

World Trademark Law Report

Switzerland

Meyer Lustenberger

Novartis sees its shape mark registration upheld

In *Novartis AG v Bausch & Lomb Inc*, the Swiss Supreme Court has upheld the validity of Novartis's three-dimensional trademark for the cog-wheel [shape](#) of a catalytic disc used as part of its [AOSEPT](#) contact lens cleaning system. The disc serves as a carrier for a catalytic coating and for technical reasons it must have a high ratio of surface area to volume.

[Bausch & Lomb Inc](#) filed a suit claiming cancellation of the shape mark, asserting that the shape of the catalytic disc was determined exclusively by its technical function and was not recognized as an indication of origin by consumers.

Both the first instance court and the Supreme Court dismissed the suit. The reasoning of the courts can be summarized as follows:

- § The shape of the catalytic disc is influenced but not exclusively determined by technical considerations. It was noted that there are a large number of other shapes available that (i) have a high ratio of surface area to volume, and (ii) are not more expensive to manufacture than the registered shape. Novartis's monopoly over the shape for the disc did therefore not unduly impede competition.
- § The use by competitors of shapes similar to Novartis's trademark for their catalytic discs did not prove that such a shape is essential for this type of product since many other shapes are technically possible.
- § The shape is original and distinctive. It differs in various aspects from the shape of an ordinary cog wheel or elementary geometric shapes. It is therefore suited for use as an indicator of origin.

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