

Now we know it for a fact: amphoras are not usually made of glass.

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With decision C-783/18 P of 12 December 2019, the CJEU upheld the GC decision (Case T 313/17) that a three-dimensional trademark consisting of a shape of an amphora was distinctive enough to be granted registration.

In our earlier comment ([see here](#)), we had voiced some doubts about the GC's conclusion. Also in view of the many amphora-shaped containers available in the market, it was unclear on which factual basis the GC concluded that the shape of the amphora-like container was considerably different from food packaging commonly available in the market.

Apparently, our doubts were not totally misplaced as the EUIPO (which only rarely appeals to the CJEU) was displeased enough to appeal the GC decision. The EUIPO's appeal was based on two lines of arguments: first that the GC had not analysed whether the mark differed significantly from the norm or customs of the sector, but relied on another criterion, namely whether that mark had 'sufficient

characteristics' to attract the attention of the average consumer, and second that the GC infringed its duty to state reasons by holding that the form of the mark applied for was "exceptional" in relation to the practices in the sectors concerned.

As for the first point, EUIPO argued that the aesthetic value of a trade mark is, as a matter of principle, irrelevant. As a matter of fact, the aesthetic value of a shape which makes it differ from the "norm" would rather militate against distinctive character, since the relevant consumer would perceive the difference as an aesthetic or decorative element and not as an indication of commercial origin. EUIPO further points out that the bulge, which the GC recognized as having aesthetic value, would also be justified by technical and functional considerations, and that functional elements are not normally perceived as indications of commercial origin.

The CJEU however did not give much importance to the "aesthetic" or not argument and found that the GC did not apply a different criterion but gave detailed reasons for its assessment that the container in question was significantly different from bottles and amphoras, as they are usually presented on the market concerned. Thus the GC, "implicitly but necessarily" held that the standard and customs of the sector were established in the sense that it is customary not to use a bottle with a significantly curved shape in the middle or a glass amphora. Consequently, it was not required to indicate, in a general and abstract manner, all the standards and customs of the sector concerned, since the GC could confine itself to stating the customs of the sector in relation to which the trade mark applied for is supposed to diverge significantly.

While this is formally correct, the question remains on which evidence the GC established "the standard and customs of the sector". The second ground of appeal by EUIPO precisely hammered this issue down.

EUIPO argued that neither the overall reference to the 'EUIPO file', nor the general reference to the 'overall aesthetic result' in relation to the usual bottles on the market would enable EUIPO or the CJEU to understand the reasons for the GC's factual assessment. A statement of reasons was all the more necessary since the GC rejected the earlier assessment by two EUIPO instances that the very characteristic which was decisive for the GC to find distinctiveness, namely the bulge, was a characteristic which can be explained by technical and functional considerations. Finally 'an understandable statement of reasons' was also

necessary because both the use of bottles and amphora-shaped containers in the relevant sector and the diversity of the forms of packaging existing in the relevant market sector were well-known facts.

Notwithstanding such reasonable arguments, the CJEU still endorsed the GC's decision with -truth to be told- a somewhat circular line of arguments.

For the CJEU, the duty to state reasons does not require it to provide a statement of reasons which would follow exhaustively and one by one all the reasoning put forward by the parties to the dispute. The statement of reasons may also be implicit, provided that it enables the persons concerned to know the grounds on which the GC relies and the CJEU to have sufficient information to exercise its review. In the case at issue, the CJEU found the decision to satisfy the requirements since the GC set out in detail the factors which enabled it to consider that the mark applied for was exceptional in relation to the practices in the sectors concerned, given that "notably" amphoras are not normally made in glass. Yes, this now we know, but what we do not know is whether there is or was any factual evidence that the shape at issue is really exceptional, and this is somewhat disappointing.

The judgment shows once again how excessively difficult it is to get GC decisions overturned by the CJEU, even where they appear to be contrary to consistent case law - here, the case law concerning 3D marks...