

## Registration of Non-traditional Marks in Turkey

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Although the Turkish Trademark Decree Law no: 556 allows the registration of signs such as trade dress, shapes or product packages, sounds, colors, etc, it has always been tricky to obtain registration for these types of non-traditional trademarks.

Article 5 of the law accepts such a sign as a trademark as long as the sign can be graphically represented and is capable of distinguishing an entity's goods or services from those belonging to others. In other words, the law requires a sign to be distinctive and this is the point where problems occur.

The distinctiveness test for three-dimensional trademarks differs from the distinctiveness test relating to traditional trademarks. In principle, the Turkish Patent Institute (TPI) takes the following criteria into account:

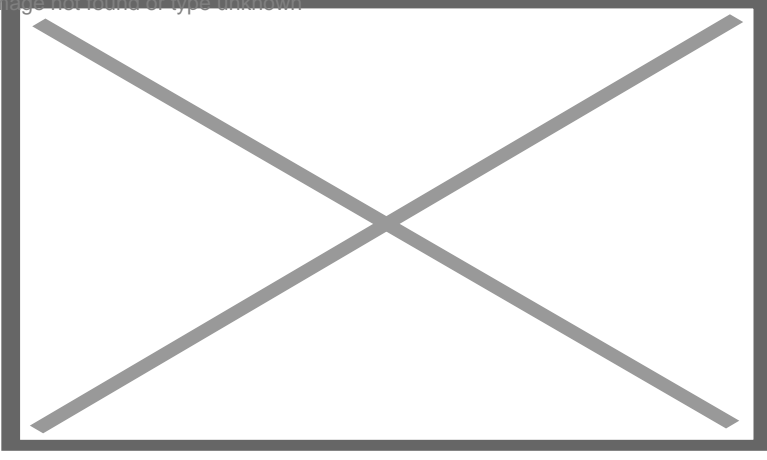
- The shape of a product becomes more distinctive as it diverges from its natural shape or what is standard in the relevant sector; and
- The average consumer should be able to identify the origin of the three-dimensional trademark without any effort because of the unusual and extra features added to it.

Due to the non-traditional features of three-dimensional trademarks, the specific element which benefits from registration differs. For example:

- Where a functional three-dimensional trademark (the shape or packaging of a good) bears a distinctive word, pattern, logo, or color combination, the mark is considered to be distinctive as a whole. However, this registration does not give the right to prevent others from using that three-dimensional mark without the logo, pattern or word on it. For example, the 11th Civil Chamber of the Appeal Court affirmed the First Instance Court's decision where the following shape was accepted as distinctive: (see image 1: a battery). Since the shape of a battery is functional, it is obvious that only the color combination will benefit from the registration.
- Where a distinctive three-dimensional trademark (the shape or packaging of a good) bears a distinctive word or device mark, protection is provided to both the three-dimensional shape and to the distinctive element on it. In this case, the owner of the trademark has the right to prevent others using the same shape or package despite its being used with a different trademark on it.
- Functional or commonly used three-dimensional trademarks (shape or packages) are not found to be distinctive and are therefore non-registrable (see Images 2 and 3).

In practice, when the TPI receives an application for a non-traditional trademark, it generally rejects the application based on the reason that the trademark lacks distinctive character. This decision should be challenged as the TPI wants applicants to prove the trademark's distinctive character. So receiving a rejection decision should be accepted as a beginning of a long tussle with the TPI and presumably with the IP Courts.

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