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There is no sweet spot for the three-dimensional gum sweet in Denmark

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The Danish Maritime and Commercial Court (hereinafter “the Court”) decided, on 8 January 2025,



to refer international trademark registration MP 1408424 for *for confectionery* in Class 30 (hereinafter referred to as “the teddy bear”) back to the Danish Patent and Trademark Office for renewed examination. The registration is owned by RiGO Trading S.A. which is part of the German company Haribo Group (hereinafter “Haribo” or “the IR Holder”).

The main allegations for the distinctive character of the three-dimensional sign put forward by the IR Holder were i) the designated teddy bear is distinctive *per se*; ii) the distinctive character should be assessed at the time of first use in 1949/1978 (in the current form) in Denmark; and iii) the teddy bear has acquired distinctive character through use in Denmark.

The Court’s assessment of the **distinctive character *per se*** started out by stating that the designated sign does not deviate significantly from industry norms and customs as it is customary to shape confectionery into different animal shapes. The allegation for distinctive character *per se* of the three-dimensional sign is thus refuted.

It came as a surprise that the IR Holder alleged that **the distinctive character should be assessed at the time of first use in Denmark**. That allegation was refuted by the Court, as it was by the Appeals Board and the Patent and Trademark Office (hereinafter “TMO”) on the grounds that the assessment whether a trademark possesses the necessary distinctive character to be registered must be made on the basis of the circumstances at the time of application/designation. They also found that this is the case both with regard to the assessment whether a trademark for which registration is applied possesses inherent distinctive character and whether a trademark for which registration is applied has acquired distinctive character through use. The allegation that the distinctive character should be assessed at the time of first use sounds most of all like a confession of the client’s trademark matters not being handled with timely due diligence.

When assessing the proof of **acquired distinctive character through use**, the Court started out by referring to standard evidence for Denmark in this kind of cases: the market share of the trademark, the intensity of use, the geographical expanse within Denmark (e.g. are Greenland and the Faroe Islands included?), the duration of use of the trademark, the size of the marketing investments made by the IR Holder to promote the trademark, the proportion of relevant consumers that identify the product as originating from the IR Holder because of the sign, as well as – and maybe to the surprise of fellow Europeans outside of Denmark – declarations from chambers of industry and commerce or other professional associations to the effect that the sign has acquired distinctive character through use in Denmark.

To understand why declarations/affidavits from chambers of industry and commerce or other professional associations are significantly relied upon in Denmark, one must understand the high degree of trust present in Denmark towards other Danes and public institutions. That trust is shown in the [European Social Survey](#) on the level of trust in the European countries and in which Denmark ranks in the top three.

The Court did not find the already assessed evidence to be sufficient. During the Court proceedings, the IR Holder had supplemented the proof with a survey based on data collected during the period from October 30, 2023 to November 5, 2023 – five years after the designation date of 16 May 2018. Despite the later date of the data and finding the evidence of significant relevance, the Court referred the designated International Registration back to the TMO for renewed assessment. It also ordered the TMO to include the survey result setting forth that 60 % of the interviewed public answered “Haribo” unaided to the question of “Which company do you associate this sign with?”. The court thereby left it to the TMO to decide how much relevance should be ascribed to a five-year-later survey and whether the 60 % unaided awareness is sufficient to show that the sign has acquired distinctive character through use.

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This entry was posted on Monday, January 13th, 2025 at 2:08 pm and is filed under [3D Trademark](#), [Acquired Distinctiveness](#), [Denmark](#)

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