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The end of 'smelly' trade marks?

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A recent decision by the ECJ may have put an end to registering smells as trade marks.

An application was made to try and register a particular smell as a trade mark in Germany. The smell was represented on the application form by both a chemical formula and the words "balsamically fruity with a hint of cinnamon". The application was refused by the German national office on the grounds that the smell was not capable of being represented graphically and therefore could not be registered as a trade mark.

On appeal, a number of questions were referred to the ECJ, asking whether representations of trade marks must be in a visible form or whether registrable marks could also include signs such as sounds or smells which, whilst they could not be perceived visually and directly, could be perceived *indirectly* with the help of certain aids. The ECJ was also asked to consider whether various different methods of representing 'smells' graphically were acceptable; these included: chemical formulas, descriptions in words, depositing a sample at the national office for inspection or a combination of these.

The ECJ said that whilst a registrable sign does not **have** to be capable of being perceived visually, it must still be, amongst other things, clear, self-contained, easily accessible, intelligible and durable. (Case No. C-273/00, December 2002) The mark must be sufficiently clear and precise that someone looking at the Trade Mark Register can accurately see what the sign is. None of the ways proposed for representing the 'smell' was sufficient to satisfy these requirements.

Although registration of smells as trade marks was not ruled out completely, it is difficult to see what alternatives for accurate and clear representation could be used. Therefore, the ECJ's decision may be tantamount to closing the door on smell registration.