

# D YOUNG & CO TRADE MARK NEWSLETTER *no.93*

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A number of interesting cases have been reviewed for our summer 2017 edition of this newsletter covering abbreviations, colour marks, figurative marks and registered Community designs. We hope you find this month's selection of articles of interest and, as always, we welcome your feedback. We wish all our readers an enjoyable summer.

The D Young & Co trade mark team

Events



17-19 September 2017

**IPO annual meeting, San Francisco, US**

Trade mark attorneys and solicitors from D Young & Co's trade mark team will be attending the annual Intellectual Property Owners Association (IPO) meeting. Partner Matthew Dick will be speaking during the "International Trade Mark Issues" session on Tuesday 19 September.

19-22 September 2017

**MARQUES conference, Prague, Czech Republic**

Partner Jackie Johnson and Senior Associate Anna Reid will be attending the 31st MARQUES Annual Conference "Brands and Culture". The conference will look at the cultural, political and social influences that shape brands in the global marketplace.

07-10 November 2017

**INTA leadership meeting, Washington, US**

Trade mark team partner Jeremy Pennant will be attending the INTA leadership meeting in Washington DC this November. The meeting brings together INTA volunteers and leaders once a year to advance the association's objectives and goals.

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London - Munich - Southampton

T +44 (0)20 7269 8550

F +44 (0)20 7269 8555

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Figurative marks / acquired distinctiveness

# Three stripes and you're out...? adidas v Shoe Branding Europe

On 18 December 2013, adidas AG (adidas) applied to register the mark below as a figurative European trade mark (EUTM), bearing the following description: "the mark consists of three parallel equidistant stripes of equal width applied to the product in whatever direction". Just over five months later (which timescale included a three-month opposition period), the mark was registered. No evidence of acquired distinctiveness was requested by the examiner.



On 16 December 2014, almost exactly a year after the mark had been filed, Shoe Branding Europe BVBA (SBE) applied to cancel the registration for lack of distinctiveness, arguing that it comprised merely a basic geometric sign which could be used for decorative purposes. SBE also argued that there was a contradiction between the mark type claimed ("figurative") and the description, which indicated positioning, claiming that the European Union Intellectual Property Office (EUIPO) should have invited the applicant to remedy the discrepancy by changing the mark type to "other". The mark type was therefore uncertain, and could conceivably grant broad protection for a wide range of goods ("clothing; footwear; headgear").

adidas noted that the mark had been registered despite a third party having

filed observations on its supposed lack of distinctiveness. It also pointed out that SBE had filed for several two-stripe marks, and that consumers had been taught to recognise the mark as designating trade origin as a result of the intensive use adidas had made of it over the years.

adidas filed around 12,000 pages of evidence of market use and recognition, including lucrative sponsorship deals with leading sports personalities and football teams.

adidas argued that market survey evidence from many EU countries supported its claim for acquired distinctiveness (including the fact that more than 60% of consumers in Spain and Germany who purchase sports clothing recognised the mark as designating origin).

The Cancellation Division found the mark to be invalid. On the formalities point, it held that the written description of the mark did not position the stripes on a particular part of a product in a constant size or particular proportion to the product; since the mark was registered as a figurative mark and not a position mark, its scope of protection was strictly limited to the graphical representation filed. Any use of the mark shown by adidas therefore had to demonstrate use of the mark exactly as applied for.

The mark had no inherent distinctiveness because consumers would likely perceive it as merely decorative.

As regards the evidence of use filed, the EUIPO noted that insofar as this related specifically to the mark as registered it was "paltry", stating that "some images showing a design on a football shirt or boot that resembles the three lines of the contested

➤ **Case details at a glance**

**Jurisdiction:** European Union

**Decision level:** Second Board of Appeal

**Parties:** adidas AG and Shoe Branding

Europe BVBA

**Citation:** R 1515/2016-2

**Date:** 07 March 2017

**Decision:** <http://dycip.com/r15152016-2>

EUTM is no basis on which to conclude that [it] is recognised as [adidas's] trade mark in the internal market of 500 million people". In short, adidas had not made the connection between the imposing market share and notoriety of the adidas brand on the one hand, and the exposure of the public to the contested mark on the other.

adidas appealed against the decision, maintaining that the Cancellation Division had carried out an incomplete review of the evidence (eg, excluding images showing the mark in the same size/proportions but viewed as going in a different direction – adidas maintained that these were permitted variations which did not alter the distinctive character of the mark); that the description of the mark did not conflict with the figurative classification; that the presence of other adidas marks being used alongside the three stripes cannot bar a finding of acquired distinctiveness; and that established case law confirmed that it is not necessary to show acquired distinctiveness for every member state.

SBE reiterated its claims that consumers would see the mark as ornamental, and that the description was clearly intended to widen its scope by adding "in whatever direction" (since the direction of the sign may well affect its distinctiveness). As regards adidas's attempts to have the survey evidence extrapolated to member states in relation to which no evidence had been adduced, SBE argued that that would only be permissible if the parallel markets were homogenous and where at least some evidence had been shown for the territories in question.

The Board of Appeal held that the description added to the mark did not fatally conflict with its classification as figurative, nor did it necessarily imply that the mark was a position mark. Although the phrase "in whatever direction" was controversial, since it appears *prima facie* to allow countless ways in which the mark might appear, the Board of Appeal held that there was nothing to prevent a proprietor from attaching his mark to a product in any manner or orientation he sees fit. The Board of Appeal noted, however, that whether

use of a mark in a specific orientation could be regarded as genuine use of the mark as registered was another question entirely (on which it did not opine further). In any event, the categorisation of the mark as "figurative", together with the verbal description, did not constitute a procedural error.

As regards adidas's claims that the mark had acquired distinctive character, the Board of Appeal reviewed relevant case law on acquired distinctiveness (including the four finger KitKat decision, case no. C-215/14). It concluded that much of the evidence filed by adidas related to other marks it has registered comprising three parallel equidistant stripes in different lengths and different directions. However, that alone was not reason enough to discard the evidence; consideration had to be given as to whether the use shown was in a form different from the form registered. In this regard, the Board of Appeal noted that the registration was extremely simple: three vertical, parallel, thin, black stripes against a white background whose height is approximately five times its width. A mark which deviates significantly from those characteristics could not be held to constitute legitimate proof of use of the mark.

The Board of Appeal noted exhibits which showed three white stripes against a dark background on clothing and bags, and concluded that this was of doubtful value; similar use on footwear showed much thicker, shorter stripes than those in the registration. Use of the mark in a logo form alongside the ADIDAS word mark were also unhelpful, as the renowned word mark so completely eclipsed the figurative stripes element that "it looks like mere decoration".

Advertising and marketing expenditure figures were not linked to the particular mark as registered, nor was the proportion spent on specific goods highlighted. As regards the extent to which acquired distinctiveness must be shown across the EU, the Board of Appeal did not give helpful guidance – it acknowledged that previous case law held that there cannot be a requirement for proof to be adduced from each individual member state, but went on to state that if the evidence submitted

"does not cover a part of the [EU], even a part which is not substantial or consists of only one member state, it cannot be concluded that distinctive character has been acquired through use of the mark throughout the [EU]".

**Overall, the Board of Appeal was critical of the evidence submitted, noting that much of it was irrelevant (not referring to three stripe marks at all) and/or did not refer to the specific three stripe mark in question.**

The appeal was therefore dismissed.

It seems that adidas has appealed further to the General Court, comprising its third (but not necessarily final) strike in the three stripe saga.

**Author:**

**Matthew Dick**



**In short**

The case confirms the increasingly high hurdle faced by owners of marks that may on one analysis be deemed "decorative" or "surface decoration". Despite the undeniably well-known consumer association between three stripes and adidas across much of the world, this decision confirms, yet again, that a trade mark owner must file the right evidence, focusing on the relevant mark and making it clear to what extent sales figures, advertising spend, market share, etc relate to that specific mark, rather than a wider stable of the owner's brands.

# Its not easy being green Enercon v EUIPO (Gamesa)

In this case, the German energy company Enercon GmbH (Enercon) could not persuade the General Court (GC) that a mark consisting of five shades of green and white, registered in connection with wind turbines, was inherently distinctive.

## Background

In August 2001, Enercon filed an application to register the mark shown on the left in connection with “wind energy converters, and parts therefor”. The trade mark application listed the mark as a “colour mark”, and a description of the colours was provided using a colour code. The mark proceeded to registration in January 2003.

In March 2009, Gamesa Eólica, SL (Gamesa) filed an application for a declaration of invalidity on the basis that the mark had been registered contrary to Article 7(1)(b) (namely, the mark lacked distinctive character), and Enercon had acted in bad faith when filing its application.

In December 2010, the Cancellation Division found in Gamesa’s favour, declaring the mark invalid as it essentially defined the way in which the colours could be applied to a wind turbine tower.

## The winds of change at First Board of Appeal

In January 2011, Enercon appealed, and the First Board of Appeal annulled the Cancellation Division’s Decision. The Board of Appeal held that:

1. The mark was a 2D shape made up of colours, rather than a colour mark per se (ie, the mark was re-categorised).
2. The mark was sufficiently distinctive since it did not represent a 3D wind turbine tower or a colour mark.
3. The mark was not descriptive and did not fall foul of Art 7(1)(e)(ii) (the shape of goods which is necessary to obtain a

technical result) as the mark was neither a colour mark nor a 3D wind turbine.

4. There was no evidence that the mark had been applied for in bad faith: the Cancellation Division’s Decision was based on the fact that green, or a blend of several shades of green, could not be registered in connection with the goods since an EU mark should not hinder the application of national legislation intended to limit the visual impact of the turbines from the ground, whilst ensuring the upper parts remain visible to aircraft.

## Seeing green at the General Court (part I)

Gamesa brought an action before the General Court (GC) for the annulment of the First Board of Appeal decision, though Enercon did not participate in proceedings. Gamesa claimed that:

1. the First Board of Appeal should not have re-categorised the mark as a figurative mark, when it was registered as a colour mark;
2. there was an infringement of the principle of functional continuity; and
3. the First Board of Appeal had failed to take account of the bad faith demonstrated by Enercon.

In its decision from November 2013, the GC dismissed plea (2), but ultimately annulled the First Board of Appeal decision, agreeing with Gamesa that the First Board of Appeal had erred by re-categorising the contested mark as a 2D figurative mark made up of colours. The GC did not go on to examine the distinctive character of the mark.

## Going round in circles: back to the Board of Appeal (via the Court of Justice)

Enercon then appealed to the Court of Justice in January 2014. However, as Enercon had not filed any submissions before the GC, the Court of Justice held that it had not participated in the proceedings and therefore was not entitled to appeal the GC’s decision. The appeal was dismissed as inadmissible.

The case was then remitted to the Second

Board of Appeal, which issued a decision in October 2015 (the contested decision). The Second Board of Appeal held that the mark needed to be considered “as registered” (ie, as a colour mark), and found that it consisted of different shades of green and white, limited to a specific form and arrangement. It went on to hold that the contested mark lacked distinctive character as it simply conveyed an aesthetic/decorative quality, rather than functioned as an indicator of origin. The green colours would be interpreted as denoting ecological or environmentally friendly credentials such that the mark was considered to be entirely mundane.

**The Second Board of Appeal concluded wind energy converters to be high-value capital goods which consumers would not purchase based on their decoration. Instead, consumers would rely on word marks or trade names to provide precise information regarding trade origin.**

Overall, it was held that the mark lacked distinctive character.

The Second Board of Appeal remitted the case back to the Cancellation Division to make an assessment as to whether the mark had acquired distinctiveness through use.

## The GC refuses to turn over a new leaf (part II)

Enercon appealed to the GC, seeking the annulment of the contested decision. At the hearing, Enercon tried to adduce new evidence to demonstrate that the classification of the mark could not affect its distinctive character, and argued that the code assigned to the registration by the European Union Intellectual Property Office (EUIPO) did not correspond to the code used for “colour marks”. However, the evidence was declared inadmissible as Enercon did not provide



The GC held the view that green, as a colour of nature, indicated that the goods were ecological or environmentally friendly



reasons why it could not have produced the materials earlier. Further, it was noted that Enercon could have applied to register a figurative mark if that had been its intention.

As such, GC found that the Second Board of Appeal was correct in its assessment that the mark should not be re-categorised. The Second Board of Appeal did not err, and the EUIPO was correct to hold that the “upright trapezoidal shape” depicted in the mark did not form part of the protection sought, but only provided an indication as to how the colours would be applied to the goods at issue.

**The GC agreed with the Second Board of Appeal’s finding that the contested mark lacked distinctive character: the colour green is associated with nature, and wind energy converters are often located in green areas.**

The applicant argued that the mark consisted of five separate colours and white, though the GC disagreed, holding that the mark consisted of five shades of the same colour and white, such that the gradation would be

seen as blending rather than a combination of separate colours. The use of green colourings would enable to the goods to blend in, thus reducing their visual impact when in situ, and as such the mark did not have the inherent capability to indicate trade origin. Enercon’s argument that the specific colour combinations and the overall shape of the contested mark were capable of denoting origin was rejected. Rather, the GC followed the Second Board of Appeal’s view that green, as a colour of nature, indicated that the goods were ecological or environmentally friendly. The relevant public would draw that same conclusion, and would be prevented from seeing the shades of green as an indication of origin of the goods.

**Overall, the colours on the lower part of the turbine shaft were held to be devoid of distinctive character, as they had the aim of enabling the goods to blend into their environment.**

It was not disputed that wind turbines are not installed in urban areas, but in agricultural or

forest areas. The GC agreed with the Second Board of Appeal that the relevant public would not purchase wind turbines based on their decoration or external presentation, but rather would be guided by other indicators, such as trade names and word marks.

**Author:**  
**Flora Cook**



### In short

The case serves as a reminder that colour marks can be very difficult to protect (and maintain, if registered). Colours are commonly used for their aesthetic appeal and consumers tend to see them as decorative. Whilst marks consisting of colours *per se* may have the capacity to indicate trade origin, this typically arises where a trade mark proprietor has made extensive use of a colour mark such that acquires distinctiveness amongst the relevant consumers.

# SOLISPOST and SOLIS POLE

## Appointed person considers costs consequences of withdrawn appeal

Case details at a glance

Jurisdiction: England & Wales

Decision level: Appointed person

Parties: Onthecase (International) Ltd and Zeta Specialist Lighting Ltd

Citation: O-192-17

Date: 18 April 2017

Decision: <http://dycip.com/O-192-17>

In proceedings before the UK Intellectual Property Office (UKIPO), the hearing officer considered that two trade mark registrations for the word mark SOLISPOST were invalid as they were registered in bad faith and conflicted with earlier unregistered rights owned by the applicant for invalidity. The proprietor appealed to the appointed person, and was represented by its managing director Mr Wood.

At a hearing before the appointed person it became apparent that there was a “blind spot” in Mr Wood’s approach to the legitimacy of the trade mark applications for SOLISPOST which had been filed despite Mr Wood’s knowledge of the applicant’s prior use of the mark SOLIS POLE in essentially the same commercial sphere. Mr Wood’s view was that since the applicant for invalidity had not yet filed or registered a trade mark for SOLIS POLE they were not the legal owners of the name. During the hearing Mr Wood explained that the rules relating to unregistered trade mark rights under the Trade Marks Act 1994 (TMA) did not align with his perception of the way things should work.

Mr Wood was given the opportunity to reconsider his position and seek professional legal advice if necessary and a few days later the appeal was withdrawn.

### Costs of withdrawn appeal

Statute provides that the registrar must award any party such costs as they may consider reasonable. The established practice is to refer to published scale figures which are treated as norms to be applied or departed from with

greater or lesser willingness according to the nature and circumstances of the case. The award should reflect the effort and expenditure caused to the successful party and should not be inflated to impose a financial penalty on the party with responsibility for payment.

The appointed person made it clear that the published scale figures do not have the force of statute and

**“They do not limit- on the contrary they are subject to- the exercise of judgement and discretion which the decision maker should bring to bear in relation to the case at hand”.**

Therefore, the proprietor’s suggestion that there should be a blind adherence to the published scale figures could not be correct.

The appointed person accepted the applicant’s view that the costs could have been avoided if Mr Wood had recognised and accepted the applicable law under the TMA in relation to prior unregistered rights at an earlier stage of the proceedings.

Indeed the hearing officer’s decision outlined the applicable law and facts to such a degree that there was little room for doubt as to the invalidity of the SOLISPOST trade mark registrations. Mr Wood failed to attend the hearing before the registry which would clearly have enlightened him to his “blind spot”. Although this made the appointed person

sympathetic to the applicant for Invalidity, he was careful to ensure the award of costs only reflected the effort and expenditure to which it related and did not include a financial penalty. The appointed person held a reasonable figure of costs for the proprietor to pay in relation to the withdrawn appeal was £3,000. This was to be paid in addition to the sum of £2,800 which was awarded by the hearing officer in relation to the registry proceedings. The overall sum was less than the £19,000 which the applicant said had been incurred in relation to the registry proceedings and the appeal.

Author:  
Fay Birch



### In short

This case reminds us of the rules and principles which will be applied by the registry and appointed person in relation to cost awards. Although the behaviour of the paying party is to be taken into account in determining the effort and expense caused to the successful party, the award should not include a financial penalty as such.

This case equally reminds us of the difficulties a party can run into if they do not carry out a thorough common law search, in addition to a search of the trade mark registers, to discover any unregistered rights which might exist in connection with the mark which they wish to register. A failure to carry out such searches can leave trade mark registrations open to applications for invalidity filed by the owners of such earlier unregistered rights.

### SOLIS POLE was filed despite Mr Wood’s knowledge of prior use of SOLISPOST



# Registered Community designs Applications must be unambiguous in what they show for a filing date to be accorded

➤ Case details at a glance

**Jurisdiction:** European Union

**Decision level:** General Court

**Parties:** Mast-Jägermeister SE v EUIPO

**Date:** 09 February 2017

**Citation:** T-16/16

**Decision:** <http://dycjp.com/T-1616>

**W**ith a registered Community design (RCD) application, there is always the risk (usually a small risk) that the European Union Intellectual Property Office (EUIPO) will not accord the application a filing date on the ground that the 'representations' (the views or figures depicting the design) that were filed were not 'suitable for reproduction'.

This has usually been understood by practitioners to mean that blurred or fuzzy views might result in no filing date being accorded (under Article 36(1) of the Community Design Regulation (CDR)). The same might also be true if the design is shown against a coloured or patterned background that makes it difficult to discern the design itself. It would then be necessary to file new representations which are 'suitable for reproduction', and a filing date will then be accorded, but it will be the date on which the new representations are filed, and importantly will not be the original date on which the first set of representations was filed. This can have serious repercussions. For example, if the RCD application is a first filing for the design in question, the design might have been publicly disclosed in the interval between the original date and the new date, and this could cause problems when, subsequently, corresponding foreign design applications based on the RCD application are filed in foreign jurisdictions which have a requirement for 'absolute novelty' under their local design laws.

For this reason, practitioners, when preparing an RCD application as a first filing, will try to ensure that the views they file depicting the design are not blurred or fuzzy, and that they show up clearly against a neutral background.

However, a probable need for additional caution has been created by a recent decision (on case T-16/16 issued on 09 February 2017) by the General Court of the EU (GC) which suggests that the requirement of 'suitable for reproduction' also means that the views must not contain a muddled collection of different objects that makes it impossible to determine what the design is for which protection is being sought.

**Make sure representations clarify what is inside, or outside, the scope of protection**



The case in question stemmed from an RCD application filed by Mast-Jägermeister SE which showed both a drinking beaker and a bottle. The original examiner at the EUIPO raised objection. The applicant explained that it was not seeking protection for the bottle. A series of examination reports was issued in which the examiner requested that the bottle be removed, or the bottle be disclaimed such as with dashed (broken) lines or by circling round the beaker, or that the application be split into separate applications. The applicant stuck by its wish to continue with the representations as originally filed, supplemented with a written statement that the protected design related to just the beaker.

The examiner eventually refused the application a filing date on the CDR Article 36(1) ground, and the EUIPO's own Board of Appeal upheld the decision. The major stumbling block to being accorded a filing date was that it was not possible to tell from the representations as originally filed whether protection was being sought for the beaker, for the bottle, or for a combination of the beaker and the bottle.

The applicant then appealed further to the GC, which upheld the decision of the Board of Appeal.

Thus, the outcome was that the applicant (Mast-Jägermeister) was left without an RCD

application even though the representations filed were not blurred or fuzzy, but simply because the representations had been somewhat visually 'muddled' in what they showed and had thus left uncertainty in the mind of the examiner as to what, of the items shown in the views, actually comprised the design for which protection was being sought.

Thus the take-home message for practitioners is to think through the preparation of the representations to be filed on your RCD application. If you are going to include items extraneous to the item or product for which protection is sought, you should consider, at the time of original filing, making it clear visually that the additional items are outside the scope of protection, and this can be conveniently done by using one of the 'EUIPO approved' visual depiction techniques of dashed (broken) lines or greying out for the excluded features, or a boundary around the features (the item) for which protection is sought.

The requirements surrounding being accorded a filing date for an RCD application have therefore been made a little bit tighter by this GC decision, and practitioners who are used to more-lenient national registered design regimes should take note.

**Author:**  
**Paul Price**





# D YOUNG & CO INTELLECTUAL PROPERTY

And finally...

## When abbreviations become descriptive BASF v Evonik Industries

**B**ASF SE (BASF) owned a European Union Trade Mark (EUTM) registration for DINCH in respect of goods categorised as chemical products for plastics in class 1. It was filed in February 2002 and registered in March 2003. In December 2012, Evonik Industries AG (Evonik) filed an invalidation action to the registration on the grounds DINCH was descriptive under Article 7(1)(c) EUTMR as DINCH was a common chemical acronym identifiable by the relevant public. The action was dismissed by the European Union Intellectual Property Office (EUIPO) Cancellation Division but Evonik appealed and the Board of Appeal upheld the appeal. BASF then appealed to the General Court (GC).

### The judgment

The GC rejected BASF's appeal finding DINCH to be descriptive of chemical products for plastics in class 1. The GC thoroughly examined the relevant public's perception of the trade mark and the goods at issue and held that for a sign to be descriptive, its meaning in relation to the specific goods applied for, should be immediately obvious to the relevant public. The GC further held that the relevant public for chemical products for plastics consisted of both professionals within the chemicals industry and specialists within the plastics sector. The evidence before the GC showed that it was common in the chemical sector to

use abbreviations to refer to plastics and the letters D, I, N and CH respectively had been used to denote plastics made up of certain components. In addition, other evidence submitted by Evonik showed that specialists in the sector had used the term DINCH in various patents to refer to plastics, and that DINCH had been used in a guide of abbreviations for plastics produced in 2003, close to the filing date of the EUTM application in February 2002.

Accordingly, the GC found DINCH to be descriptive of chemical products for plastics in class 1 and invalidated the trade mark registration.

**Author:**  
**Gemma Kirkland**



### In short

The decision is interesting as it shows that common abbreviations for goods may still be found descriptive, even if the abbreviation does not refer to a particular product. If the relevant public understands its meaning, this is enough to uphold an Article 7(1)(c) objection.

### Contact details

London  
Munich  
Southampton

T +44 (0)20 7269 8550  
F +44 (0)20 7269 8555

mail@dyoung.com  
www.dyoung.com

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### Contributors

Partner, Solicitor  
**Matthew Dick**  
mjd@dyoung.com  
www.dyoung.com/  
matthewdick



Partner, Trade Mark Attorney  
**Gemma Kirkland**  
gmk@dyoung.com  
www.dyoung.com/  
gemmakirkland



Associate, Trade Mark Attorney  
**Flora Cook**  
fec@dyoung.com  
www.dyoung.com/  
floracook



Associate, Patent Attorney  
**Paul Price**  
pp@dyoung.com  
www.dyoung.com/  
paulprice



Legal assistant  
**Fay Birch**  
fxb@dyoung.com  
www.dyoung.com/  
faybirch



Marketing Communications Manager  
**Rachel Daniels**  
rjd@dyoung.com  
www.dyoung.com/  
racheldaniels

