

**DECISION
of the First Board of Appeal
of 30 March 2023**

In case R 0445/2022-1

August Storck KG

Waldstr. 27
13403 Berlin
Germany

IR Holder / Appellant

represented by CMS HASCHE SIGLE PARTNERSCHAFT VON RECHTSANWÄLTEN
UND STEUERBERATERN MBB, Stadthausbrücke 1-3, 20355, Hamburg, Germany

APPEAL relating to International Registration No 1 593 537 designating the European Union

THE FIRST BOARD OF APPEAL

composed of G. Humphreys (Chairperson), M. Bra (Rapporteur) and C. Bartos (Member)

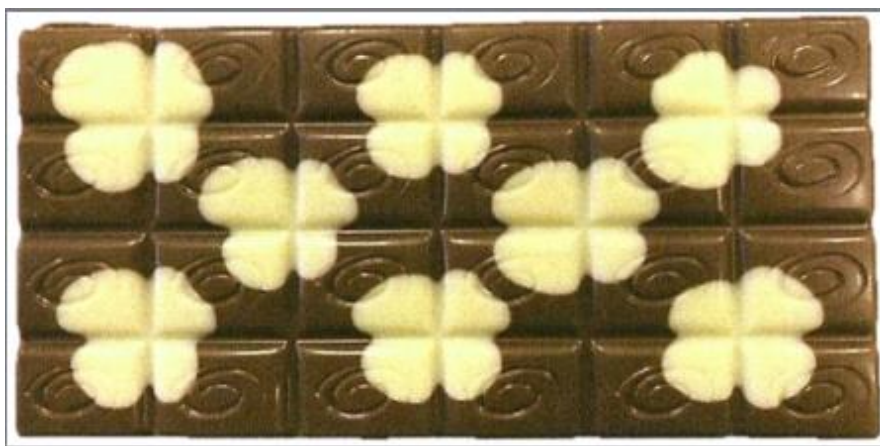
Registrar: H. Dijkema

gives the following

Decision

Summary of the facts

- 1 On 26 April 2021, August Storck KG ('the IR holder') designated the European Union in its international registration for the figurative mark ('the IR'), claiming the colours : 'brown and beige'



for the following list of goods:

Class 30: *Confectionery; chocolate; chocolate products; pastries; ice-cream; preparations for making the aforementioned products, included in this class.*

- 2 On 14 June 2021 the Examiner raised an objection on the ground that the mark is devoid of distinctive character, within the meaning of Article 7(1)(b) EUTMR. The reasons provided were the following:
 - While the public is used to recognizing word or figurative marks instantly as signs identifying a product, it will not necessarily do so where the sign is indistinguishable from the appearance of the product itself.
 - The appearance of the mark at issue does not depart significantly from the norms or customs of the relevant sector. End users usually pay more attention to the label or name of the product than to its shape or packaging.
 - The sign consists merely of a combination of presentational features (the top part of a dark chocolate tablet with eight flowers figures of white chocolate) that would be seen as typical of shapes and arrangements of two chocolates commonly used in trade for the goods, or a variation thereof.
 - This shape and arrangement of the two chocolates is not markedly different from those commonly used in trade for the goods but are merely a variation thereof, as it appears from the following examples:



(hereinafter the ‘marble bar’),
<https://www.woodhousechocolate.com/milk-chocolate-marble-bar>



(hereinafter the ‘white-milk-swirl’ bar
<https://ilfracombechocolateemporium.co.uk/products/deluxe-white-milk-swirlchocolate-bar>



(hereinafter the ‘tree-shaped-blocks’ bar) [https://en.paperblog.com/new-cadbury-dairy-milk-winter-wonderland-tree-shapedchocolate- 647 523/](https://en.paperblog.com/new-cadbury-dairy-milk-winter-wonderland-tree-shapedchocolate-647-523/)

- Therefore, the sign is devoid of any distinctive character.
- 3 On 18 October 2021, the IR holder maintained its request notwithstanding the examiner’s ex officio provisional refusal of protection. Its arguments may be summarised as follows:
- The sign is distinctive. It consists of a representation of a chocolate bar with eight four-leaf clovers arranged in a way that they are crossed by the breaking edges of the chocolate pieces, which are at the same time the divisions into four individual leaves of the cloverleaf.
 - A four-leaf clover is a symbol of luck and a lucky charm thus it conveys a special message and is not merely any decorative/ornamental floral motive. The sign is striking and eye-catching and may be easily and instantly memorized.
 - The sign significantly deviates from the norms and customs of the sector. The shape and arrangement of the black and white chocolates is markedly different from

various basic shapes and arrangement of the two types of chocolate commonly used in trade and is not merely a variation thereof.

- The design is unusual. The white chocolate parts are not just any white spots, but have a design of cloverleaves, a particular floral motif.
 - There is no customary use of flower/plant motifs, in particular shamrocks, using white chocolate on dark chocolate. The combination of dark and white chocolate as intarsia in one chocolate bar is unusual.
 - The examples cited by the examiner are inappropriate to support the objection. In the first two examples, the design is caused by the two types of chocolate being drawn when the product is in liquid state and the result is not comparable. The third example, in tree-shaped blocks, is also totally different and it is also registered as a trademark in the United Kingdom.
 - Further examples of chocolate bars on the market, show that it is rather unusual to combine dark and white chocolate and when this is the case, it would be in the form of filings or layers or as simple spots, without specific motif. These are clearly different from the inlay design of the mark at issue.
 - Even if there are chocolate bars combining dark and white chocolate, they use different designs. The new and eye-catching design at issue is not a variation of existing designs but is clearly distinguishable by sufficient and obvious differences.
 - Registration as a trademark is not subject to a finding of artistic creativity. It is irrelevant that the mark also serves a decorative purpose. It suffices that the mark enables to identify the trade origin of the goods. This is the case here.
- 4 On 11 March 2022, the examiner took a decision (‘the contested decision’) entirely refusing protection of the IR, pursuant to Article 7(1)(b) EUTMR. The reasons may be summarised as follows:
- The goods target the general public. The level of attention varies between low and that of a well-informed consumer. Its level of attention may be relatively low with respect to the depiction of products usually sold inside packaging and in large quantities.
 - The sign consists merely of a combination of presentational features: the top part of a dark chocolate bar with eight shapes in white chocolate that resemble flowers. Consumers would see it as a typical shape and arrangement of two chocolate types commonly used in trade. The mark is not markedly different but a mere variation of basic shapes and arrangements of two chocolate types commonly used in the trade.
 - The Holder’s view that the relevant public would recognize the white chocolate elements as cloverleaves, cannot be followed, as there is no exact depiction of a clover leaf. Probably, part of the public might perceive a modified clover leaf, and another part, might perceive a flower. The Holder did not submit substantiated information or evidence that the relevant public would see a cloverleaf or an arrangement thereof.
 - The relevant public would see the white chocolate elements as merely decorative/ornamental generalized depictions of flowers. They are not striking and would not catch the consumer’s attention as indicators of origin.

- Consumers would not see any distinctive element, but only a variation of a chocolate design and would expect the product to combine two tastes of chocolates.
- The figurative mark at issue, a dark chocolate bar with eight shapes in white chocolate resembling flowers, does not depart significantly from the expected appearance of the product.
- The market reality shows that numerous products combine black with white chocolate elements. The Holder distinguishes the mark from the examples cited, stressing that it shows eight white four-leaf clovers in a special arrangement. However, these differences are insignificant. The eight spots of white chocolate, which could be seen as spots or as resembling flowers that are not identical, would be seen as design elements, rather than as distinctive elements.
- Moreover, it is rare that chocolate is sold without packaging. Consumers usually buy chocolate and related goods without opening them, thus they are unlikely to encounter the mark on unpacked products or to unpack a chocolate to ensure that it contains dark chocolate with eight flower-like white spots.
- Whether these figurative elements will be perceived as an indication of origin must be assessed based on the overall impression created by the appearance of the sign. A variation in insignificant or not readily perceptible details cannot decisively affect this assessment. The figurative sign at issue is not markedly different from the appearance of various chocolate-related products commonly used in trade for the goods but appears as a simple variation thereof.
- There is nothing unusual in the combination of dark and white chocolate in one chocolate tablet, such combination is well known in the relevant market. Also, it is customary to use different designs/motifs on a chocolate; chocolate manufacturing technology allows this to be done either manually (in small chocolate shops) or with special equipment (in mass production).



- The examples provided by the Holder, especially (Annexes A1 and A2) support these findings as they show the diversity of white and dark chocolate products.
- As the alleged differences are insignificant and/or the white elements (in different sizes and shapes) are not readily perceptible as an exact flower or leaf, these elements cannot be sufficiently distinguished from other shapes/elements commonly used for the goods and will not enable the relevant public to distinguish immediately and with certainty the Holder's goods from those having another commercial origin.
- In sum, the figurative mark consists of a combination of elements that are typical for the goods and would not enable a relevant consumer to distinguish the Holder's goods from those of other undertakings. Thus, it is devoid of distinctive character.
- The holder did not provide any specific and substantiated information showing that the mark has distinctive character in the relevant market sector, to disprove the Office's analysis based on facts arising from general experience.
- The holder cannot rely on the registration of the tree shaped chocolate bar as a mark in the UK. The mere fact that that mark combines black and white chocolate, does not put it on a par with the mark at issue. The registrability of the mark as an EUTM

can only be assessed by reference to the EU regulations. The Office is not bound by registrations in third countries and the marks registered in the UK, cannot justify the registration of the mark at issue.

- 5 On 21 March 2022, the IR holder filed an appeal requesting that the contested decision be entirely set aside. The statement of grounds of the appeal was received on 6 July 2022.

Grounds of appeal

- 6 The arguments raised by the IR Holder in the statement of grounds may be summarised as follows:
- The figurative mark is not devoid of any distinctive character for the goods. The Examiner focused primarily on the fact that the design of the product did not differ from the usual shapes in this field, stressing that part of the public would not recognize the white chocolate motifs as clover leaves as they are not an exact representation thereof and the holder did not prove that the public would recognize them as such.
 - However, the clover leaf shape is clearly recognizable. Even if the motifs were only recognized as flowers or blossoms, they clearly deviate from the usual shapes due to the other design features and are distinctive.
 - The Examiner did not sufficiently consider the concrete characteristics of the mark, nor the usual market customs and practices in the use of marks in general and of three-dimensional or figurative marks, in particular.

Distinctive character

- The natural reproduction of a product can be registered provided its characteristic features go beyond those typical of the goods and are not merely decorative. No different or stricter criteria apply. The decisive factor is whether its design differs from the norms of the sector so it may act as a trademark.
- The caselaw regarding 3D marks consisting of the appearance of the goods themselves also applies for a figurative mark or a design on the surface of a product. The mark departs significantly from the norm or customs of the sector and fulfils its essential function. It is not devoid of any distinctive character.

Characteristic features of the mark

- The sign represents a chocolate tablet with eight four-leaf clovers arranged in a way that they are crossed by the predetermined breaking edges of the chocolate pieces which also mark the division into four individual leaves of the cloverleaf.
- Four-leaf clovers are not just any merely ornamental floral motif, but a symbol of luck (lucky charm) that contains a special message. The design is striking and eye-catching and will be easily and instantly memorized and immediately perceived as a trademark.
- The Examiner surprisingly disputes the obvious perception of the white chocolate elements as a clover leaf, as it is not an exact depiction of thereof, thus (only) part of the relevant public would perceive a clover leaf, but another part would see a flower.

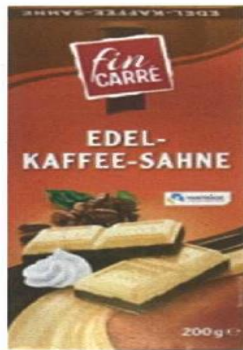
However, the obvious perception of a clover leaf or an arrangement thereof, is hardly appropriate to be supported by evidence, even by expensive opinions polls.

- The Examiner failed to assess the mark as it appears in the color illustration attached to the application, which clearly shows all details. In assessing the perception of the white motifs, the Examiner ignored the clearly contoured dividing lines which is rather unusual for flowers and will be typically associated with clover leaves by any unbiased observer, as there is no flower pistil between the leaves. Even in nature, clover leaves differ slightly from each other and are arranged so closely together that the dividing lines between them form a cross, as they also appear in the mark (see zoomed in illustrations of clover leaves from Wikipedia, compared to the mark).
- The said figurative element clearly deviates from the norms and customs and from known shapes in the relevant sector of goods. This is true, even for those consumers who would not perceive them as four-leaf clovers, but only as four-leaf flowers. Even so, the representation is characterized by plants arranged in a way that the leaves are separated by the dividing lines of the bar.
- Thus, the relevant public will see the white chocolate elements not as a mere decoration, but as distinctive elements. The overall impression is striking and can catch the consumer's attention.
- The shape and arrangement of two chocolates is markedly different from basic shapes and arrangements commonly used in the sector and not a mere variation thereof. The design is not commonplace but unusual.
- The examples provided by the Examiner, are irrelevant or inconclusive. The white chocolate elements of the mark are not just white spots, but have a special design of clover leaves, as a particular floral motif. There is no customary use of flower/plant motifs in white/dark chocolate and this alone is already new and unusual in the market sector. Also, the combination of white/dark chocolates inside or next to each other, so as to create a flat surface in different colors (intarsia) of inlaid floral motifs, in particular clover leaves, is not customary in the chocolate tablet sector.
- The Examiner did not reply to these arguments and did not provide examples showing the customary nature of such inlay work in white/dark chocolate with floral motifs or shamrocks.

Examples cited by the Examiner

- The first two examples given by the examiner ('marble bar' and 'white-milk-swirl' bar) are no more cited in the contested decision, as they were unsuitable to support the objection. The third example described as 'unique tree-shaped blocks' (see Annexes 1, 2 and Attachment A1), is very different from the mark. Anyway, one example of a single product showing a tree (not a blossom leaf or flower) and which (except for the motif using light and dark chocolate) has no design features matching to the mark, cannot prove customary use of flower/plant motifs in white/black chocolate, particularly not in the form of an inlay.
- The Examiner's statement that the elements are not readily perceptible as an exact flower plant or leaf seems to indicate that only identically repeated motifs, or true to nature representations would be registrable. Such requirements are legally irrelevant.

- The Examiner’s argument that only few chocolate products are sold without packaging and consumers usually buy them without opening them is too restrictive and legally inappropriate, as it would mean that the image of products that are usually wrapped could never be registered. This argument is illogical as the products, for example, ice creams can be sold in transparent packaging and/or an image of the product can be represented on the packaging, as is common practice for such products (29/03/2016, R 590/2015-4, 3D mark, § 24).
- Further examples of chocolate bars available on the market, provided in response to the objection, show that the combinations of dark/white chocolate in one chocolate tablet is rather unusual, and would rather be combined in the form of fillings or layers, for example,



or as simple spots without specific motif, such as for



example,
chocolate bar).

(hereinafter, ‘spotted surface’

- Most chocolates are single-colored (full brown or white chocolate). The few multi-colored designs are clearly different from the Holder’s inlay design of four-leaf clovers, highlighted by the dividing lines, which clearly deviates from the usual range of shapes.

Further principles of settled case law

- The fact that a sector is characterized by a wide variety of product shapes does not mean that any new shape will necessarily be perceived as one of them (14/07/2021, T- 488/20, *FORME D'UN ROUGE À LÈVRES OBLONGUE, CONIQUE ET CYLINDRIQUE* (3D), EU:T:2021:443, § 50). Even if some chocolate bars combine dark and white chocolate in different designs, the new and eye-catching design of the mark at issue is not merely a variation thereof as it is clearly distinguishable from those designs by sufficient and obvious differences.
- Registration of the sign as a trade mark is not subject to a finding of a specific level of artistic creativity or imagination. Whether or not the mark may (also) serve an ornamental purpose is irrelevant. A sign which fulfils functions other than that of a trade mark in the traditional sense is distinctive (only) if it may be perceived immediately as an indication of origin of the goods so as to enable the relevant public to distinguish without any possibility of confusion the goods from those of a different commercial origin (29/09/2009, T- 139/08, *Device of smile from SMILEY* (fig.), EU:T:2009:364, § 30). This requirement is fulfilled here.

Customary labelling habits in the confectionery sector

- In defining the customs in the confectionery sector, the perception of the public must be borne in mind, in particular, the fact that trade mark owners strive to differentiate their goods from those of rivals by striking and memorable designs. Thus, the mark has the necessary distinctive character and must be registered for all the goods.

Reasons

- 7 The appeal complies with Articles 66, 67 and Article 68(1) EUTMR. It is admissible.

Article 7(1)(b) EUTMR

- 8 Under Article 7(1)(b) EUTMR, a trade mark may not be registered if it is devoid of any distinctive character. For a trade mark to possess distinctive character it must serve to identify the goods or services in respect of which registration is sought as originating from a particular undertaking, and thus to distinguish them from those of other undertakings (29/04/2004, C- 456/01 P, *red-white squared washing tablet* (fig.), EU:C:2003:678, § 34 ; 09/12/2010, T-253/09 & T-254/09, *Motorgehäuse einer Pumpe* (fig.+colour), EU:T:2010:507, § 17).
- 9 The signs referred to in Article 7(1)(b) EUTMR are those which do not enable the relevant public to repeat the experience of a purchase if it proves to be positive, or to avoid it, if it proves to be negative (21/10/2004, C- 64/02 P, *DAS PRINZIP DER BEQUEMLICHKEIT*, EU:C:2004:645, § 33). The public interest underlying this provision is indissociable from the essential function of a trade mark, which is to guarantee the identity of the origin of the product or service to the consumer or end-user by enabling him, without any possibility of confusion, to distinguish them from others which have another origin (29/07/2022, T- 51/22, *FORME DE PRESSE AGRUMES* (3D), EU:T:2022:490, § 33, and the case law cited therein).
- 10 It is common ground that the case-law developed in relation to three-dimensional marks consisting of the appearance of the product itself also applies in the case at hand since the mark is a two-dimensional representation of the upper surface of a chocolate bar which is

a typical shape of chocolate and basic ingredient of the chocolate products applied for as such or as broader categories (14/12/2011, T- 237/10, Device of clasp lock (figurative mark), EU:T:2011:741, § 20 and the case law cited; 05/02/2020, T-573/18, FORM EINES SCHNÜRSENKELS (3D), EU:T:2020:32, § 34; 22/06/2006, C- 25/05 P, Bonbonverpackung (fig.), EU:C:2006:422, § 29).

- 11 It is well established case law that the criteria for assessing the distinctive character of three-dimensional or figurative trade marks consisting of the appearance of a product are no different from or no more stringent than those to be applied to other categories of trade marks (18/06/2002, C-299/99, Philips, EU:C:2002:377, § 48; 20/10/2011, C- 344/10 P, Shape and colour of bottle, EU:C:2011:680, § 45; 25/09/2014, T- 171/12, BETONVERSCHALUNG (3D), EU:T:2014:817, § 33).
- 12 None the less, for the purpose of applying those criteria, the average consumer's perception is not necessarily the same in the case of a mark consisting of the appearance of the product itself as it is in the case of a word 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 as to 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 may therefore prove more difficult to establish distinctiveness in relation to such a three-dimensional mark than in relation to a word or figurative mark independent from the appearance of the goods themselves (10/11/2004, T- 396/02, Karamelbonbon, EU:T:2004:329, § 35, 36; 20/10/2011, C- 344/10 P, Shape and colour of bottle, EU:C:2011:680, § 46; 25/10/2007, C- 238/06 P, Plastikflaschenform, EU:C:2007:635 80; 22/06/2006, C-25/05 Bonbonverpackung, § 29 and 32; 12/02/2004, C-218/01, Perwoll-Flasche, § 52; 30/11/2005, T- 12/04, Limonadenflasche, EU:T:2005:434, § 24; 25/09/2014, T- 171/12, BETONVERSCHALUNG (3D), EU:T:2014:817, § 34).
- 13 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) EUTMR (29/04/2004, C-456/01 P and C-457/01, red-white and green-white squared washing tablet (fig.), EU:C:2004:258, § 39; 07/10/2004, C- 136/02 P, Torches, EU:C:2004:592, § 31; 20/10/2011, C-344/10 P and C-345/10 P, Shape and colour of bottle, EU:C:2011:680, § 47; 14/12/2011, T- 237/10, Device of clasp lock (figurative mark), EU:T:2011:741, § 53; 25/09/2014, T- 171/12, BETONVERSCHALUNG (3D), EU:T:2014:817, § 35, 41).
- 14 The Court confirmed that the case-law cited above is also applicable to three dimensional or figurative marks which are constituted by the shape of part of the product concerned, since such a mark is likewise not independent of the appearance of the product it designates, in so far as the relevant public will perceive it, immediately and without particular thought, as a representation of a particularly interesting or attractive detail of the product in question rather than as an indication of its commercial origin (14/12/2011, T- 237/10, Device of clasp lock (figurative mark), EU:T:2011:741, § 24, 25, 27).
- 15 Thus, where the mark consists of the appearance or of the shape of the product or part thereof, the mere fact that that shape is a 'variant' of one of the usual shapes of that type of product, is not sufficient to establish that that mark is not devoid of any distinctive character for the purposes of Article 7(1)(b) EUTMR. It must always be determined whether such a mark enables 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 (14/07/2021, T-488/20, *FORME D'UN ROUGE À LÈVRE OBLONGUE, CONIQUE ET CYLINDRIQUE* (3D), EU:T:2021:443, § 19; 29/07/2022, T- 51/22, *FORME DE PRESSE AGRUMES* (3D), EU:T:2022:490, § 38, and the case-law cited).

- 16 It is established case-law that the distinctive character of a trade mark, must be assessed by reference to the goods or services concerned and by reference to the perception of the relevant public (12/02/2004, C-363/99, *Postkantoor*, EU:C:2004:86, § 34 ; 25/09/2014, T- 171/12, *BETONVERSCHALUNG* (3D), EU:T:2014:817, § 30; 29/07/2022, 29/07/2022, T- 51/22, *FORME DE PRESSE AGRUMES* (3D), EU:T:2022:490, § 32).


Relevant public

- 17 Account should be taken of the perception of the mark by the average consumer of the goods at issue, who is reasonably well-informed and reasonably observant and circumspect. The way in which the average consumer, perceives a trade mark is influenced by its level of attention, which is likely to vary according to the category of goods or services in question (10/11/2004, T-396/02, '*Karamelbonbon*', EU:T:2004:329, § 37, confirmed by 22/06/2006, C-24/05 P; 22/06/1999, C-342/97, *Lloyd Schuhfabrik*, EU:C:1999:323, § 26; 13/02/2007, T-256/04, *Respicur*, EU:T:2007:46, § 42)
- 18 The examiner correctly considered that the relevant consumer's level of attention may be relatively low with respect to the appearance of products usually sold inside packaging and in large quantities.
- 19 Indeed, it is common ground that the goods at issue are mass food products, which address potentially to any average consumer, who is deemed to be reasonably well-informed and reasonably observant and circumspect. However, according to the case law, the average consumer's level of attention is deemed to be rather low with respect to mass consumption goods which are broadly available at affordable prices, such as those at issue, (03/10/2017, T-695/15, *Comfit boxes, Containers*, EU:T:2017:684, § 37; 10/10/2012, T-569/10, *Bimbo Doughnuts*, EU:T:2012:535, § 99; 20/05/2020, R 2003/2019-1, *MADE FROM RUBY COCOA BEANS NO COLOR ADDED NO BERRY FLAVOR ADDED* (fig.), §20).
- 20 Moreover, according to the case law, in the case of mass consumer goods such as those at issue, the consumer is unlikely to pay much attention to the shape and colour of a chocolate bar and accordingly it is unlikely that the choice of the average consumer will be determined by the shape or appearance of the bar (10/11/2004, T-396/02, '*Karamelbonbon*', EU:T:2004:329, § 39).
- 21 Moreover, since the mark at issue is a figurative mark with no verbal elements, the public concerned is not limited to any part of the EU defined by an understanding of a particular language and comprises the public in all the Member States (25/09/2014, T- 171/12, *BETONVERSCHALUNG* (3D), EU:T:2014:817, § 45; 10/05/2016, T-806/14, *Device of a square-shaped packaging* (fig.), EU:T:2016:284, § 54).

Assessment of the mark at issue

- 22 In order to assess whether or not a trademark, including one which consist of the appearance of the goods, is devoid of distinctive character, the overall impression created by its features must be considered (10/11/2004, T-396/02, '*Karamelbonbon*',

EU:T:2004:329, § 38). However, 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 (29/07/2022, T- 51/22, *FORME DE PRESSE AGRUMES* (3D), EU:T:2022:490, § 39 and the case-law cited).

- 23 The Examiner considered that the mark is devoid of any distinctive character, since in an overall impression, it merely consists of a combination of presentational features -the top part of a dark chocolate bar with eight shapes in white chocolate that resemble flowers – which would be seen by the relevant consumers as typical of shapes and arrangements of two chocolate types commonly used in trade.
- 24 The IR Holder claims that the mark is distinctive, as the mark obviously represents a chocolate bar with eight four-leaf clovers, which is a symbol of good luck/lucky charm, thus it substantially differs from the norms or customs of the sector and distinctive. The applicant criticises the examiner for having failed to examine the specific features of the mark as represented in the application and to provide appropriate examples of chocolate products on the market place having a similar appearance to those of the mark applied for.
- 25 Following the IR Holder’s criticism to the Examiner, the Board deems it useful to first examine the individual features of the mark.
- 26 According to the IR holder the mark represents the surface of a chocolate bar with eight four-leaf clovers, in white chocolate, arranged in a way that they are crossed by the predetermined breaking edges of the pieces of the brown chocolate bar, which also mark the division into four individual leaves of each cloverleaf.
- 27 Regarding the constituent features of the mark to be taken into account for the assessment of its distinctive character, the Board first notes that the Holder does not claim that, on its own, the body of the chocolate bar represented in the application -a bloc divided in 6x4 equal pieces- presents any distinctiveness with respect to the goods at issue.
- 28 Moreover, the application only claims protection for the colours ‘brown and beige’, on the surface of the chocolate bar as represented in the application but does not contain any description of the mark at issue. As for the colors claimed, it is common ground that these will be perceived by the relevant public as a combination of brown/dark and white/beige chocolate, thus as an indication that the chocolate bar combines two chocolate flavours.
- 29 The IR Holder’s criticism of the examiner, essentially stems from the allegedly ‘obvious perception’ of the white chocolate elements, arranged on the intersections of the surface of the dark chocolate bar, as four clover leaves (shamrocks).
- 30 However, the IR Holder’s claims regarding the allegedly ‘obvious’ perception of the white chocolate elements in the specific arrangement, as stylised four-leaved clovers (shamrocks), are not supported by any element in the file. The application itself, does not describe the white elements on the surface of the brown chocolate bar, as representing shamrocks or any specific type of plant, flower, or any other concrete device. Even taking into account their arrangement on the intersections of the chocolate bar, the patterns created by the irregular distribution of the white chocolate on the four pieces of bar, are far from being an obvious and unequivocal representation of stylised four-leaved clovers, which are typically characterized by four heart-shaped leaves of equal size (such as ). Moreover, even taking into account their arrangement the white chocolate elements on the surface of the bar are far from true-to life representations of shamrocks, which in addition to evenly sized heart-shaped leaves, are naturally of a green colour. Thus, the

comparison of the eight irregular white elements on the intersections of the chocolate bar, with true-to-life representations of clover leaves in Wikipedia, does not prove the IR Holder's view that any 'unbiased' consumer would unequivocally and univocally assume that these irregular patterns of white chocolate, represent four-leaved clovers.

- 31 Contrary to the IR Holder's view, even taking into account all the details of the figurative representation of the mark filed with the application, the perception of the white chocolate elements on the intersections of the bar as 'shamrocks' remains far from obvious or unequivocal. Indeed, in the absence of any additional indication, clearly pointing to any specific figure or device, these white elements on the intersections of the bar might be perceived, as an abstract representation of any four-leaved plant or flower, in any colour, or indeed as mere irregular spots on the intersections of the chocolate bar, which are not aimed to -and do not- convey any particular concept.
- 32 Although the Examiner explicitly pointed to this possibility, the IR Holder did not provide even in the appeal any objective element, such as opinion polls, to support the allegedly 'obvious' perception of the white chocolate elements on the intersections of the chocolate bar, as any specific figure, in particular, as a shamrock.
- 33 Therefore, the evidence and arguments in file are insufficient to support the Holder's claim that the eight irregular white chocolate elements in the intersection of the brown chocolate bar, would be 'obviously' perceived by any 'unbiased' observer as 'shamrocks'.
- 34 Since these patterns do not convey any immediately obvious and unequivocal concept, their perception by the relevant consumers remains uncertain. Thus, the examiner cannot be criticised for having held that for some consumers, these patterns might vaguely evoke flowers, for others, shamrocks, while other consumers would merely see them as simple spots.
- 35 However, in the Board's view, the alleged perception of four-leaved 'shamrocks' or flowers, is unlikely to come to the mind of a vast majority or at least a significant part of average consumers. Indeed, such perception would require conducting an analytical examination of the bar, paying particular attention to its details. Such detailed and thoughtful examination cannot be expected from an average consumer, all the more when purchasing inexpensive everyday consumption foodstuff such as those at issue, which are often bought by consumers quickly and without paying a great deal of attention (12/02/2014, T-570/11, *La qualité est la meilleure des recettes*, EU:T:2014:72, § 30-31). The vast majority or at least a significant part of average consumers, are highly unlikely to take time to analyse in detail the appearance of a chocolate bar, or to seek to second guess whether or not any particular concept might be remotely evoked by eight irregular white chocolate elements on the intersections of the chocolate bar.
- 36 Therefore, in the Board's view, in the absence of any feature or additional element, prompting any immediately obvious and univocal perception as any concrete device, the vast majority or at least a significant part of average consumers are unlikely to attempt any conceptual inference, but would merely see a chocolate bar, with eight irregular white chocolate elements, in the intersections of the pieces of the brown bar.
- 37 The IR Holder's criticism that the Examiner failed to provide appropriate examples of similar bars, essentially stem from the alleged 'obvious perception' of the elements in white chocolate as shamrocks, due to their design and arrangement on the bar. However,

in the Board's view, this perception is highly unlikely to occur, for the vast majority, or at least a significant part of the relevant public, as explained.

- 38 Moreover, according to well established case-law, the examiner was not required to provide examples of goods having an identical appearance available on the marketplace in order to conclude that the appearance of the product referred to in the application was devoid of distinctive character (28/06/2019, T- 340/18, SHAPE OF A FLYING V GUITAR (3D), EU:T:2019:455 36; 26/03/2020, T- 570/19, FORM EINES KÄSESTRANGS (3D), EU:T:2020:127, § 21). Indeed, the mere novelty of that shape is not sufficient for a finding of such character, since the decisive criterion is whether that shape is capable of fulfilling the function of indicating commercial origin (05/02/2020, T- 573/18, FORM EINES SCHNÜRSENKELS (3D), EU:T:2020:32, § 63, 64). In addition, for the purpose of defining the norms and customs of the sector, the Office may take into account of facts which stem from the practical experience generally acquired from the marketing of general consumer goods, that is facts which are likely to be known by any person and are in particular known by consumers of those goods or services. In such a case, the Office is not required to submit examples of that practical experience (03/02/2011, T-299/09 & T-300/09, combination of the colours broom yellow and silver grey, EU:T:2011:28, § 36 and the case-law cited).
- 39 According to the case law, for a sign consisting of the shape or the appearance of the product itself (or a part thereof) to be distinctive within the meaning of Article 7(1)(b) EUTMR, it must depart significantly from the norm or customs of the sector concerned so as to strike the consumer's attention and be immediately taken in and remembered as an indicator of commercial origin of the goods, rather than as a variant of the appearance of products that consumers are accustomed to seeing on the market (14/07/2021, T- 488/20, FORME D'UN ROUGE À LÈVRES OBLONGUE, CONIQUE ET CYLINDRIQUE (3D), EU:T:2021:443, § 48 ; 25/11/2020, T- 862/19, FORME D'UNE BOUTEILLE (3D), EU:T:2020:561, § 56). The decisive factor is whether such a mark would enable the average consumer of that product, to distinguish the product concerned from those of other undertakings without conducting an analytical examination and without paying particular attention (14/07/2021, T- 488/20, FORME D'UN ROUGE À LÈVRES OBLONGUE, CONIQUE ET CYLINDRIQUE (3D), EU:T:2021:443, § 19; 29/07/2022, T- 51/22, FORME DE PRESSE AGRUMES (3D), EU:T:2022:490, § 38, and the case-law cited).
- 40 This is not the case here. Even if chocolate bars are most commonly in single colour (brown or beige), as alleged by the IR holder, the norms and customs of the sector cannot be reduced to the most common statistical form, but include all the shapes that the consumer is accustomed to seeing on the market (14/07/2021, T- 488/20, FORME D'UN ROUGE À LÈVRES OBLONGUE, CONIQUE ET CYLINDRIQUE (3D), EU:T:2021:443, § 48 ; 25/11/2020, T- 862/19, FORME D'UNE BOUTEILLE (3D), EU:T:2020:561, § 56). It is well-known from general experience, that chocolate bars combining two (or more) colours (brown, beige, amber, red, etc.), indicating the presence of different flavours (dark/brown/white chocolate, or other flavours, such as caramel, red fruits, etc.), in various arrangements and patterns, are not uncommon in the market sector concerned. This is also confirmed by the examples of a 'marble bar' and a 'white-milk-swirl' chocolate bar, cited by the examiner (page 3 above).
- 41 It is clear from the examples in the file, cited both by the examiner and by the IR Holder itself (in pages 3 and 8 above), that chocolate bars combining two colours of chocolate, in particular shades of brown/dark and white chocolate, are one of the most common

combinations. Therefore, the brown and beige colours of the chocolate bar, which is the only feature expressly claimed in the application, is one of the most common combinations that consumers are accustomed to meet in the marketplace.

- 42 It is also clear from all the examples in the file, that the combination of brown/beige colours, can be obtained by combining the two flavours of chocolate in various ways and arrangements, for example, by creating layers or fillings (see examples cited by the Holder in page 8) or clearly distinguishable juxtaposed motifs on the surface of the brow bar (see 'tree-like chocolate bar', cited both by the Holder and by the examiner), by mixing shades of brown and white chocolates on the surface of the bar, to create more complex motifs (see 'marble bar', 'white-milk-swirl' chocolate bar, cited by the examiner, page 3 above), or simple 'spots' of chocolate in contrasting colour on the surface of the chocolate bar (see 'spotted surface chocolate bar', cited by the Holder, last example in page 8 above).
- 43 Insofar as the IR Holder seeks to single out the mark at issue from these examples based on the 'intarsia effect' created by an allegedly different method of mixing white and brown chocolate to obtain the design on the surface of the bar, it must be noted that an average consumer, who is neither a professional chocolate manufacturer, nor a designer, cannot be deemed to be aware of the various techniques used in the chocolate sector, nor to focus on minimal visual details produced by different techniques of mixing chocolate flavours. Insofar as the allegedly specific method of combining the chocolate flavours does not result in a strikingly different appearance of the chocolate bar, from those that consumers are accustomed to encounter on the marketplace, these consumers are unlikely to focus on simple design details or to take them in and remember them as a trade mark element, on their own.
- 44 This having been said, it is worth noting that the so called 'intarsia effect' resulting from the arrangement of white chocolate on the intersections of the surface of the brown chocolate bar, seems neither striking, nor uncommon in the relevant sector. Actually, a similar arrangement creating the so-called 'intarsia effect' on the intersections on the surface of the bar (presumably by a similar method/technique of mixing brown and white chocolate as argued by the IP Holder) can be observed in the 'spotted surface chocolate bar' (see last example in page 8, above), where three spots of white chocolate can be observed at the surface of the edges of one piece of a brown chocolate bar.
- 45 Moreover, as it can be also observed from the 'spotted surface chocolate bar', cited by the applicant, independently of the appearance of the decorative design created by the white spots on the surface of the bar (here, remotely evocative of four-leaved plants or flowers), the arrangement of the white chocolate in the intersections of the brown chocolate bar, has the result that each piece of the bar combines both white and brown chocolate.
- 46 In an overall impression, the appearance of the chocolate bar at issue, consists merely of a combination of presentational features: the top part of a dark chocolate bar with eight shapes in white chocolate, which does not clearly depart from the norms and customs of the sector. Indeed, it is clear from the examples of chocolate bars in the file, that neither the combination of brown/beige colour (which is the only feature claimed in the application), nor the arrangement of elements in white chocolate on the intersection of the brown chocolate bar, nor even the so called 'intarsia' visual effect (resulting from the way of mixing or combining them on the surface of the chocolate bar) are uncommon or unusual in the relevant market sector. Whether the white chocolate elements would be perceived as merely decorative spots or four-leaved plants or flowers and/or as a means

to distribute two chocolate flavors on each piece of the bar, consumers would see nothing more but a mere variation of basic arrangements of two chocolate types on the surface of a chocolate bar. Overall, the sign would be perceived as a variant of a typical chocolate bar, which is not markedly different from those commonly encountered in the market place.

- 47 Even if the examples in file do not establish that the chocolate bar at issue would be the most common appearance on the market, or that chocolate bars with exactly the same combination of colours and arrangement were present on the market, the fact remains that the appearance of the chocolate bar in question combines elements which form part of the ‘norms and customs of the sector’, which include all the examples of chocolate bars that the consumer is accustomed to seeing on the market, according to the above cited case law. The variations in design and arrangement of the white chocolate on the intersections of the surface of the bar pointed out by the Holder, whether they would be seen as merely decorative and/or as a means to distribute two flavours of chocolate on each piece of the bar, do not imply such a radical departure from the norms or customs of the sector. Therefore, the mere variation of these features does not allow the conclusion that the mere appearance of the chocolate bar at issue would create, in the eyes of an average consumer, an objective and unusual visual impression, which could allow it to perform the essential function of a trade mark. In particular, nothing indicates that, in an overall impression, the eight irregular elements in white chocolate on the intersections of the brown chocolate bar, which do not convey any clear or inambiguous concept as explained above, would be seen as anything more than as a common decorative arrangement aiming to distribute the two flavors of chocolate on the bar, so that each piece of chocolate contains both white and dark chocolate.
- 48 Therefore, the features underlined by the Holder, do not prove that any ‘unbiased’ reasonably well-informed and circumspect, average consumer, without conducting an in-depth analysis and without paying particular attention, would perceive the appearance of the chocolate bar, in brown and white pattern as represented in the application, as a chocolate bar which, overall, departs significantly from the norms and customs of the sector, and not a mere variant of the appearance of chocolate bars commonly used on the market (14/07/2021, T- 488/20, FORME D'UN ROUGE À LÈVRES OBLONGUE, CONIQUE ET CYLINDRIQUE (3D), EU:T:2021:443, § 19, 48).
- 49 The IR Holder’s line of arguments in support of the distinctiveness of the mark, based on the allegedly ‘obvious’ perception of the white elements as shamrocks/lucky charms, concern at most some consumers, being part of the relevant public. However, for a sign to fall under the prohibition of Article 7(1)(b) EUTMR, it suffice that the absolute ground of refusal exists with respect to a non-negligible part of the relevant public (26/03/2020, T- 572/19, FORM EINES KÄSESTRANGS (3D), EU:T:2020:129, § 16; 11/07/2019, T- 601/18, Fi Network, EU:T:2019:510, § 26).
- 50 As explained above, in the Board’s view such perception is far from obvious and is even highly unlikely to spontaneously come to the to the mind of the vast majority or at least a significant part of the public at large, bearing in mind that average consumers tend to acquire mass consumption foodstuff, rather quickly and without paying particular attention. Thus, the vast majority or at least a significant part of average consumers, are highly unlikely to analyze the design of the elements in white chocolate or seek to infer any concept from their arrangement on the intersections of the brown chocolate bar. Most consumers would merely perceive, in an overall perception, nothing more but a variant of a typical appearance of a brown chocolate bar with decorative spots in white

chocolate (remotely evocative of plants or flowers), arranged in a way that each piece contains both flavours of chocolate.

- 51 Since the overall appearance of the chocolate bar at issue does not significantly depart from the norms or customs of the sector, the vast majority or at least a significant part of average consumers, are unlikely to perceive the details of its appearance, on their own, as an indication of commercial origin, in the absence of any word or figurative element independent of the appearance of the chocolate product itself.
- 52 By noting in the overall assessment, that the appearance of the chocolate bar at issue, as a whole, is unlikely to strike the consumer as an indicator of commercial origin, all the more with respect to products that are usually sold in large quantities and inside packaging, the Examiner correctly took into account two relevant circumstances: firstly, the consumer's perception of marks consisting of the appearance of inexpensive foodstuff which are often bought in large quantities without paying particular attention, as explained above; and secondly, the consumer's habits in the market reality, which make it unlikely that consumers would even perceive the shape or appearance of the goods themselves, before acquiring them. Indeed, such circumstances, make it all the more unlikely that consumers would tend to rely on the appearance the goods at issue as an indicator of commercial origin, but are all the more likely to rather seek to identify their origin by a word or figurative mark independent from the appearance of the goods.
- 53 The Holder did not produce any evidence of any special labelling practice in the chocolate market sector. Although it is true that producers of all types of products may seek to distinguish their goods from those of other competitors in various ways, including by an attractive design, or by adding decorative or ornamental elements, this does not mean that due to some special labelling practice in that sector consumers would automatically perceive the appearance of a chocolate bar containing some decorative element (here, sports remotely evocative of flowers, leaves), as an indicator of commercial origin only due to a slight variation in the design on its surface, with respect to other chocolate bars in the marketplace.
- 54 To the Board's best knowledge, the labelling practice in the chocolate market sector, does not differ from the labelling practice for mass consumption goods, whereby producers typically seek to distinguish their products by word and/or figurative marks independent from the appearance of the goods themselves. This is also supported by the examples provided by the Holder itself (see page 8, above) where the appearance of the chocolate bar, is never displayed alone but together with the word/figurative mark of the producer, which always appear on the product's packaging. Therefore, even admitting that the figurative mark at issue, consisting of the appearance of the upper part of a chocolate bar at issue with eight white chocolate elements is visible, for example, through the transparent packaging of an ice cream, or appears as an image on the packaging, for example, of preparations for making pastries or confectionary having the specific two-chocolate flavour, nothing supports the Holder's view that consumers would primarily, or mainly rely on the appearance of the chocolate bar itself, rather than on word or other figurative marks of the Holder, in order to distinguish the commercial origin of these goods on the marketplace.
- 55 The further criticisms raised by the IP Holder stem from obvious misunderstandings of the examiner's reasoning and methodology and cannot alter the above findings.
- 56 Contrary to the Holder's view, the Examiner did not consider that the appearance of the goods at issue can never be registered as a trade mark, nor that only a mark presenting a

repetition of identical patterns or real to life representations of plants or shamrocks would be registrable, but correctly assessed the distinctiveness of the mark at issue, taking into account all the relevant factors. In particular the fact that consumers do not tend to make assumptions about the commercial origin of the goods on the marketplace, merely based on their appearance, unless their appearance significantly departs from the norms or customs of the sector to such an extent that it would immediately strike consumers as a trade mark, which fulfils the essential function of indicating commercial origin.

- 57 In this context, the Examiner cannot be criticised for having mainly based its assessment of the distinctive character on the overall impression produced by the figurative mark at issue, rather than on an exhaustive analysis of the details of its appearance underlined by the IR Holder. The Examiner's approach is all the more legitimate, bearing in mind that an average consumer, who does not tend to pay particular attention when acquiring inexpensive goods for mass consumption, such as those at issue, is unlikely to focus on the details of a spotted pattern on a chocolate bar when buying chocolate products on the marketplace. Moreover, since the white chocolate elements on the surface of the chocolate bar, do not immediately convey any clear or unambiguous concept, the Examiner correctly dismissed the IR Holder's claims, based on the allegedly 'obvious' perception of shamrocks, underlining that this perception would at most be that of a part of the public. Indeed, as explained above, even if some consumers the white chocolate spots might be remotely evocative of flowers or plants, in the Board's view, the vast majority or at least a significant part of relevant consumers are unlikely to even attempt to second guess any specific concept, but would merely perceive decorative spots which aim to distribute both flavours on each piece of the bar. Thus, the vast majority of consumers are unlikely to attribute any trade mark significance to the white chocolate elements on the intersections of the chocolate bar.
- 58 While it is true that the fact that a sector is characterised by a wide variety of shapes (or designs) of goods does not mean that any new shape will necessarily be perceived as a non-distinctive variant of common shapes (14/07/2021, T- 488/20, *FORME D'UN ROUGE À LÈVRES OBLONGUE, CONIQUE ET CYLINDRIQUE* (3D), EU:T:2021:443, § 50), this does not mean either that any new 'variant' on a design, which does not significantly depart from the norms and customs of the market sector, would automatically be perceived as a trade mark. This is also clear when the statement of the Court in paragraph 50 of the "Lipstick" judgment, is read in conjunction with other considerations in that judgment (14/07/2021, T- 488/20, *FORME D'UN ROUGE À LÈVRES OBLONGUE, CONIQUE ET CYLINDRIQUE* (3D), EU:T:2021:443, § 40 and seq.), where the Court reminded that the mere novelty of the design of a product, does not necessarily mean that the appearance of that product will ab initio serve to distinguish the origin of the goods at issue. In this case, even though the file does not contain examples of chocolate bars with exactly the same appearance of the combination of colours in the specific arrangement, the file contains numerous relevant examples of chocolate bars combining dark/brown and white chocolate in various arrangements and patterns. In particular the 'spotted surface chocolate bar' which combines various features similar to those of the sign at issue, supports the Examiner's finding that the appearance of the IR Holder's chocolate bar, does not depart significantly from the norms and customs of the sector, but is a simple variant of the appearance of chocolate bars which the relevant consumer is accustomed to seeing on the marketplace. The IR Holder's arguments stemming from the allegedly 'obvious perception' of shamrocks are not supported by the evidence and arguments in the file and cannot be followed, as explained above.

Therefore, nothing supports the IR Holder's view that the sign submitted for registration would be seen as anything more than a mere 'variation' of the appearance of chocolate bars combining dark/brown and white/beige chocolate in some decorative pattern aiming to distribute both flavours on each piece of the bar, that consumers are accustomed to encounter in the marketplace.

- 59 While it cannot be excluded that the relevant consumer might be able to perceive the appearance of a chocolate bar per se as an indication of origin, this nevertheless presupposes that its appearance departs significantly from the norm or customs of the sector and thereby fulfils its essential function of indicating origin. This may have been the case of the 'tree-like chocolate bar', whose shape and pattern may have been deemed sufficient to endow it with the minimum distinctive character required for its registration as a trade mark in the United Kingdom. However, the mark at issue here is neither identical nor equivalent to the 'tree-like chocolate bar', as correctly noted by the IR Holder itself.
- 60 In this case the Examiner correctly determined that, that the overall appearance of the chocolate bar at issue here is not markedly different from the norms and customs of the sector. Therefore, the vast majority (or at least a substantial part) of consumer will perceive the IR Holder's chocolate bar as a mere variant of the appearance of typical chocolate bars which they are accustomed to meet on the marketplace and not as an indication of the commercial origin of the IR Holder's chocolate products and related goods.
- 61 Therefore, the contested decision correctly found that the mark applied for is unable to perform the essential function as a trade mark thus it is totally devoid of any distinctive character, within the meaning of Article 7(1)(b) EUTMR.
- 62 The appeal must be dismissed.

Order

On those grounds,

THE BOARD

hereby:

Dismisses the appeal.

Signed

G. Humphreys

Signed

M. Bra

Signed

C. Bartos

Registrar:

Signed

H. Dijkema

