



A mark consisting of a colour applied to the sole of a shoe is not covered by the prohibition of the registration of shapes

Such a mark does not consist ‘exclusively of the shape’, within the meaning of the trade mark directive

Mr Louboutin and Christian Louboutin SAS design high-heeled shoes for women. A particular feature of those shoes is that the outer sole is always red. Mr Louboutin registered that trade mark in Benelux for ‘footwear’ in 2010 and for ‘high-heeled shoes’ in 2013. The trade mark is described as consisting ‘of the colour red (Pantone 18 1663TP) applied to the sole of a shoe as shown (the contour of the shoe is not part of the trade mark but is intended to show the positioning of the mark)’. It is reproduced below:



The Van Haren company operates shoe retail outlets in the Netherlands. In 2012, Van Haren sold high-heeled women's shoes with red soles. Mr Louboutin and his company brought proceedings before the Netherlands courts seeking a finding of trade mark infringement by Van Haren. The latter claims that the mark at issue is invalid. The EU trade mark directive sets out a number of grounds on which registration of a mark may be refused or declared invalid, particularly in relation to signs that consist exclusively of a shape that gives substantial value to the goods.¹ The Rechtbank Den Haag (District Court, The Hague, Netherlands) decided to refer a question to the Court of Justice in that regard. The referring court considers that the mark at issue is inextricably linked to a shoe sole and it has raised the question as to whether the concept of ‘shape’, within the meaning of the directive, is limited solely to three-dimensional properties of a product, such as its contours, measurements and volume, or whether that concept also covers other characteristics, such as colours.

In today's judgment, the Court takes the view that, since the trade mark directive provides no definition of the concept of ‘shape’, the meaning of that concept must be determined by considering its usual meaning in everyday language. The Court points out that it does not follow from the usual meaning of that concept that a colour per se, without an outline, may constitute a ‘shape’.

Furthermore, while it is true that the shape of the product or of a part of the product plays a role in creating an outline for the colour, it cannot, however, be held that a sign consists of that shape in

¹ Article 3(1)(e)(iii) of Directive 2008/95/EC of the European Parliament and of the Council of 22 October 2008 to approximate the laws of the Member States relating to trade marks (OJ 2008 L 299, p. 25).

the case where the registration of the mark did not seek to protect that shape but sought solely to protect the application of a colour to a specific part of that product.

In the present instance, **the mark does not relate to a specific shape of sole for high-heeled shoes since the description of that mark explicitly states that the contour of the shoe does not form part of the mark and is intended purely to show the positioning of the red colour covered by the registration.**

The Court also holds that a sign, such as that at issue, cannot, in any event, be regarded as consisting ‘exclusively’ of a shape, where the main element of that sign is a specific colour designated by an internationally recognised identification code.

NOTE: A reference for a preliminary ruling allows the courts and tribunals of the Member States, in disputes which have been brought before them, to refer questions to the Court of Justice about the interpretation of EU law or the validity of a European Union act. The Court of Justice does not decide the dispute itself. It is for the national court or tribunal to dispose of the case in accordance with the Court's decision, which is similarly binding on other national courts or tribunals before which a similar issue is raised.

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The [full text](#) of the judgment is published on the CURIA website on the day of delivery.

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