

### No trademark protection for Lindor chocolate wrapping Switzerland - Meyer Lustenberger

### Examination/opposition National procedures

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The Swiss Supreme Court has upheld a decision to refuse registration of two Lindor chocolate wrappings as trademarks (4A.129/2007, July 18 2007, unpublished).

For over 50 years, one of the bestsellers of [Lindt & Sprüngli AG](#), the well-known Swiss chocolate producer, has been the Lindor Kugeln (chocolate shell surrounding a smooth melting centre). The colour of the wrapping is [blue](#) if the shell is made of black chocolate, or [red](#) if it is made of milk chocolate.

Lindt applied for the registration of two device marks (one [blue](#) and one [red](#)) for chocolate products in Class 30 of the [Nice Classification](#). The [Federal Institute of Intellectual Property](#) (IGE) rejected the application based on absolute grounds of non-registrability, as the shape of the marks resulted from the nature of the goods themselves (Article 2(b) of the [Trademark Act](#)). The IGE further held that the trademarks were devoid of any distinctive character and were thus unregistrable under Article 3(a) of the law, despite the fact that Lindt had submitted survey results purporting to show the marks' distinctiveness.

Lindt appealed to the Administrative Court, which affirmed the decision of the IGE. Lindt subsequently appealed to the Supreme Court.

The Supreme Court held that although cellophane wrapping with two twisted ends was more usual for sugar candy than for chocolate, it was characteristic of bite-sized sweets. The court found that the cellophane wrapping reflected only the shape of the chocolates and thus the nature of the product itself. Therefore, it concluded that the marks were not apt to distinguish the products of one manufacturer from those of another.

In addition, the court held that neither the spherical element nor the colour of the marks were sufficiently distinctive. However, the court failed to acknowledge that a specific combination of shape and colour may have resulted in distinctiveness. The court nevertheless indicated that had the shape and the colour of the mark been further specified, such combination could have constituted a registrable trademark in connection with specific goods.

In light of this decision, Swiss applicants are advised to specify as much as possible the characteristics of the trademarks applied for. However, with regard to device marks, it is possible to specify the colour, but not the shape (eg, the radius of a sphere in the *Lindor Case*).

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