

TRADE MARK — Registration — Application to register odour — Whether trade mark having to be visually perceivable — Graphical representation — Whether odour representable by chemical formula or other indicia — Council Directive 89/104/EEC, art 2

Sieckmann v Deutsches Patent- und Markenamt (Case C-237/00)

ECJ: President Rodríguez Iglesias, Judges Wathelet, Schintgen, Timmermans, Gulmann, Edward, La Pergola, Skouris, Macken, Colneric and Cunha Rodrigues: 12 December 2002

A sign which could not itself be perceived visually could nonetheless be a trade mark if it could be represented graphically and the representation was clear, precise, self-contained, easily accessible, intelligible, durable and objective. Those requirements were not satisfied, in respect of an olfactory sign, by a chemical formula, a description in words, the deposit of an odour sample, or a combination of those elements.

The Court of Justice of the European Communities so held on a preliminary reference by the Bundespatentgericht, Germany.

On appeal by the applicant from the refusal by the respondent patent and trade mark office to register an "olfactory mark" in respect of "the pure chemical substance methyl cinnamate" with formula " $C_6H_5-CH = CHCOOCH_3$ ", of which the applicant provided a sample in a container, also describing the scent as "balsamically fruity with a slight hint of cinnamon", the Bundespatentgericht sought guidance from the European Court on whether such a sign could constitute a trade mark.

Art 2 of First Council Directive 89/104 on trade marks provides: "A trade mark may consist of any sign capable of being represented graphically, particularly words, including personal names, designs, letters, numerals, the shape of goods or of their packaging ..."

THE COURT said that the list in art 2 of examples of signs which could constitute trade marks was non-exhaustive. A trade mark could consist of a sign which was not in itself capable of being perceived visually, provided it could be represented graphically. In view particularly of the object of registration of trade marks, to enable the competent authorities and the public to know precisely what were the boundaries of the protection given by a mark, such a sign had to be clearly and precisely identifiable, and therefore self-contained, easily accessible and intelligible, and it also had to be durable, and unequivocal and objective. A chemical formula was not sufficiently intelligible to the general public to represent an odour; both it and a description of the odour were not sufficiently clear and precise, and the deposit of an odour sample was not a graphic representation and in any event was not sufficiently durable. A combination of those elements also did not satisfy the requirements of graphic representability.

Appearances: Not listed

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