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HARD TIMES FOR 3D BRANDS ALSO IN SWITZERLAND: NO TRADEMARK PROTECTION FOR THE “KNOPPERS” PACKAGING

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In a recent judgement, the Swiss Federal Administrative Court once again confirmed its (too) strict position with regard to the registration of shape marks. The court ruled that a three-dimensional mark consisting of the graphical background of a popular chocolate bar’s packaging could not be registered since the design was not perceived as an indication of origin, but rather as an indication of an ingredient of the packaged goods.

In its decision of 28 March 2018 (Case no. B-1722/2016), the court concludes that the 3D trade mark depicted below merely represents the packaging of the claimed goods (*inter alia* chocolate products, pastries and ice-cream), which does not differ significantly from the customary packaging designs in the product segments concerned and therefore lacks distinctiveness.



IR 1169244 “fig.”

The Court states that due to the “banal” form of the packaging, the distinctive character of the sign largely derives from the distinctiveness of the printed graphic elements. Although it is possible that, like the complainant had argued, the consumers see a snowcapped chain of hills against the blue sky, they might just as well perceive the white, undulating surface as a merely descriptive reference to milk as an ingredient of the product. Accordingly, whilst in general a graphic design can serve to distinguish the products from other products in the same segment, the present design is not perceived as a trademark, i.e. as an indication of origin, but rather as an

indication of an ingredient of the packaged goods.

This ruling is in line with the consistent strict judicial practice with regard to the registration of shape marks in Europe. However, in the case at hand, the unfounded fear of 3D brands seems to have resulted in an overly strict attitude.

Personally, I doubt that the registration of the graphic design alone, i.e. detached from the shape design, as a two-dimensional figurative mark would have been refused.



However, after the present decision, such a registration will be difficult to achieve. Maybe the brand owner could try again to get his mark registered by showing acquired distinctiveness. Presumably, many Swiss consumers would recognize the shape of their “Frühstückchen” when asked in a consumer survey.

Decision B-1722/2016 of March 28, 2018

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