Introduction

As a member of the European Union, Sweden has implemented the First Council Directive of 21 December 1988 to approximate the laws of the Member States relating to trade marks (89/104/EEC) and also abide with the case law of The Court of Justice of the European Communities.

Questions

1. How is the scope of what constitutes a registrable trademark defined? Does that definition list specific examples of permissible types of trademark?

A trade mark may consist of any sign capable of being represented graphically provided that such signs are capable of distinguishing goods which are made available in one business activity from those which are made available in another one. The definition includes the following examples (non-exhaustive) of permissible types of trademarks: words, including personal names, as well as designs, letters, numerals or the shape or the ornamental aspects of goods or their packages.

2. What categories of signs are capable of registration as a trademark? Are any categories of signs excluded from registrability as a trademark?

There is no specific category of signs that is excluded from registrability as a trademark as long as the mark is possible to present graphically. The graphic representation must however enable the sign to be represented visually so that it can be precisely identified (“clear, precise, self contained, easily accessible, intelligible, durable and objective”, The Court of Justice of the European Communities, case C-273/00, Sieckmann). A trade dress for shops is one example of a mark which is difficult to represent graphically and therefore difficult to register.

3. Where applications to register a colour per se or a combination of colours per se may be accepted for registration?

A colour per se or a combination of colours is in principal possible to register in Sweden. However, until now all applications for registration of a colour per se have been refused because the colour as such was not considered to be distinctive and the applicant was not able to show acquired distinctiveness in the specific case.

3.1 In relation to goods, is such an application acceptable if it does not specify the outline, contours or proportions in which or the shape or object to which the colour is to be applied?
As long as the colour mark fulfils the conditions mentioned under the answer to the first question above and is distinctive enough, through use or inherently, there is no demand for a specified outline, contour or proportion to which the colour is to be applied.

3.2 Is such an application registrable in relation to services and, if so, under what conditions?

If a mark consisting of a colour per se is graphically represented and is distinctive it is registrable also for services.

3.3 Is an applicant required to file a sample of the colour(s) applied for and/or a colorimetric reference or other colour code?

As the Court of Justice of the European Communities states in the judgement of the court in case C-104/01 Libertel Groep BV a mere sample of a colour does not satisfy the requirements for a graphic representation. The designation of a colour using an internationally recognised identification code in addition to a colour sample may be considered to constitute a graphic representation.

3.4 Can the mark be considered inherently distinctive in relation to certain goods or services?

It is possible that a mark consisting of a colour per se may be assessed as inherently distinctive in relation to certain goods or services but generally speaking this would only exceptionally be the case.

3.5 Will the mark only be accepted for registration after de facto distinctiveness acquired through use has been shown?

No. As stated in the answer to question 3.4 inherent distinctiveness for colours per se is in principal not excluded. The Court of Patent Appeals has however stated that there has to be very special circumstances for a mark consisting of a colour per se to be considered inherently distinctive, e.g. when a colour is exhibiting a shade which is very unusual in relation to the goods or services applied for.

3.6 Are certain colours denied registration on the basis that there is a need to keep them free for general use?

No colours are in principal denied registration on the basis that there is a need to keep them free for general use. The need to keep certain colours free for general use is one circumstance which is regarded in assessing the potential distinctiveness of a given colour as a trade mark. One can therefore imaging that it will prove difficult - if not impossible - to satisfy the distinctiveness requirement if a particular colour is commonly used for a particular type of product, for instance orange for life saving equipments such as a lifebelt or a life raft.

3.7 To what extent do other visual aspects of the way the mark is used affect the assessment of the distinctiveness of the mark?

Such aspects of the way the mark is used may affect the assessment of the distinctiveness of a colour mark. However, there is no such registration till now.

4. Where applications to register three-dimensional signs may be accepted for registration:

Applications to register three-dimensional signs may in principal be accepted for registration in Sweden.

4.1 What form of representation of the three-dimensional sign is accepted as part of the application for registration?

A photo, a drawing or other kind of still images and, if the Swedish Patent and Registration Office find it necessary, a specimen of the shape itself to be kept by the Authority, is accepted as part of the application.
4.2 What are the criteria for assessing whether the three-dimensional sign can be considered capable of distinguishing the goods or services of one undertaking from those of another?
The criteria are the same as for other marks.

4.3 What are the criteria for assessing whether the three-dimensional sign can be considered inherently distinctive in relation to certain goods or services?
The criteria are the same as for other marks.

4.4 Will the mark only be accepted for registration after de facto distinctiveness acquired through use has been shown?
In many situations yes, but in other cases the mark may be considered inherently distinctive.

4.5 Are certain shapes denied registration on the basis that there is a need to keep them free for general use?
A mark consisting exclusively of a shape which results from the nature of the goods or of a shape which is necessary to obtain a technical result or of a sign which gives a substantial value to the goods may not be registered as a trademark. This provision reflects the recognition that certain shapes need to be kept free for general use.

4.6 To what extent do other visual aspects of the way the mark is used affect the assessment of the distinctiveness of the mark?
Other visual aspects of the way the mark is used may affect the assessment of the distinctiveness of a three-dimensional mark; for instance if a specific colour is added to a three-dimensional trademark. However, there is no such registration till now.

4.7 To what extent do technical or functional considerations prevent registration?
A mark consisting exclusively of a shape which results from the nature of the goods or of a shape which is necessary to obtain a technical result or of a sign which gives a substantial value to the goods may not be registered as a trademark (Section 5, Swedish Trade Marks Act, cf. Court of Justice case C-299/99 Philips).

5. Where applications to register smells may be accepted for registration:
It is recognized that a smell may function as a trade mark. However, so far no smell mark has been registered in Sweden, in the absence of satisfactory methods for graphical representation. (cf. the requirements in the Sieckmann case).

5.1 What form of representation or description of the smell is accepted as part of the application for registration?
Not applicable.

5.2 How is the capacity of the smell to function as a trademark and/or its distinctiveness assessed?
Not applicable.

5.3 How is the mark made available to the public on publication of the trademark application and thereafter?
Not applicable.

6. Where applications to register a sound mark may be accepted for registration:
Applications concerning sound marks are accepted for registration.
6.1 What form of graphical representation of the mark applied for is required as part of the application for registration?

A sound mark is considered represented graphically if musical notes are presented in the application (Swedish Court of Patent Appeals, case No. 95-491, Hemglass). There is, so far, no case law on the possibility to register non-musical sounds as trade marks.

6.2 Can audio recordings of a sound mark be filed as part of the application for registration?

Audio recordings is not a part of the application itself but can supplement the application similar to the situation in a three dimensional application of a shape supplemented by a specimen.

6.3 If such audio recordings are filed as part of the application for registration, how are these recordings made available to the public on publication of the trademark application and thereafter?

Audio recordings are at the moment not made available to the public through publication and can only be obtained through a file inspection.

7. Where applications to register moving images or holograms may be accepted for registration:

7.1 What form of representation of the moving image or hologram is accepted as part of the application for registration?

In principal yes. However, the applications has hitherto been refused due to non compliance with the requirement of graphical representation that is clear and precise.

7.2 How is the moving image or hologram made available to the public on publication of the trademark application and thereafter?

The scope of protection of “non-conventional” trademarks is assessed in the same way as for other marks. Non-conventional trademarks are not treated any differently than registrations for “traditional” forms of trademark, neither in substantive nor procedural terms. However, there is yet a lack of case law in this field which indicate that it is more difficult to predict the outcome in a dispute compared to disputes concerning “traditional” trade marks.

8. How is the scope of protection of “non-conventional” trademarks assessed? In particular, are registrations for “non-conventional” trademarks treated any differently than registrations for “traditional” forms of trademark either in substantive or procedural terms?

Issues relating to enforcement and scope of protection should not influence the assessment of the registrability of non-conventional trade marks to a higher degree than these circumstances influence the assessment of conventional trade marks. Any registration - be it a conventional or a non-conventional trade mark- based on acquired distinctiveness includes the goods and services to which acquired distinctiveness has been showed. Thus, the scope of protection is linked to the extent the applicant has been successful in showing acquired distinctiveness; often resulting in a narrow list of goods or services. In that sense the trade mark system contain a tool for limiting itself; guaranteeing that the rights given for any type of trade mark is appropriate.
10. To what extent is the assessment of the registrability of “non-conventional” trademarks influenced by the fact that there may be a limited number of certain “non-conventional” marks (such as colours or shapes) available for general use?

As stated earlier a mark consisting exclusively of a shape which results from the nature of the goods or of a shape which is solely functional or of a sign which gives a substantial value to the goods may not be registered as a trademark (Section 5, Swedish Trade Marks Act). This provision can prove applicable in situations referred to in question 10. Another situation is touched upon in a case by the Court of Patent Appeals, saying, obiter dictum, that the limited numbers of letters in the alphabet indicates that a registration for a trade mark consisting of a single letter might constitute an unfair advantage to a certain businessmen (case No. 00-244, LC).

11. To what extent is the assessment of the registrability of “non-conventional” trademarks influenced by the fact that consumers may be less used to understanding “non-conventional” marks as an indicator of origin?

If the consumers fail to recognize a non-conventional mark as an indicator of origin the trade mark can not possibly comply with the distinctiveness requirement and no trade mark right is recognized. However, every trade mark systems should provide for the possibility to furnish, free of choice, any piece of evidence to prove the consumers appreciation and understanding of the trade mark nature of a non-conventional trade mark. Market surveys directed on the relevant target consumer group based on objective and scientific criterions is one example. Trade mark protection will only be given in case convincing evidence is submitted. The Swedish Group is of the opinion that such, case by case, approach is the appropriate solution rather than provisions addressing generally the asserted difficulty to understand these types of trade marks among consumers.

**Summary**

As a member of the European Union, Sweden has implemented the First Council Directive of 21 December 1988 to approximate the laws of the Member States relating to trade marks (89/104/EEC) and also abide with the case law of The Court of Justice of the European Communities. A trade mark may consist of any sign capable of being represented graphically provided that such signs are capable of distinguishing goods which are made available in one business activity from those which are made available in another one. No specific category of signs is excluded from registrability as a trademark as long as the mark may be presented graphically. Sound marks and three-dimensional has been registered in Sweden. A colour per se or a combination of colours is in principal possible to register in Sweden. However, until now all applications for registration of a colour per se have been refused because the applicant was not able to show acquired distinctiveness in the specific case. With regard to smell marks it is recognized that a smell may function as a trade mark. However, so far no smell mark has been registered in Sweden, in the absence of satisfactory methods for graphical representation. Moving images as well as holograms are in principle accepted for registration but has hitherto been refused due to non compliance with the requirement of graphical representation. Acquired distinctiveness has been a prerequisite for registering some of the non-conventional trade marks while others, for instance some three dimensional marks, has been regarded inherently distinctive.

The Swedish Group is of the opinion that every trade mark system should provide for the possibility to furnish, free of choice, any piece of evidence to prove the consumers appreciation and understanding of the trade mark nature of a non-conventional trade mark. Market surveys directed on the relevant target consumer group based on objective and scientific criterions is one example. Trade mark protection will only be given in case convincing evidence is submitted. The Swe-
dish Group is of the opinion that such, case by case, approach is the appropriate solution rather than provisions addressing generally the asserted difficulty to understand these types of trade marks among consumers.

Résumé

En étant membre de l’Union Européenne, la Suède a transformé en droit national la première directive du 21 décembre 1988 sur le rapprochement du droit des Marques (89/104/EEC) et se conformant à la jurisprudence du Cour de Justice des Communautés Européennes. Une marque peut consister d’un signe capable d’être représenté graphiquement à la condition qu’un tel signe est capable de distinguer des marchandises tenues à la disposition dans une activité commercial desquelles tenues à la disposition dans une autre. Aucune catégorie spécifique de signes soit exclue d’être régi comme une marque tant que la marque est possible de représenter graphiquement. Des signes sonores et tridimensionnels ont été enregistré en Suède. En principe, une couleur en tant que telle ou une combinaison de couleurs peut être enregistré en Suède. Cependant, jusqu’à aujourd’hui tous les demandes d’enregistrement d’une couleur en tant que telle ont été rejétée comme le demandeur n’ont pas été capable de montrer l’acquisition de caractère distinctif au cas spécifique. Quant aux marques olfactives il est reconnu qu’une odeur peut fonctionner comme une marque. Cependant, jusqu’à aujourd’hui aucune marque olfactive a été enregistré en Suède, en absence de méthode satisfaisant de représentation graphique. Des images animées et des hologrammes sont accepté pour enregistrement mais ils ont jusqu’ici été rejetés à cause de non-accomplissement à la critère de représentation graphique. L’acquisition de caractère distinctif a été la critère d’enregistrement pour quelques-unes des marques non-conventionnelles, pendant que des autres, par exemple quelques marques tridimensionnelles, ont été vues comme distinctives par nature.

Zusammenfassung

den wegen mangelnder Übereinstimmung mit dem Gebot der graphischen Darstellung. Erworbbene Unterscheidbarkeit hat als Voraussetzung zur Eintragung einiger konventioneller Marken gedient, während andere, z.B. einige dreidimensionale Marken, als inhärent unterschiedlich betrachtet worden sind.

Die schwedische Gruppe ist der Auffassung, dass jedes Markensystem es erlauben sollte nach eigener Wahl jeglichen Beweis zu erbringen, um die Auffassung der Verbraucher und ihr Verständnis um die Natur einer unkonventionellen Marke darzulegen. Marktuntersuchungen, die aufgrund objektiver und überzeugender Beweise auf die fragliche Verbrauchergruppe zugeschnitten sind, sind ein Beispiel. Der Markenschutz wird nur gewährt, wenn überzeugende Beweise vorgelegt werden. Die schwedische Gruppe ist der Meinung, dass ein solches, von Fall zu Fall, Vorgehen eher die richtige Lösung darstellt als Vorschriften, die sich allgemein der dargelegten Schwierigkeit widmen Verständnis zu finden für solche Marken im Verbraucherbereich.