

GERMANY



**Maiwald Patentanwalts
GmbH
Munich**

Stefanie Parchmann

4648465, 31237, 3308087 and
2661163 being eaten?

Chocolate trade marks reviewed

Two recent decisions on three-dimensional chocolate product trade marks whet our appetite to compare them with each other and with more chocolate trade marks.

The European Court of First Instance ruled on 8 July 2009 that the Bounty bar shape (registered as a Community trade mark) is devoid of any initial distinctive character and had not acquired distinctive character through use (T-28/08). The Court took the position that the rounded ends of the bar and the three chevrons on top could not be sufficiently distinguished from other common chocolate bar shapes. Acquired distinction was denied because Mars had failed to demonstrate a uniform rate of recognition for the entire EC. Surveys covering the six most populous EC states out of 15 were not sufficient, as the recognition rates varied from 44% to 82%. The Court held that it was not possible to extrapolate from these results to the rest of the Community market.



Bounty bar

Remarkably, only one day later, on July 9, the German Federal Court of Justice had to decide on a single chocolate ball (“Rocher”; BGH I ZB 88/07). The Court ruled that even though the chocolate lacked distinctiveness *per se*, it had acquired distinctiveness through use in Germany. A rate of recognition of about 60% was found to be sufficient.



Rocher ball shape

Against this background and in view of the Lindt chocolate bunny fights in several European courts (for example, EuG C_529/07), it might be interesting to watch the future fate of other registered chocolate 3-D marks. What would you consider the chances of the pictured Community trade marks