in the scope of protection.

Consequently, the General Court based its finding that the shape in question departs significantly from the norms and customs of the sector on the fact that the shape of a boat's hull, or a baby's cradle, graphically depicted in the marks' application for registration, does not permit the goods in question to be placed vertically.

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[23] Judgment of the CJEU of 7 October 2004, C-136/02 P *Mag Instrument/OHIM*, EU:C:2004:592, para. 32; S. Martin, *General Court Confirms Rejection of EUTM Application for 'Hickies Shoelaces' Due to Lack of Distinctiveness*, "Journal of Intellectual Property Law & Practice" 2020, vol. 15(7), p. 495.

[24] Judgment of the Court of Justice of 12 December 2019, C-783/18, para. 33.

[25] From this perspective, see the position of the CJEU expressed in its judgment of 7 May 2015, C-445/13 P, paras 82–87, according to which there is no need to define expressly the norms and customs prevailing in the sector of the goods in question. The Supreme Court has implicitly carried out an analysis of the distinctive character of the components of the three-dimensional sign in the light of the norms of the relevant sector. See also judgment of the General Court of 14 July 2021, T-488/20, para. 31.

Pobrane z czasopisma Studia Iuridica Lublinensia **http://studiaiuridica.umcs.pl**
Data: 24/04/2024 19:36:03

That feature, according to the EU General Court, enhances the unusual visual effect for the relevant public. Moreover, those recipients with a medium to high level of attention will be surprised by that easy-to-remember shape and it will be perceived as significantly departing from the norm and customs of the lipstick sector.

CONCLUSIONS: SIGNIFICANCE OF THE COMMENTED JUDGMENT

The General Court in its judgment did not deal with the question of the existence of an absolute obstacle to registration when the shape, determined solely by the nature of the goods, is necessary to obtain a technical effect or substantially increases the value of the goods. It seems that the case may have been influenced by the aesthetic functionality doctrine and public interest.[26] The case well illustrates the dilemma relating to three-dimensional trademarks. It is that shapes that do not differ significantly from those available on the market have little chance of acquiring secondary meaning. On the other hand, original shapes with inherent distinctiveness may be so attractive, that they significantly increase the value of the goods, which leads to an absolute obstacle to obtaining protection.[27] The postulates of doctrine are correct, that when assessing the protective capacity of a shape as a trademark, an analysis of the competitive potential of a given form should take place.[28] Such a test would consist in assessing the extent to which granting protection to a particular entity for a given shape would hinder or limit effective competition on the relevant market. In other words, to what extent granting protection will limit the possibility to develop and commercialise alternative, attractive designs, in this case lipsticks. This issue was not raised in the case under discussion. And it should be pointed out that the determination whether a given shape may serve as a designation of product's origin is only one element of this assessment.

The public interest in this case may manifest itself in preventing the acquisition of an indefinite monopoly on the exploitation of the lipstick shape in question. Indeed, the fact that a shape is a "variant" of one of the shapes typical of a given kind of products may not be entirely sufficient to show that the shape in question is devoid of distinctive character. However, such a circumstance should influence the analysis,

[26] N.-L. Wee Loon, *Absolute Bans on the Registration of Product Shape Marks: A Breach of International Law?*, [in:] *The Protection of Non-Traditional Marks: Critical Perspectives*, eds. I. Calboli, M. Senftleben, Oxford 2019, p. 150.

[27] A. Kur, *Too Pretty to Protect? Trade Mark Law and the Enigma of Aesthetic Functionality*, "Max Planck Institute for Intellectual Property & Competition Law Research Paper" 2011, no. 16, p. 3; J. Hughes, *Non-Traditional Trademarks and the Dilemma of Aesthetic Functionality*, [in:] *The Protection of Non-Traditional Marks…*, p. 109.

[28] A. Kur, *op. cit.*, s. 17; S. Hopkins, *Aesthetic Functionality: A Monster the Court Created but Could Not Destroy*, "Trademark Reporter" 2012, vol. 102(5), s. 1135.

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whether such a variant should be covered by an exclusive right obtained by trademark registration. It should also be considered what market effects such a decision would have. It seems that the boat shape applied to lipsticks may significantly increase the value of the product. Registering it as a trademark may restrict access to the market for other lipstick manufacturers using elongated cylindrical shapes in combination with flat and oval surfaces. It should be stated that the fact that in a given industry there is a large variety of shapes of goods and there is a risk that a possible new shape will be perceived as one of these variants should influence stricter application of the requirement of an atypical shape in relation to the norms and customs of the industry. Systemically, such shapes should be protected as industrial designs. The case shows the permeation of the industrial design and trademark protection regimes. The influence of novelty and individual character of a design on the establishment of original distinctiveness of a sign including a shape is well illustrated here. This is an example of recognition of the inherent distinctiveness of a three-dimensional mark devoid of word elements and colours. This is in contradiction with one of the positions formulated so far in the doctrine, supported by the case law, that it is not possible to prove the inherent distinctiveness of such a sign.[29] Although such a view seems to be too far-fetched, it is necessary to express the thesis that inherent, concrete distinctiveness of a shape may sometimes occur.[30] The uniqueness of such a phenomenon lies in the fact that customers are not accustomed to recognising the origin of goods on the basis of their shape in the absence of any graphical or textual elements.[31] In turn, it is possible to prove secondary meaning of such a sign. Indeed, it is difficult to accept that the otherwise original and characteristic shape of a lipstick resembling the hull of a boat or a child's cradle had an inherent distinctive character, i.e. caused customers to associate it with the applicant's company. This would have been possible, if it had been shown that the mark had acquired secondary meaning through use in the trade, which did not occur in the case in question.

This judgment sets a new, liberalising tone for existing European Union case law on the protection of three-dimensional trademarks. It may result in a certain loosening of standards in respect of obtaining protection rights for three-dimensional trademarks in the European Union.

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[29] K. Li, *Where Is the Right Balance – Exploring the Current Regulations on Nontraditional Three-Dimensional Trademark Registration in the United States, the European Union, Japan and China*, "Wisconsin International Law Journal" 2012, vol. 30(2), p. 466.

[30] A.H. Khoury, *Three-Dimensional Objects as Marks: Does a Dark Shadow Loom Over Trademark Theory*, "Cardozo Arts & Entertainment Law Journal" 2008, vol. 26(2), p. 346; B. Pietrzyk-Tobiasz, *The Registrability of Olfactory Trade Marks Before and After the Implementation of Directive (EU) 2015/2436: Practical or Only Theoretical Change?*, "Studia Iuridica Lublinensia" 2021, vol. 30(2), p. 321.

[31] Judgment of the CJEU of 22 June 2006, C-24/05 P *August Storck KG v OHIM (Three-dimensional shape of a light brown candy)*, ECLI:EU:C:2006:421, paras 48 and 49; opinion of Advocate General Ruiz-Jarabo Colomer delivered on 23 March 2006; E. Wojcieszko-Głuszko, *Zdolność rejestrowa…*, p. 138.

Pobrane z czasopisma Studia Iuridica Lublinensia **http://studiaiuridica.umcs.pl**
Data: 24/04/2024 19:36:03

It should be pointed out that after the decision in question was issued, on 19 January 2022, the judgment of the General Court in the case *Tecnica Group v EUIPO*[32] was delivered. According to the judgment, the inherent distinctiveness of the form of the footwear was successfully challenged. The adjudicating authority confirmed the findings of the Board of Appeal at EUIPO, according to which the three-dimensional sign comprising the shape of "moon-style" after-ski boots did not deviate significantly from the norms and customs of the sector, and the challenged mark is devoid of distinctiveness. Moreover, the assumption was made that relevant public pays an average level of attention to these types of products. This also made it more difficult to prove the protective capacity of the sign.

It seems that another consequence to be expected is that the Guerlain judgment will positively influence the steady increase of entrepreneurs' interest in obtaining protection for three-dimensional trademarks covering the shape of a product without word elements. In the long run, it is also to be expected that more disputes concerning infringements of three-dimensional trademarks will arise.

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[32] Judgment of the General Court of 19 January 2022, T-438/20 *Tecnica Group v European Union Intellectual Property Office (EUIPO)*, ECLI:EU:T:2022:11.

Pobrane z czasopisma Studia Iuridica Lublinensia **http://studiaiuridica.umcs.pl**
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ABSTRAKT

Opracowanie stanowi glosę częściowo aprobującą wyroku Sądu Unii Europejskiej w sprawie T-488/20 *Guerlain przeciwko EUIPO*. W sprawie problemem była ocena zdolności odróżniającej zgłoszonego oznaczenia obejmującego szminkę w kształcie kadłuba łodzi. W świetle dokonanych ustaleń Sąd Unii Europejskiej odwołał się do uznanych kryteriów oceny, takich jak m.in. znaczne odbieganie wzoru od przyjętych w danej branży norm i zwyczajów, w tym wartości estetycznej oraz oryginalności wzoru. Odniósł także zgłoszony kształt do właściwego kręgu odbiorców. Zabrakło natomiast w sprawie przedstawienia dowodów na wtórną zdolność odróżniającą, a także analizy aspektu związanego z estetyczną funkcjonalnością produktu i ochroną konkurencji rynkowej. W rozstrzygnięciu Sąd doszedł do dyskusyjnego wniosku, że sporny kształt jest nietypowy dla szminek i odbiega od wszystkich innych kształtów obecnych na rynku i w konsekwencji ma cechę pierwotnej zdolności odróżniającej. W efekcie doszło do pewnego zliberalizowania standardów w uzyskiwaniu ochrony trójwymiarowych znaków towarowych, które nie zawierają elementów słownych. W sektorach, w których wzornictwo jest zróżnicowane, nowy i nietypowy kształt produktu lub jego opakowania może w świetle komentowanego wyroku być chroniony jako unijny znak towarowy. Zapewne zachęci to przedsiębiorców do dokonywania zgłoszeń tego typu oznaczeń. Dla doktryny prawa wyrok stanowi interesujące źródło inspiracji dla dyskursu na temat systemowej roli ochrony prawnej znaków towarowych i wzorów przemysłowych.

Słowa kluczowe: trójwymiarowy znak towarowy; zdolność odróżniająca; estetyczna funkcjonalność; nietypowy kształt produktu