

**DECISION**  
**of the Fourth Board of Appeal**  
**of 6 December 2024**

In case R 12/2024-4

**TETRA LAVAL HOLDINGS & FINANCE S.A.**

70, avenue Général-Guisan  
1009 Pully  
Switzerland

EUTM Proprietor / Appellant

represented by Denis V. Shamo, Ruben Rausing gata, 221 86 Lund, SE, Sweden and  
Mattias Malmstedt, Sockerkokaregatan 12, 222 36 Lund, SE, Sweden

v

**Lami Packaging (Kunshan) Co., Ltd.**

No.369, West Xinnan Road  
215 300 Kunshan, Jiangsu Province  
China

Cancellation Applicant / Defendant

represented by Barker Brettell Sweden AB, Kungsbrogatan 3, 112 27 Stockholm, SE, Sweden

APPEAL relating to Cancellation Proceedings No C 52 444 (European Union trade mark  
registration No 1 620 566)

THE FOURTH BOARD OF APPEAL

composed of N. Korjus (Chairperson), C. Govers (Rapporteur) and J. Jiménez Llorente  
(Member)

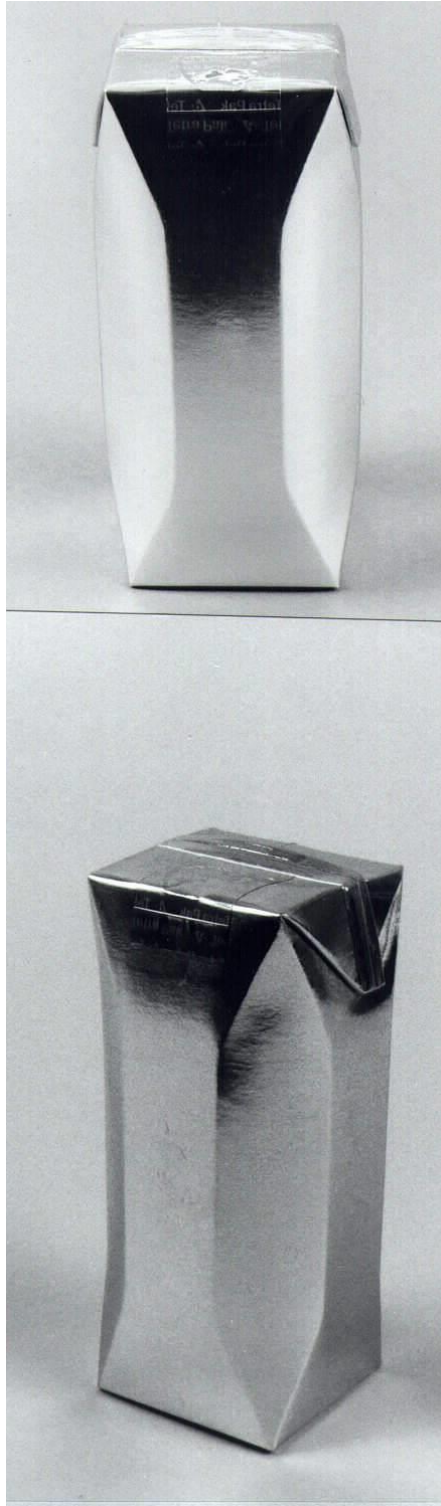
Registrar: H. Dijkema

gives the following

## Decision

### Summary of the facts

- 1 By an application filed on 19 April 2000, TETRA LAVAL HOLDINGS & FINANCE S.A. ('the EUTM proprietor' or 'the proprietor') sought to register the shape mark



as a European Union trade mark ('the contested mark' or 'the contested EUTM') for the following list of goods following partial revocation for non-use (08/06/2015, No 6 110 C)

*Class 16: Packaging containers and packaging material made of paper or made of paper coated with plastic material.*

- 2 The application was published on 1 March 2004, the mark was registered on 20 August 2004, and it will expire on 19 April 2030.
- 3 On 3 January 2022 Lami Packaging (Kunshan) Co., Ltd. ('the cancellation applicant' or 'the applicant') filed a request for a declaration of invalidity of the registered mark for all goods in Class 16.
- 4 The grounds of the request for a declaration of invalidity were those laid down in Article 59(1)(a) EUTMR in conjunction with Article 7(1)(e)(ii) EUTMR, and Article 59(1)(b) EUTMR.
- 5 In support to its request for cancellation, the applicant relied on the following evidence:
  - Annex 1: Cease-and-desist letter dated 18/03/2011 sent by the EUTM proprietor.
  - Annex 2: PCT application WO1997034809A1 filed on 29/10/1996 and two granted US patents.
  - Annex 3: Expert analysis on 'Optimizing Tetra Pak's Utility Patent to Maximize the Described Technical Effect' and Addendum 'Considering the Flaps in Optimizing Tetra Pak's Utility Patent to Maximize the Described Technical Effect'.
  - Annex 4: The proprietor's reply to an examination report received in respect of European Patent Application No 96 940 300 5.
  - Annex 5: Italian patent application No IT1996MI01424 and English translation thereof together with the proprietor's response of 31/08/1998 in reply to the first Office action received in US patent No 5 938 107 (application No 08/739,723).
- 6 By decision of 6 November 2023 ('the contested decision'), the Cancellation Division declared the invalidity of the contested EUTM in its entirety and ordered the EUTM proprietor to bear the costs. It gave, in particular, the following reasons for its decision:

*The essential characteristics of the EUTM*

- The EUTM consists of the following essential characteristics:
  - 1) Four (substantially planar) vertical wall panels and two (substantially planar) rectangular top and bottom panels.
  - 2) Four corner ('secondary') wall panels (defined by straight, vertical lines which, at the upper and lower ends of the panels, merge into pairwise converging diagonal lines that intersect as they reach the top and bottom panels, producing the form of hexagons).
  - 3) A sealing fin crossing the top surface and extending to two corner flaps which are folded down to two of the vertical wall panels.

*All essential characteristics are necessary for obtaining a technical result*

- Contrary to the proprietor’s assertion that the term ‘technical result’ is to be understood in a narrow sense, the term must be interpreted broadly and also includes technical results as (for instance) using less material or facilitating storage or transportation (see, inter alia, Trade Mark Guidelines of the Office, Part B, Section 4, Chapter 6, Part 3) in order to prevent undertakings from obtaining a trade mark on technical solutions or functional solutions of a product.
- A broad interpretation of the term ‘technical result’ does not lead to all trade marks for packaging and containers being declared invalid; the presence of an essential characteristic which is not necessary to obtain a technical result prevents the applicability of Article 7(1)(e)(ii) EUTMR.
- The potential ‘technical result’ or function of packaging containers in Class 16 is not limited to ‘containing another product’, ‘hermetically sealing’ a product or ‘making it capable of being transported’. Other – not less technical – results of packaging containers within the meaning of Article 7(1)(e)(ii) EUTMR also could be (for instance) to keep content warm, cold or germ-free – or to increase the volume of a container in relation to the amount of packaging material used (while ensuring package stability, functional flat-laid corner flaps and handling properties).
- The applicant submitted a copy of the PCT application WO1997034809A1, filed on 29/10/1996 by the proprietor (the ‘PCT application’, Annex 2). The patent was objected to on substantive grounds, and it was not granted.
- The first essential characteristic [four (substantially planar) vertical wall panels and two (substantially planar) rectangular top and bottom panels] is covered by the ‘Background of the Invention’ section in the PCT application, which refers to ‘... the need of maintaining, substantially planar wall panels for imparting stability and good handling properties to the container, and secondly the need to provide for dependable anchorage possibilities for the corner flaps of parallelepipedic containers’.
- The second essential characteristic consists of the four corner (‘secondary’) wall panels which are defined by straight, vertical lines which, at the upper and lower ends of the panels, merge into pairwise converging diagonal lines that intersect as they reach the top and bottom panels, producing the form of hexagons). The functional nature of this characteristic is covered by the ‘Background of the Invention’ section in the PCT application, which refers to the invention as ‘a packaging container of the type disclosed by way of introduction that has secondary wall panels at the corners of the side walls that are defined by two substantially straight vertical fold lines which, at the upper and lower ends of the panels, respectively, merge into pairwise converging diagonal fold lines which meet at one point. This achieves reduction in the amount of packaging material required to produce a container of the same volume’ (emphasis added).
- The expert opinion submitted by the proprietor as Appendix 6 refers to the PCT application and confirms that corner wall panels improve the ratio of the container volume in relation to the packaging material needed.

- The third essential characteristic (a sealing fin crossing the top surface and extending to two corner flaps which are folded down to two of the vertical wall panels) is the result of folding and sealing the carton, and is therefore technically necessary for the creation of a packaging container made of paper (coated with plastic material), as shown by the shape of the EUTM.
- The fact that the shape is, or has been the subject of a claim in a patent application is almost an irrefutable evidence that the aspects of the shape identified in the patent claim as functional are necessary for achieving a technical result.
- Every essential element of the shape of the contested mark is reflected in the teachings of the patent documents submitted by the applicant. The alleged differences between the contested mark and the drawings in the PCT application (as a more rectangular shape of top and bottom, fold lines or the exact size and bending of side panels) do not affect this finding since they either do not concern essential characteristics of the shape at all or are not capable of substantially affecting the function performed by the essential characteristics of the shape.
- The fact that there may be alternative shapes, with other dimensions or another design, capable of achieving the same technical result, does not, in itself, mean that Article 7(1)(e)(ii) EUTMR does not apply.
- As regards the proprietor’s argument that the mark’s shape would by no means be the optimal shape in respect of reducing packaging material (but merely a compromise), the Cancellation Division notes that this is of no relevance. The application of Article 7(1)(e)(ii) EUTMR requires a sign which consists exclusively of the shape (or another characteristic) of goods which is necessary to obtain ‘a’, as opposed to ‘the optimal’, technical result. It would otherwise be possible to circumvent the time-limited monopoly rights for technical solutions via trade mark law, which would run counter the legislator’s objective.
- It is required that all essential characteristics collectively fulfil a technical function, notwithstanding the fact that each essential characteristic might have a specific function. This principle applies to the third essential characteristic (the sealing fin crossing the top surface and extending to two corner flaps) which contribute to enable the overall technical result of increasing the volume of a container in relation to the amount of packaging material used (while ensuring package stability and handling properties).
- The proprietor claims that the contested mark is distinctive, that it features an unusual and unique design and was intended to create an overall aesthetic impression. However, the question of distinctiveness of the contested mark is not relevant under Article 7(1)(e)(ii) EUTMR.
- The proprietor refers to affidavits to show that the overall appearance of the shape ‘is not perceived as functional’. However, unlike in the situation covered by Article 7(1)(b) EUTMR, where the perception of the relevant public must be taken into account (since it is essential in order to determine whether the sign filed for registration as a trade mark is capable of identifying the goods or services concerned

as originating from a particular undertaking), no such obligation may be imposed in the context of Article 7(1)(e)(ii) EUTMR.

- The contested mark is exclusively composed of the shape or another characteristic of the goods that is necessary to obtain a technical result in relation to all the contested goods at the time of filing. Previous decisions adopted by the Cancellation Division (28/11/2013, 6 111 C) or the Board of Appeal (04/10/2010, R 1198/2009-2, SHAPE OF FOOD PACKAGING (3D MARK)) are not binding since they refer to different signs and/or involve different factual backgrounds, or address the functionality of the shape in an *obiter dictum*.
  - As the application is entirely successful on the grounds of Article 59(1)(a) EUTMR in conjunction with Article 7(1)(e)(ii) EUTMR, it is not necessary to examine the remaining ground (Article 59(1)(b) EUTMR) on which the application is based.
- 7 On 3 January 2024, the EUTM proprietor filed an appeal against the contested decision, requesting that the decision be entirely set aside and that the costs be borne by the applicant. The statement of grounds of the appeal was received on 5 March 2024.
  - 8 In its response received on 6 May 2024, the cancellation applicant requested that the appeal be dismissed.
  - 9 By communication dated 18 September 2024, the Board’s Rapporteur invited the parties to submit observations, possibly supported by evidence, on the benefits brought by the shape to the purchasers of the packaging at issue (who will fill them with liquids or foodstuffs and sell them as end products).
  - 10 On 17 October 2024, the EUTM proprietor submitted observations in reply to the Rapporteur’s communication.
  - 11 On 18 October 2024, the cancellation applicant replied to the communication from the Rapporteur.

### **Submissions and arguments of the parties**

- 12 The arguments raised in the statement of grounds by the EUTM proprietor may be summarised as follows:
  - Firstly, while the Cancellation Division (28/11/2013, 6 111 C) and the Board of Appeal (04/10/2010, R 1198/2009-2, SHAPE OF FOOD PACKAGING (3D MARK)) had already taken position on the inapplicability of Article 7(1)(ii) EUTMR to the shape at issue, the Cancellation Division wrongly took the view that the Court of Justice had changed its guidance on the matter. The Cancellation Division should have applied the reasoning followed by the Board of Appeal in its decision of 18/12/2006, R 884/2006-4, 3D (shape of a container). In this decision the Board of Appeal held that ‘provided one can speak of a technical function of a package, this would consist of that the storage in question is able to hermetically seal and transport the product itself. This function is, as far as it is technical at all, completely independent of the chosen shape of the package (right angled, spherical or as featured in the present registration). Consequently, the applicability of Article 7(1)(e)(ii) CTMR is neither

dependent on whether the chosen shape of the package is ergonomically advantageous in the sense that it enables an easier grip and hold of the product, nor on whether it is shaped in such a way that it enables better stackability and use of space so as to allow a larger number of packages to be simultaneously transported ([12/06/2006, R 618/2005-4, dental packaging]), since it does not affect the function of the package, that is, to store the product (...) Moreover, the appellant correctly points out that in any other case, the shape of packages would never be registerable as three-dimensional trademarks since they possess the function of a package’.

- Secondly, the Cancellation Division did not have regard to the specificities of the products at issue when examining if the essential features were technically causal of and sufficient to obtain the intended technical result of the product. The law not only requires that a shape needs to be functional to fall within its scope, but also that this function obtains the specific intended technical result of the product in question. Following the case-law in *Lego* and *Rubik* (14/09/2010, C-48/09 P, Lego brick, EU:C:2010:516; 10/11/2016, C-30/15 P, CUBES (3D), EU:C:2016:849), the ‘technical function’ of the products at issue was defined as the main, direct function of the goods. In turn, when it comes to packaging, the notion of ‘technical result’ excludes advantages such as lower production cost or other general advantages that are not related to the product’s direct functionality.
- The fact that the contested mark makes the packaging container suitable for processing during manufacturing and filling with existing equipment, for efficient shipping and handling by both retailers and consumers or that the shape has positive effects in terms of saving paper in production, does not affect the main intended function of the package, that is, to contain liquids or other products. Such a function is not dependent on the product’s shape.
- Since the contested mark does not correspond to the technically preferable solution for the category of goods at issue, it cannot consist of a shape which is technically causal of, and sufficient to obtain, *the* intended technical result of the goods in question.
- Thirdly, the Cancellation Division failed to appropriately identify all of the contested mark’s essential characteristics. The Cancellation Division disregarded the most important essential characteristic feature of the contested mark, namely the overall impression. The Cancellation Division should have reached the same conclusion as in the previous decision of 18/12/2006, R 884/2006-4, Shape of a container. In this decision, the Board of Appeal had held that ‘the overall impression of the shape is similar to a prism and has obvious non-functional features’.
- Fourthly, the Cancellation Division erred in interpreting the evidence, including the PCT application, because the intended technical result of the product is not to ‘save paper’ but to ‘store liquid’. In any event, the Cancellation Division wrongly equated the drawing in the PCT application with the contested mark. There are differences between them.
- Contrary to what is disclosed in the drawings in the PCT application, the contested mark has got a substantially squared top and bottom, not a rectangular one. Also, the

contested mark does not show fold lines and the ‘secondary panels’ at each corner are plane, not inward bending.

- Fifthly, the Cancellation Division arrived at an incorrect conclusion because it failed to demonstrate that the ‘overall appearance’ of the contested mark (which is an essential feature thereof) is technically causal of and sufficient to obtain the intended technical result, whether the result is to store liquid or to save paper.
- The features were chosen for aesthetic reasons, in order to enhance the visual impression left by the contested mark, rather than technical ones.
- The fact that a shape of container was disclosed in the PCT application does not necessarily imply that its features perform a technical function. Drawings in patents may also include non-technical features such as ornamental ones. The focus of the PCT application is not to provide a container that increases the volume-to-surface ratio, but to provide a container that has a discernible profile such as the contested mark.
- There is no bad faith in protecting the appearance of a product or some of its features by means of trade marks and patents. Moreover, the essential features of the mark are non-functional and have no technical effects.

- 13 In support to its appeal, the proprietor relied on the following evidence which had been already submitted before the Cancellation Division:

Appendix 1: Cancellation Division decision of 28/11/2013, No 6 111 C.

Appendices 2-4: Affidavits from the Italian Institute of Packaging, the Polish Packaging Research Institute and the Polish Chamber of Food Industry

Appendix 5: Article by Felix Schulyok: ‘The protection of functional shapes under European trade mark law’ (2010)

Appendix 6: Expert Opinion (European Patent Attorney Mr. Broströmer)

Appendix 7: Web page regarding Tetra Brik® container

Appendix 8: Web page regarding Tetra Prisma® container

Appendices 9 & 10: Affidavit & Exhibit 1 to Affidavit.

- 14 The arguments raised in response to the appeal by the cancellation applicant may be summarised as follows:

- The technical function of the goods in the present case is not limited to being able to hold liquids but also being suitable for processing during manufacturing and filling with existing equipment, and for retail, transportation and storage.
- The proprietor’s descriptions in the patent documents establish that the technical effect that was being pursued with the shape of the contested mark was not merely to hold fluid, but to maximise the amount of fluid that can be held by a given amount of container material, while still providing the rectangular footprint required for



processing and expected for the retail environment. The object was to impart (without expensive technical intervention) a greater volume in relation to consumed material area, at the same time as the packaging containers retain their suitable shape from the point of view of handling and packing.

- This is confirmed by the expert analysis submitted by the proprietor as Appendix 6, which states that ‘The main problem for a container is to contain a liquid, and the invention [of WO 97/34809] looks at the problem of increasing the theoretical volume of contents of the packaging container in relation to the area of consumed packaging material and ensuring package stability, functional flat-laid corner flaps and handling properties. In the patent, the problem is solved by introducing secondary wall panels to a packaging container comprising a plurality of side wall panels and a top portion and a bottom portion, the side wall panels extending between the top portion and the bottom portion. Each secondary side wall panel being defined by a pair of vertical fold lines having their ends spaced from the respective top portion and bottom portion and by a pair of diagonal fold lines extending from the ends of the vertical fold lines and converging toward the top portion and the bottom portion respectively’. The expert’s conclusion is the following: ‘The invention in WO 97/34809 thus allows for several different embodiments of different configurations suitable for different uses, all having the secondary side wall panels of claim 1 and solving the problems posed in the invention. These containers also offer a different profile, which makes it possible to distinguish them more easily and employ it as a vehicle for identifying a specific product type [p17, rows 1-5, WO 97/34809]’.
- If holding liquid is a core technical function, then holding more liquid for the same amount of material while meeting other practical constraints in manufacturing and distribution is an advance to this technical function. The prismatic shape reduces the amount of liquid packaging paperboard needed to hold a given volume compared to traditional parallelepiped shapes. Thus, a given amount of packaging material is now able to hold an increased volume of fluid while still being able to be processed on equipment normally requiring parallelepiped-shaped packages. This technical function, as explained in the patent documents, is strictly functional in relation to the goods concerned. The ability for a given amount of material to hold an increased amount of liquid is a valuable technical effect.
- The contested mark brings an added technical function of commercial importance.
- The PCT application teaches in words and shows in the figures that the shape of the contested mark is within the scope of the claims. Naturally, the patent seeks to cover a wide range of variations of the invention, including the cross-section (square or rectangular) of the brick. The width of the concave edges, for example, essentially one half the width of the package, has been mathematically shown to the optimum value, for a square or nearly-square shape, to optimise material savings.
- The absence of fold lines in the contested mark is irrelevant since the PCT application makes it clear that they are merely optional for the achievement of the technical effect.
- Nothing in the patent documents implies that the goal of the invention was to achieve an aesthetic design or that the invention is not entirely functional and driven by technical functions.

- Where it is established that each and every essential characteristic is necessary to obtain a technical result, the overall impression left by the contested mark is irrelevant.
  - Since the EUTM application was filed with the intention of obtaining an exclusive right for purposes other than those falling within the functions of a trade mark (namely artificially substituting patent protection, which was denied, by trade mark protection), the EUTM proprietor was acting in bad faith when filing the trade mark application.
- 15 The EUTM proprietor's observations on the Rapporteur's communication (see paragraph 9 above) can be summarised as follows:
- The assumption that the PCT application WO1997034809A1 explains the purpose and function of the contested shape is wrong because the drawing of the PCT application does not correspond to the contested mark. In particular, certain fold lines, which are explicitly connected to the technical effect of avoiding bulging as per PCT application WO1997034809A1, are clearly absent from the contested mark.
  - The assumption that the contested shape would allow maximising the amount of fluid that can be held by a given amount of container material is wrong because maximisation of the ratio capacity-used material is only achieved by a sphere.
  - The contested mark does not correspond to one of the 'preferred' shapes for ensuring package stability and handling properties or saving paper material. The contested mark is a less effective result than other alternative shapes.
  - The material-savings criterion is not even at the core of the PCT application WO1997034809A1. The primary focus of the technical teaching is instead on other practical matters such as stackability and ease of handling.
  - The packages shown in figures 2 and 8 of the PCT application have a substantially rectangular cross-section which allows the package to be handled easily by both the human user and during industrial production. In contrast thereto, the contested mark has an octagonal cross-section, which is inferior in terms of handling, but exhibits instead a superior aesthetic quality. Thus, the patent application itself proves that the original aesthetic design of the contested mark cannot be regarded as a shape where all essential features are contributing to the technical result of the product. The patent application explicitly states that one of the main goals is to obtain a different profile in terms of appearance.
  - A mere improvement brought to standard product's characteristics should not be barred from trade mark protection.
  - The teaching of the patent application is not solely directed at providing the best technical functionalities, but to partially do so while providing a discernible shape.
  - The basic requirement for a container to fulfil the intended technical result of storing liquid is to be three-dimensional, hollow, with an ability to store liquid without leakage. This is the technical solution and function. Those features are present in every container or package and there is no legislative intention to exclude packages from being registered as trademarks for the goods in Class 16 or in any other class. The shape of a packaging container will not affect the intended functionality, as it is

possible to randomly change the shape of a packaging container (and hence the respective essential features of such shape) without affecting its function of storing liquid per se.

- In relation to the *KIT-KAT* chocolate bar shape, the CJEU found that a shape resulting from *a more efficient process for manufacturing goods* is **not** excluded from registration under Article 7(1)(e)(ii) EUTMR (16/09/2015, C-215/14, Nestlé KIT KAT, EU:C:2015:604). Consequentially, even if – for the sake of an argument – the contested mark was to be regarded as a shape helping ‘saving paper material’ compared to a package with a rectangular cross-section, it would not be excluded from registration under Article 7(1)(e)(ii) EUTMR. The possibility of ‘saving paper’ is not the intended technical result of a package or a container, but instead a process for manufacturing goods.
  - An expert opinion is submitted which concludes that the shape of the contested mark is not a functional shape but a shape with its own inherent advantages/disadvantages. The expert considers that the contested mark does not present a solution for solving the problems defined in patent application. In fact, the contested mark is a shape that is taught to be impractical and inferior to other alternatives.
- 16 The cancellation applicant’s observations on the Rapporteur's communication (see paragraph 9 above) can be summarised as follows:
- The overall shape of the contested mark is particularly appealing to the sellers, as it strikes a delicate balance between volume, transportability, stability and end user demands, especially for on-the-go beverages.
  - Moreover, the design allows for the use of less material without compromising the qualities of the packaging. By optimising the shape and structural integrity, manufacturers may reduce weight, and thereby costs, while still meeting other in-demand functions. The use of less material also aligns with environmental sustainability goals relevant to these sellers, as well as to their environmentally conscious end-users.
  - Consumers of relevant dairy and plant-based beverages are often particularly interested in environmental sustainability issues, and environmentally conscious end-users are increasingly seeking products that reflect their commitment to sustainability. They prefer packaging that reduces waste, uses fewer resources, and has a minimal environmental footprint. This growing consumer awareness influences purchasing decisions, with many choosing brands which prioritise eco-friendly practices. For sellers who wish to cater to these preferences, the shape of the contested mark is highly relevant as it meets that demand while not compromising on other features. By using the packaging design that uses less material, that may help attract and retain customers who value environmental responsibility, in a market that is progressively leaning toward green initiatives.
  - The proprietor advertises its products as being ‘ergonomic packaging’ which is ‘designed to fit perfectly the hand’. The benefits are twofold, namely 1) the octagonal shape fits perfectly in human hands for a more comfortable grip, and 2) there is more space for printing, which improves branding potential. The proprietor’s webpage dedicated to its product named ‘Tetra Prisma Aseptic’ contains the following

statements: ‘The tall, slim profile catches the eye while the ergonomic, space-saving design offers optimal efficiency. It’s the ideal addition to your range of on-the-go packaging’. The contested mark aims to minimise waste, save resources, and reduce distribution costs. The reduced material required for a given volume of fluid is naturally part of these additional ‘main purposes of packaging’.

- Ease of use, the ability to withstand the rigours of shipping and handling, and marketing success are among the benefits that customers may learn from the sales performance and physical performance of the Prisma package for those purchasing it.
- Some of the benefits are only experienced by the proprietor, not the customers. The improved carton shape costs less to manufacture since the customers might expect some price reduction rather than paying a premium for the octagonal shape. Analytical observation such as measuring the mass of the blank or the empty carton can also reveal that the mass of laminated paperboard material is less than that of cartons holding the same volume but having conventional parallelepiped shapes. Thus, relatively simple observation can reveal the significant material reduction inherent in the 3D shape and may then lead customers who are sufficiently inquisitive to understand at least some of the benefits of the shape related to the technical functions taught in the patents.
- While such benefits are most directly for the proprietor, there are some secondary benefits from such technical functions for the customers such as slightly reduced transportation costs, a lower carbon footprint and a better sustainability story.
- Customers are likely to seek information about the Prisma package. If one simply searches for the term ‘Tetra Prisma package’ on a free patent database such as Google Patents or Free Patents Online (freepatentsonline.com), useful information will be quickly found.
- The proprietor states in U.S. patent 5 938 107 (or the PCT application) that ‘The improved economy, which is inherent in the advantageous relationship between packed volume and consumed material area in practice provides **significant savings** in the quantity of material used to form a package of a given volume. According to the invention, packages having a volume of, e.g. 1000 ml have been manufactured with **8 %** less material than was previously required to make a package of the same volume. It is also vital to note that the packaging container will have a different, distinguishing appearance at the same time as becoming easier to grasp and easier to use for the consumer’.

## Reasons

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

*Applicable law*

- 19 With regard to the substantive law, the relevant provisions are, on the one hand, Article 51(1)(a) read in conjunction with Article 7(1)(e)(ii) of Regulation (EC) No 40/94 ('CTMR'), and, on the other hand, Article 51(1)(b) CTMR, since the application for registration of the contested mark was made on 19 April 2000. In the case of applications for a declaration of invalidity, the date on which the application for registration of such marks was made is determinative for the purposes of identifying the applicable substantive law (23/04/2020, C-736/18 P, GUGLER (fig.) / GUGLER FRANCE, EU:C:2020:308, § 3).
- 20 In contrast to substantive rules, procedural rules generally apply on the date on which they enter into force (12/05/2021, T-70/20, MUSEUM OF ILLUSIONS (fig.) / MUSEUM OF ILLUSIONS (fig.), EU:T:2021:253, § 17 and the case-law cited). Since the application for cancellation was filed on 3 January 2022, the dispute is governed by the procedural provisions of Regulation 2017/1001 ('EUTMR').

*Scope of appeal*

- 21 The request for a declaration of invalidity was based on two grounds, namely Article 51(1)(a) read in conjunction with Article 7(1)(e)(ii) CTMR, and Article 51(1)(b) CTMR ('bad faith').
- 22 The Cancellation Division upheld the request on the basis of the first of these two grounds, without examining the second. The Board of Appeal will start examining the first ground, namely Article 51(1)(a) read in conjunction with Article 7(1)(e)(ii) CTMR.

*Article 51(1)(a) in conjunction with Article 7(1)(e)(ii) CTMR*

- 23 Following Article 51(1)(a) CTMR, an EUTM shall be declared invalid on application to the Office where the trade mark has been registered contrary to the provisions of Article 7 CTMR.
- 24 Under Article 7(1)(e)(ii) CTMR, signs which consist exclusively of the shape of goods which is necessary to obtain a technical result are refused registration. The general interest underlying Article 7(1)(e)(ii) CTMR is to prevent trade mark law from resulting in an undertaking being granted a monopoly as to the technical solutions or utilitarian characteristics of a product (26/06/2024, T-192/23, Shape of metal beams for construction, EU:T:2024:420, § 12).
- 25 The rules laid down by the legislature reflect the balancing of two considerations, each of which is likely to contribute to the achievement of a healthy and fair system of competition. First, the inclusion in Article 7(1) CTMR of the prohibition on registering as a CTM (now: EUTM) any sign consisting of the shape of goods which is necessary to obtain a technical result ensures that undertakings cannot use trade mark law to perpetuate, without any time limit, exclusive rights relating to technical solutions. Secondly, by limiting the ground for refusal set out in Article 7(1)(e)(ii) CTMR to signs consisting 'exclusively' of the shape 'necessary' to obtain a technical result, the legislature duly considered that any shape of goods is, to a certain extent, functional and that it would, therefore, be inappropriate to refuse registration as an EU trade mark of a shape of goods merely on the ground that it has utilitarian characteristics. By the terms 'exclusively' and 'necessary', that provision

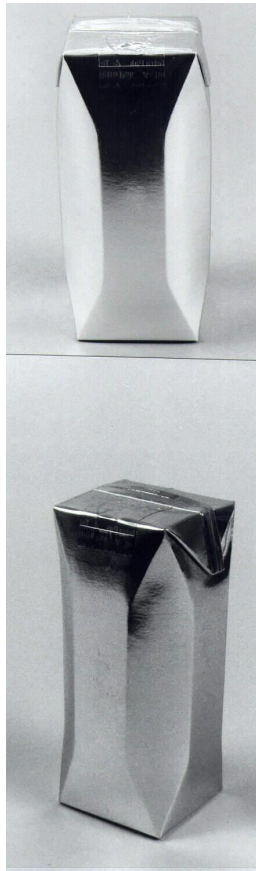
ensures that solely shapes of goods which only incorporate a technical solution, and whose registration as a trade mark would therefore actually impede the use of that technical solution by other undertakings, are not to be registered (14/09/2010, C-48/09 P, SHAPE OF A LEGO BRICK (3D), EU:C:2010:516, § 44-45).

- 26 As regards the condition laid down in Article 7(1)(e)(ii) CTMR, referring to a shape which is ‘necessary’ to obtain the technical result in question, that does not mean that the shape in question must be the only one which makes it possible to obtain that result. Thus, there may be alternative shapes, with other dimensions or another design, capable of achieving the same technical result (14/09/2010, C-48/09 P, SHAPE OF A LEGO BRICK (3D), EU:C:2010:516, § 53-54). In other words, Article 7(1)(e)(ii) CTMR precludes registration of any shape consisting exclusively, in its essential characteristics, of the shape of the goods which is technically causal of, and sufficient to obtain, the intended technical result, even if that result can be achieved by other shapes using the same or another technical solution (12/11/2008, T-270/06, SHAPE OF A LEGO BRICK (3D), EU:T:2008:483, § 43).
- 27 The correct application of that ground for refusal requires that the authority deciding on the validity of a registered mark first, properly identify the essential characteristics of the three-dimensional sign at issue and, second, establish whether they perform a technical function of the product concerned (23/04/2020, C-237/19, Gömböc Kutató, EU:C:2020:296, § 28).

*Identification of the contested mark’s essential characteristics*

- 28 A correct application of Article 7(1)(e)(ii) CTMR requires the essential characteristics of the three-dimensional sign at issue to be duly identified. The expression ‘essential characteristics’ must be understood as referring to the most important elements of the sign (14/09/2010, C-48/09 P, SHAPE OF A LEGO BRICK (3D), EU:C:2010:516, § 68-69).
- 29 The identification of the essential characteristics of a sign must be carried out on a case-by-case basis, there being no hierarchy that applies systematically between the various types of elements of which a sign may consist. It may be carried out either directly on the basis of the overall impression produced by the sign, or by first examining in turn each of the components of the sign (14/09/2010, C-48/09 P, SHAPE OF A LEGO BRICK (3D), EU:C:2010:516, § 70).
- 30 Furthermore, Article 7(1)(e)(ii) CTMR cannot be applicable where the sign relates to a shape of goods in which a non-functional element, such as a decorative or imaginative element, plays an important role. In this case, competitor undertakings easily have access to alternative shapes of equivalent functionality, so that there is no risk that the availability of the technical solution will be impaired. That solution may, in that case, be incorporated without difficulty by the competitors of the mark’s proprietor in shapes which do not have the same non-functional element as that contained in the proprietor’s shape and which are therefore neither identical nor similar to that shape (14/09/2010, C-48/09 P, SHAPE OF A LEGO BRICK (3D), EU:C:2010:516, § 72).

31 The contested mark consists of the following shape:



32 The Board of Appeal considers that the contested mark's essential characteristics are the following:

- A brick with four wall panels and four truncated angles creating an octagonal shape with a roughly square cross-section;
- The four truncated angles are in the form of rounded hexagons/parallelograms, and their surface is concave rather than plane;
- The four wall panels are narrowing in their middle part and flaring upwards and downwards;
- The upper part of the brick is equipped with a sealing fin crossing the top surface and extending to two corner flaps which are folded down to two of the vertical wall panels.

33 The proprietor has argued that the overall appearance resulting from the combination of the foregoing characteristics is an *additional* characteristic. In this respect, the Board points out that if each of the characteristics of the shape is, individually, imposed by a technical function, then the fact that their arrangement has ornamental value is irrelevant. In other words, the overall configuration of the functional elements is not a characteristic on its own which is independent of its parts. The fact that the sum of the exclusively functional elements contributes to creating an ornamental image is not relevant, even if the combination of the characteristics gives the sign a distinctive character (19/09/2012, T-164/11, Knife handles, EU:T:2012:443, § 33; 05/07/2023, T-10/22, FORM EINER

FLASCHE (3D), EU:T:2023:377, § 49; 26/06/2024, T-192/23, Shape of metal beams for construction, EU:T:2024:420, § 106).

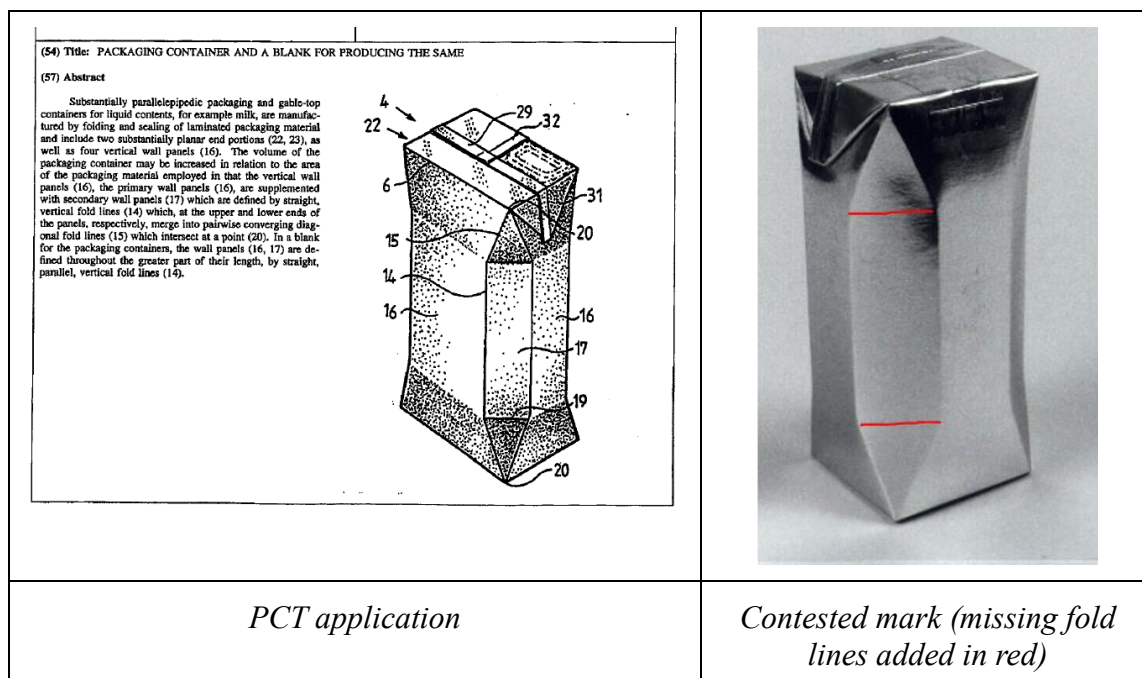
- 34 The Board of Appeal also dismisses the proprietor's argument that, assuming that some of the essential characteristics might have a technical function, those characteristics *also* have arbitrary aesthetic aspects preventing the application of Article 7(1)(e)(ii) CTMR. In order to exclude the application of that provision, it is necessary for the shape at issue to contain at least one aesthetic element which is devoid of the technical function and which, at the same time, plays an important role in that shape. Thus, the fact that an essential element of the contested mark, which is necessary to obtain a technical result, also has an aesthetic value does not preclude the application of Article 7(1)(e)(ii) CTMR (26/06/2024, T-192/23, Shape of metal beams for construction, EU:T:2024:420 § 56).

*Identification of the technical result achieved and its relevance to the goods*

- 35 In examining the functionality of a sign consisting of the shape of a product, it is only necessary to assess, once the essential characteristics of that sign have been identified, whether those characteristics correspond to the technical function of the product concerned. That assessment must, of course, be made by analysing the sign filed for registration as an EU trade mark, and not signs consisting of other shapes of goods. The technical functionality of the characteristics of a shape may be assessed, *inter alia*, by taking account of the documents relating to previous patents describing the functional elements of the shape concerned (14/09/2010, C-48/09 P, SHAPE OF A LEGO BRICK (3D), EU:C:2010:516, § 84 and 85). Such an analysis cannot be made without taking into consideration, where appropriate, the additional elements relating to the function of the actual goods (10/11/2016, C-30/15 P, CUBES (3D), EU:C:2016:849, § 46 and 48).
- 36 In addition, the ground for refusal under Article 7(1)(e)(ii) CTMR is applicable only where all the essential characteristics of the sign are functional, with the result that such a sign cannot be refused registration as a trade mark under that provision if the shape of the goods at issue incorporates a major non-functional element, such as a decorative or imaginative element which plays an important role in that shape (11/05/2017, C-421/15 P, A surface covered with circles (fig.), EU:C:2017:360, § 27). The fact that an essential element of the contested mark, which is necessary to achieve a technical result, also has aesthetic value or an unusual character does not preclude the application of Article 7(1)(e)(ii) of Regulation 2017/1001 (05/07/2023, T-10/22, FORM EINER FLASCHE (3D), EU:T:2023:377, § 22 and 45).
- 37 In the present case, the goods designated by the contested mark, namely *packaging containers and packaging material made of paper or made of paper coated with plastic material* in Class 16, are addressed at foodstuff producers who fill the containers with foodstuff or liquid, and distribute them under their own trade mark.
- 38 The proprietor argues that the only relevant functionality of a container is to contain liquid and that Article 7(1)(e)(ii) CTMR would therefore be inapplicable to any shape of container whose characteristics do not impact on this 'primary' function. According to the proprietor, the notion of 'technical result' would exclude any improvement or advantage, such as lower production cost or other general advantages obtained in the course of use of the product that are not related to its direct functionality.



- 39 The Board notes that Article 7(1)(e)(ii) CTMR only refers to a ‘technical result’ without introducing any distinction based on the ‘primary’ or ‘secondary’ utility of the shape at issue for the goods.
- 40 As is clear from the case-law cited in paragraph 35 above, the technical result achieved by the essential characteristics must be examined starting from the sign at issue, as represented graphically for the purposes of registration, and taking into account, where appropriate, additional elements relating to the function of the actual product at issue.
- 41 This means that the starting point of the analysis is not limited to the abstract utility of the category of product covered by the trade mark registration. On the contrary, the analysis takes as a starting point the specific technical function performed by the shape at issue. Once the technical function performed by the contested mark is defined, it must then be examined if this function is relevant to the category of goods at issue.
- 42 In other words, Article 7(1)(e)(ii) CTMR applies to all functionalities, primary or secondary, that are performed by essential characteristics of shapes which consumers will be looking for in the products of competitors, given that they are intended to perform an identical or similar function (18/06/2002, C-299/99, Remington, EU:C:2002:377, § 78; 18/09/2014, C-205/13, Tripp Trapp, EU:C:2014:2233, § 26).
- 43 On the basis of the PCT application which contains the drawing reproduced below, the Cancellation Division found that each and every essential characteristic of the contested mark was necessary to obtain a technical result, namely to increase the volume of a container in relation to the amount of packaging material used, while ensuring package stability and handling properties:



- 44 For the reasons set out by the Cancellation Division, the Board agrees that the essential characteristics of the contested mark allow increasing the capacity/used material ratio, while ensuring package stability and handling properties, in accordance with the claims of the PCT application.

- 45 The proprietor's arguments about the differences between the contested mark and the drawing in the PCT application are ineffective. Firstly, the fact that the contested mark has a square cross-section rather than a rectangular one is irrelevant since other drawings in the PCT application show containers which a square cross-section (see Fig. 9 of the PCT application). A square cross-section is therefore an alternative solution to achieve the same result as described in the patent. Secondly, the fact that the contested mark does not have a fold line, as shown as the feature 19 in the drawing above, is irrelevant since this fold line is optional in the invention (see PCT application, p. 12, lines 2 to 6). Thirdly, the fact that the truncated angles are concave in the contested mark while they are flat in the drawings of the PCT application is irrelevant since concavity is mentioned as an alternative solution to achieve the result described in the patent (see PCT application, p. 17, first line).
- 46 In any event, the relevance of the PCT application cannot be called into question by the fact that its drawings show variations from the contested mark, since the identity of the patent with the trade mark is not a condition for it to be taken into account when assessing the functionality of the essential characteristics of the mark (26/06/2024, T-192/23, Shape of metal beams for construction, EU:T:2024:420 § 62).
- 47 The PCT application, including its drawings, illustrates that a prismatic shape such as the contested mark reduces the amount of liquid packaging paperboard needed to hold a given volume compared to traditional parallelepiped shapes. Secondary advantages obtained are that the shapes, including the contested shape, applying the invention remain compatible with package stability and handling properties.
- 48 The fact that this result is improving the volume-to-surface ratio compared to classic bricks, while not optimising the capacity of the container to the same extent as a sphere, is irrelevant. Article 7(1)(e)(ii) CTMR does not require the shape at issue to be the only or the best appropriate shape for the purpose concerned, as alternatives and better alternatives remain possible (see case-law mentioned at paragraph 26 above).
- 49 The Board therefore considers that the contested mark was designed to achieve a certain result that is technical in nature (that is, solving the technical problem of improving the ratio of the container volume in relation to the packaging material needed by means of the specific arrangement of the features of the packaging). This result is achieved by the first three characteristics identified at paragraph 32 above, which define the shape's structure and contours, while the fourth characteristic (the sealing fin crossing the top surface and extending to two corner flaps which are folded down to two of the vertical wall panels) merely ensures that the packaging is hermetically closed.
- 50 This does not, however, mean that all results of a technical nature are 'technical results' within the meaning of Article 7(1)(e)(ii) CTMR.
- 51 The Court of Justice has repeatedly said that the expression 'necessary to obtain a technical result' must be interpreted as meaning that the essential characteristics of the shape must 'perform a technical function' in order to achieve a certain technical result (18/06/2002, C-299/99, Remington, EU:C:2002:377, § 79 and 80; 14/09/2010, C-48/09 P, SHAPE OF A LEGO BRICK (3D), EU:C:2010:516; 10/11/2016, C-30/15 P, CUBES (3D), EU:C:2016:849, § 38).
- 52 In the 'shape of a chocolate bar' case, the Court of Justice was asked in substance whether the shape of the 'Kit Kat' bar was functional on account of the fact that its essential

characteristics allowed for efficient de-moulding, packaging and distribution and, more generally, for the optimisation of the mass production of the goods. The Court of Justice answered that the absolute ground of refusal or invalidity applies where the shape allows a product to achieve a desired technical result when this product is in use, but it does not apply to the manner in which the goods are manufactured (16/09/2015, C-215/14, Nestlé KIT KAT, EU:C:2015:604, § 57).

- 53 That interpretation is confirmed by the objective of Article 7(1)(e)(ii) CTMR, which consists of preventing a monopoly from being granted on technical solutions which a user is likely to seek in the goods of competitors (18/06/2002, C-299/99, Remington, EU:C:2002:377, § 78; 18/09/2014, C-205/13, Tripp Trapp, EU:C:2014:2233, § 18). As the Court of Justice held, ‘from the consumer’s perspective, the manner in which the goods function is decisive and their method of manufacture is not important’ (16/09/2015, C-215/14, Nestlé KIT KAT, EU:C:2015:604, § 55).
- 54 In this case, the public targeted by the contested mark are professional intermediaries of the foodstuff industry who will purchase empty packaging to fill them with liquids and foodstuffs.
- 55 When asked by the Board about the benefits brought by the characteristics of the shape at issue to the public of professional intermediaries purchasing the goods at issue from the proprietor, the cancellation applicant referred, first and foremost, to the benefits enjoyed by the proprietor itself, that is economic savings and compliance with environmental sustainability objectives. However, such benefits are only for the proprietor, and they will consequently not be sought in the goods of competitors by purchasers of empty packaging.
- 56 The applicant remains rather vague when identifying the benefits brought by the contested mark to the retailers. The applicant refers to ‘real economic and environmental benefits associated with such a technical function’, such as slightly reduced transportation costs, a lower carbon footprint, a better contribution to sustainability and improved communication capacities.
- 57 The Board considers that the savings on transportation costs are purely hypothetical. The gains on sustainability are speculative in their extent and merely the consequence of the economies of used material. The fact that the contested mark offers more space for printing, which improves branding potential and communication, and the fact that it has ‘eye-appeal’, concern marketing considerations, not the utility of the products. Likewise, the mere possibility for the retailer to sell a greater quantity of their products in a packaging incorporating the contested mark, compared to classic bricks which have a lower capacity, is a purely commercial benefit, not a technical one. The alleged benefits are economic or marketing results but not ‘technical results’ within the meaning of Article 7(1)(e)(ii) CTMR, because they do not concern the manner in which the product is used by professional intermediaries, let alone by the end users.
- 58 The effect of the contested mark’s shape on other functions of packaging, such as the capacity to be handled and stored, is at best indirect. The proprietor was obviously working under some constraints when designing the contested mark, and the fact that the shape preserves the capacity of the container to be grasped and stacked does not mean that it has a positive impact on them. This is not supported by the PCT application or the proprietor’s marketing communication which refers to the ergonomic value of the contested mark. The fact that the contested mark can be obtained while complying with the basic requirements

applying to most items of packaging only means that the proprietor made good use of its limited degree of freedom when developing the contested mark.

- 59 To conclude, Article 7(1)(e)(ii) CTMR applies where the shape at issue has a direct effect on the utility that the good in question is intended to have from the relevant public's perspective. Article 7(1)(e)(ii) CTMR does not apply here because the technical result achieved by the first three characteristics identified in paragraph 30 above merely relates to the manufacturing process of the product itself without influencing the function performed by this product.
- 60 Article 7(1)(e)(ii) CTMR should therefore be excluded in cases such as the present one where the shape at issue is not the *cause* of a technical result impacting on the manner in which the product is used, but rather the *consequence* of industrial engineering on its design and production.
- 61 Thus, the fact that the contested mark allows for an efficient volume-to-surface ratio while preserving the stackability, storage and handling of the product does not concern a technical result within the meaning of Article 7(1)(e)(ii) CTMR. Indeed, the ability of a shape to contain more liquids or foodstuffs or to be easily packed and grasped is not a technical result achieved by the product in the normal course of its use. The shape at issue does neither perform a function on its own, nor in relation to other products.
- 62 The Board concludes that Article 7(1)(e)(ii) CTMR does not apply to the contested mark.

#### *Bad faith*

- 63 According to Article 51(1)(b) CTMR (now Article 59(1)(b) EUTMR), an EUTM shall be declared invalid on application to the Office where the EUTM proprietor was acting in bad faith when filing the application for the trade mark.
- 64 Since the Cancellation Division upheld the cancellation applicant's first ground for invalidity, it did not adjudicate on the second ground for invalidity that is, the proprietor's alleged bad faith on the date of filing.
- 65 Pursuant to Article 71(1) EUTMR, following the examination as to the allowability of the appeal, the Board of Appeal shall decide on the appeal. The Board of Appeal may either exercise any power within the competence of the department which was responsible for the decision appealed or remit the case to that department for further prosecution.
- 66 Both parties submitted their arguments on the applicability of Article 51(1)(b) CTMR, including in the course of the appeal proceedings.
- 67 The Board of Appeal stresses that the cancellation applicant's arguments in support of this second ground for invalidity are inseparable from those underlying the first ground that is, the contested mark's alleged functionality within the meaning of Article 7(1)(e)(ii) CTMR. Should the case be remitted for further prosecution to the Cancellation Division, it would be bound by the *ratio decidendi* of the Board's decision regarding the first ground for invalidity, which would necessarily imply the dismissal of the second ground under Article 51(1)(b) CTMR.

- 68 Having regard to the principle of sound administration, the Board considers it expedient to examine the ground for invalidity under Article 51(1)(b) CTMR.
- 69 Where the applicant for a declaration of invalidity seeks to rely on that ground, it is for that party to prove the circumstances which substantiate a finding that the EUTM proprietor had been acting in bad faith when it filed the application for registration of that mark (08/09/2021, T-460/20, Geographical Norway (fig.) / Geographic, EU:T:2021:545, § 16).
- 70 The concept of ‘bad faith’ referred to in Article 51(1)(b) CTMR is not defined, delimited or even described in any way in the legislation (see opinion of 12/03/2009, C-529/07, Lindt Goldhase, EU:C:2009:148, § 36; 11/07/2013, T-321/10, Gruppo Salini, EU:T:2013:372, § 19; 28/01/2016, T-335/14, DoggiS, EU:T:2016:39, § 45). Its meaning and scope must be therefore determined by considering its usual meaning in everyday language, whilst also taking into account the context in which it occurs and the objectives pursued by the CTMR (see 12/09/2019, C-104/18 P, STYLO & KOTON (fig.), EU:C:2019:724, § 43, 44 and the case-law cited). In addition to the fact that, in accordance with its usual meaning in everyday language, the concept of ‘bad faith’ presupposes the presence of a dishonest state of mind or intention, regard must be had, for the purposes of interpreting that concept, to the specific context of trade mark law, which is that of the course of trade. In that regard, the EU rules on trade marks are aimed, in particular, at contributing to the system of undistorted competition in the European Union, in which each undertaking must, in order to attract and retain customers by the quality of its goods or services, be able to have registered as trade marks signs which enable the consumer, without any possibility of confusion, to distinguish those goods or services from others which have a different origin (12/09/2019, C-104/18 P, STYLO & KOTON (fig.), EU:C:2019:724, § 45 and the case-law cited; 29/01/2020, C-371/18, SKY, EU:C:2020:45, § 74).
- 71 Consequently, the absolute ground for invalidity referred to in Article 51(1)(b) CTMR applies where it is apparent from relevant and consistent indicia that the proprietor of a trade mark has filed the application for registration of that mark not with the aim of engaging fairly in competition but with the intention of undermining, in a manner inconsistent with honest practices, the interests of third parties, or with the intention of obtaining, without even targeting a specific third party, an exclusive right for purposes other than those falling within the functions of a trade mark, in particular the essential function of indicating origin (12/09/2019, C-104/18 P, STYLO & KOTON (fig.), EU:C:2019:724, § 46 and the case-law cited; 29/01/2020, C-371/18, SKY, EU:C:2020:45, § 75; 24/11/2021, T-434/20, dziandruk (fig.), EU:T:2021:815, § 31).
- 72 The cancellation applicant based its claim under Article 51(1)(b) CTMR on a single argument: since the EUTM application was filed with the intention of obtaining an exclusive right for purposes other than those falling within the functions of a trade mark (namely artificially substituting patent protection by trade mark protection), the proprietor was acting in bad faith when filing the trade mark application.
- 73 The application under Article 51(1)(b) CTMR must be rejected because it is *exclusively* based on an incorrect premise that is, that the contested mark is necessary to obtain a technical result within the meaning of Article 7(1)(e)(ii) CTMR.
- 74 The applicant therefore failed to prove that the proprietor misused the trade mark registration system to artificially protect a shape which could only be protected by a patent.

- 75 Article 7(1)(e)(ii) CTMR is precisely meant to ensure that the trade mark registration system is not used for the purpose to perpetuate patent protection which is limited in time. Since Article 7(1)(e)(ii) CTMR does not apply to the contested mark, the allegation that the proprietor was acting in bad faith on the day of filing must be dismissed.
- 76 Since the applicant failed to submit any other argument independent from the alleged technical result achieved by the contested mark, Article 51(1)(b) CTMR must be ruled out.

### *Conclusion*

- 77 The Board of Appeal concludes that the contested decision is vitiated by an error in applying Article 7(1)(e)(ii) CTMR to the contested mark.
- 78 Since neither Article 7(1)(e)(ii) CTMR nor Article 51(1)(b) CTMR apply to the contested mark, the contested decision must be annulled and the application for a declaration of invalidity must be rejected in its entirety.

### **Costs**

- 79 Pursuant to Article 109(1) EUTMR and Article 18 EUTMIR, the cancellation applicant, as the losing party, must bear the EUTM proprietor's costs of the cancellation and appeal proceedings.
- 80 As to the appeal proceedings, these consist of the appeal fee of EUR 720 and the EUTM proprietor's costs of professional representation of EUR 550.
- 81 As to the cancellation proceedings, the cancellation applicant must reimburse the EUTM proprietor's cost of professional representation of EUR 450. The total amount is fixed at EUR 1 720.

**Order**

On those grounds,

THE BOARD

hereby:

- 1. Annuls the contested decision.**
- 2. Rejects the application for a declaration of invalidity in its entirety.**
- 3. Orders the cancellation applicant to bear the EUTM proprietor's costs in the appeal and cancellation proceedings in the total amount of EUR 1 720.**

Signed

N. Korjus

Signed

C. Govers

Signed

J. Jiménez Llorente

Registrar:

Signed

H. Dijkema

