

GIURISPRUDENZA | *Altro***Ufficio UE per la proprietà intellettuale | Sentenza | 16 maggio 2024 | n. 260**

Data udienza 16 maggio 2024

Integrale

**Marchi e brevetti - Tutela - Marchio "COVIDIOT"**

DECISION

of the Grand Board of 16 May 2024

In case R 260/2021-G

<b>Matthias Zirnsack</b> <b>Al.La. n. (...)</b> <b>150980 Omissis</b> <b>Germany</b>	Applicant/Appellant
---	---------------------

represented by Slopek Rechtsanwälte, Zippelhaus 6, 20457 Hamburg, Germany

THE GRAND BOARD

composed of G. Humphreys (Chairperson ad interim), Ph. von Kapff (Rapporteur), S. Stürmann, V. Melgar, N. Korjus, M. Bra, A. Kralik, A. González Fernández and S. Rizzo (Members)

Registrar: H. Dijkema

gives the following

Decision

Facts and proceedings

1 By application filed on 12 August 2020, Matthias Zirnsack ('the applicant') sought to register the figurative mark



as an EU trade mark for the following goods:

Class 6: Metal Clips.

Class 9: Computer gaming software: Mobile apps

Class 28: Boards games; Toys

2 The applicant indicated the following colours: Yellow, red, blue, black, white and gold.

3 On 1 September 2020, the examiner objected to the application pursuant to Article 7(1)(f) EUTMR on the grounds that the trade mark violated accepted principles of morality:

- The word combination of "Covid" and Idiot is understood in German and English among other languages
- The term is an insult which is likely to offend the sense of decency of the fair and just-minded, as the term discredits, inter alia, people who do not believe that all the measures implemented by most governments, such as social lockdown or compulsory masking, are purposeful, proportionate or even necessary.
- The goods applied for in Classes 6, 9 and 28 can be used to label people with the designation "Covidiot" in a derogatory manner, for example, the criteria to defame other people as "covidiot".

4 On 21 September 2020, the applicant maintained his application for registration and submitted the following arguments:

- The trade mark examination of accepted principles of morality must balance the alleged defamatory content with the freedom of expression and the freedom of art. The examination of absolute grounds shall not serve to merely censure bad taste.
- The applicant has the intention to use the trade mark for game. "COVIDIOT" refers to the protagonists of the game against whom the players compete and against whom they must win. The winner of the game receives a challenge cup consisting of a goldcoloured clip that is attached to the score sheet.
- In connection with a game, the use of the sign is socially appropriate. Even though "idiot" can be considered a vulgar term, it does not have, when combined with "Covid", a purely insulting or negative connotation. "Covidiot" is a buzzword; thus, a liberalisation of the public perception is to be assumed.

- The figurative elements in colour clearly allude ironically to covidiot. Art and opinion may be ironic and are protected by freedom of expression and freedom of art.

#### The contested decision

5 By decision of 9 December 2020 ('the contested decision'), the examiner refused the application pursuant to Article 7(1)(f) EUTMR in conjunction with Article 7(2) EUTMR in respect of all the goods applied for, essentially for the reasons already mentioned in his objection letter. In addition, the examiner relied in particular on the following grounds:

- The purpose of Article 7(1)(f) EUTMR is not to identify and filter out signs whose use in commerce must necessarily be prevented, but to prevent the registration of EU trade marks where the granting of a monopoly would be contrary to applicable law or would be perceived by the relevant public as directly infringing the fundamental moral standards of society. The Office should not actively support persons who wish to advance their business objectives by means of trade marks which are contrary to certain fundamental values of civilised society.

- The goods are aimed at the general public, which uses them for private purposes, and at the more limited target group of gaming professionals. Depending on the nature of the goods in question, the level of attention of the relevant public will be that of average consumers who are reasonably well informed and reasonably observant and circumspect, or it will be high since professional circles regularly pay particular attention to procurements in the course of their professional activities and the goods declared are particularly important for the functioning of an undertaking.

- As pointed out in the objection letter, the term discredits those who do not believe in all the measures implemented by most governments in the context of the pandemic

- The figurative element of the jester's caps is not able to weaken or even refute this impression, because it primarily underlines the statement that we are dealing with a fool or an idiot.

- There can therefore be no question of a liberalisation of the public's perception in the present case. Nor is a mere ironic allusion to "covidiot" apparent.

- Freedom of art or freedom of opinion are not restricted, as the refusal to register the sign does not grant it protection under trade mark law, but does not prohibit the use of the sign, even in business activities.

#### Grand of appeal

6 The applicant filed a notice of appeal on 8 February 2021, requesting that the contested decision be annulled in its entirety. The Office received the statement setting out the grounds of appeal on 9 April 2021.

7 The applicant's arguments in the statement of grounds of appeal can be summarised as follow:

- No specific individuals are attacked. Those people who are critical of individual measures in the fight against the COVID 19 pandemic will not feel addressed - nor should they. A satirical reference to the COVID-19 pandemic, and also the political debate, must continue to be possible, especially in a playful, humorous way.

- As the examiner rightly points out, the term "Covidiot" has become part of the standard language and is now part of the political debate in both German- and English-speaking

countries.

- The examiner incorrectly defined the term in a way that is too broad. Evidence (reproduced in the referral decision of 16 December 2021) shows that "Covidiot" does not refer to all people who are critical of individual measures to combat the COVID-19 pandemic but people who deny the virus as such or oppose any measures and behave with a lack of solidarity towards their fellow human beings

- A term used by high-ranking politicians and even in conservative dailies or liberal weeklies does not exceed the average tolerance level of a reasonable person. It may seem inappropriate to some people and a reasonable, average observer may not use the term, for this reason. However, this is not yet sufficient to see in it a fundamental violation of the moral rules that exceeds the threshold of tolerance.

- There is also no reason why moral standards in another EU Member State should be significantly different from those in Germany, which has been used as an example here.

- The term covidiot is contrasted in the social debate with the German term ["sleep sheep"]. Supporters of harsh measures to combat the pandemic are referred to as *Schlafschaf*, especially from the ranks of critics of pandemic control *schlafschaf* is registered as EUTM 17998077. It would be inconsistent and contradictory that one should be contrary to morality while the other is not.

- The use of the term is protected by freedom of expression, Article 10 of the European Convention on Human Rights (ECHR) or Article 11 of the Charter of Fundamental Rights of the European Union ( the Charter ). When assessing whether the registration of a trade mark is contrary to morality, freedom of expression must also be taken into account (27/02/2020, C-240/18 P, Fack Ju Göhte, EU:C:2020:118, § 56). Freedom of expression is a fundamental pillar of democratic society; it is simply constitutive of it.

In this context, freedom of expression is not exhausted in the final expression in traditional media, such as newspapers, magazines and broadcasting, nor in addition with the so-called social media, but also takes other forms. Thus, the European Court of Human Rights (ECtHR) considered it permissible that the initials of an allegedly corrupt Austrian minister were used for the board game "KHG - Korrupte haben Geld" [KHG the corrupt have money]. In this regard, it is irrelevant for the assessment of whether a satirical debate is permissible whether commercial purposes are pursued with a theme (ECtHR, 23/04/2019, no. 37 898/17, Karl-Heinz Grasser v. Austria, ECLI:CE:ECHR:2019:0423DEC003789817, § 15).

- Other similar trade marks have been accepted by the Office: You're An Idiot (IR No 1 489 107), The Idiot Among Us (IR No 1 537 631), American Idiot (EUTM No 4 148 052), Air Hole Face Masks You Idiot (EUTM No 11 667 045) or God's Favorite Idiot (EUTM No 18 346 297).

Communication on Article 7 (1) (b) EUTMR

8 By communication of 1 October 2021, the rapporteur additionally indicated on behalf of the Board that the application was also likely to be found non-distinctive (Article 7(1)(b) EUTMR), for the following reasons:

- "COVIDIOT" is a kind of trendy name for a specific phenomenon, limited in time, such as Brexit. The relevant consumers will know the meaning of the word "COVIDIOT"- namely something concerning a historical and political circumstance and will therefore perceive the mark, when applied to games, merely as

designating the occurrence in question. That perception would dwarf any possibility of the mark being perceived as indicating a specific industrial or commercial origin of the goods.

- The jester's cap merely accentuates the semantic sense conveyed by the word element "COVIDIOT"

9 By letter dated 22 October 2021, the applicant replied to the communication and argued as follows:

- The word element "COVIDIOT" is distinctive when used alone (see statement of grounds of appeal of 9 Aprile 2021) grounds of appeal of 9 April 2021).

- A fortiori, the mark as a combination of the term with the figurative elements is distinctive. It is not apparent why the figurative elements should necessarily be descriptive of the goods applied for. The stylisation of the mark, in particular the yellow colour, which accounts for a disproportionate share of the word/figurative mark due to its area, and the blue, yellow and red figures in the upper centre leave a wide scope for interpretation.

- The fact that these stylisations have a semantic content, which is conveyed by the word "COVIDIOT", seems artificial at best. The mere assumption that the stylisation is reminiscent of a jester's cap already shows that it is not entirely clear what exactly these stylisations are supposed to represent. This results in an interpretability which rather speaks without further ado for the distinctive character and thus for the registrability of the application. Even if one were to assume that it is a jester's cap, it is not apparent to what extent jester's caps could be descriptive of the goods applied for (games).

Referral to the Grand Board

10 By interim decision of 16 December 2021, the case was referred to the Grand Board, because of the degree of legal complexity of the case and its importance, namely with respect to the impact of fundamental rights, such as the freedom of expression, in the scope of examination of Article 7(1) EUTMR. The main arguments were as follows:

- Evidence (reproduced in the referral decision) shows that the term is frequently used in media and social networks, in particular by journalists and commentators, but also by some politicians, especially in the political and ideological debate on the "COVID-19" pandemic and the way to deal with the disease, with the purpose of characterising people who behaved, in their view, like idiots. The term has also found its way into language dictionaries. The term may have to be refused in accordance with Article 7(1)(f) EUTMR, inter alia because it trivialises the pandemic in relation to games and may develop into a term that downplays the original message and creates resistance to public measures fighting the pandemic.

- According to Article 7(1)(b) EUTMR, the term can also be seen as a kind of buzzword for a certain temporary phenomenon and is, therefore, not seen as an indication of origin for the goods declared.

- Finally, the term may describe the subject matter of games and other goods applied for, in accordance with Article 7(1)(c) EUTMR.

- The Court of Justice has recently clarified that the Office must take into account fundamental rights, in particular Article 11 of the Charter of Fundamental Rights of the European Union (the Charter) (27/02/2020, C-240/18 P, Fack Ju Göhte,

EU:C:2020:118, § 56). The present case gives the opportunity to further develop principles of examination of fundamental rights in the context of absolute grounds.

Observation by the INTA

- Third parties were invited to file observations, in accordance with Article 37(6) EUTMDR.

The International Trademark Association (INTA) filed the following observations:

- The terms "public policy" and "principles of morality" are inherently vague and therefore carry with them a risk of an inconsistent application and a danger of each

examiner being tempted to follow personal preferences rather than clear legal guidance. Accounting for the principle of free speech does not necessarily solve this problem as it just transports the uncertainty and vagueness to a higher level. The clearer the language and the scope of application of Article 7(1)(f) EUTMR, the lesser the need take freedom of speech into account in order to "rescue" applicants from an inconsistent and too broad an interpretation of this provision.

- Even though the examiner and the Board have made a great effort to identify the possible connotations and public perception of the term "Covidiod", they may have failed in the second step of the investigation as to whether the established content of the mark will be perceived as adverse to accepted principles of morality and may therefore not satisfy the necessary degree of clarity and reliability.

- Absolute grounds for refusal are barriers to registration, even if the concern exists in only part of the Union, and thus creates a tension with the principle of protection of IP which is protected under Article 17(2) of the Charter.

- Article 7(1)(f) EUTMR should be interpreted in a way that does not merely depend on the examiner's personal taste or abstract public morals, but that are accepted by the majority. The wording of that provision, in English, focusses on "accepted" principles of morality. The wording of the ground for refusal differs from the US legislation:

There, among other grounds, a trade mark must be refused that "a) consist of or comprises immoral, deceptive, or scandalous matter;.... (15 U.S. Code § 1052 (Section 2 of the Lanham Act).

- To avoid abstract public moral rules, the reference public should be interpreted narrowly, in the way that necessarily it has to be a large majority of the relevant public which perceives the mark as immoral.

- As to the procedure for establishing adverse principles of morality, the CJEU has stressed in the judgment "Fuck Ju Gote", that to establish a violation of accepted principles of morality, more is needed than just looking at dictionaries and use in literature and media. Equally, it is important that the examiner not merely subjectively applies his or her personal taste. The factual assessment of the contextual factors of majority of the relevant public must be done on the Office's own motion.

- There is an inherent tension and immediate conflict between the applicant's rights to the trade mark application as enshrined in the Charter, such as the Article 17(2) of the Charter for the right to Intellectual Property, and the catalogue of absolute grounds for refusal under Article 7(1) EUTMR. Freedom of speech bears the potential to overrule the concerns from absolute grounds of refusal and to effect registration contrary to objections on absolute grounds.

- In the role of a reverse restriction, freedom of speech limits the impact of Article 7(1)(f) EUTMR in those cases in which it is invoked. As a practical guidance, one may take this into account in practice by not only

asking for public policy, but rather legal standards to object to registration on the one hand and not only for a possible majority of the relevant public, on the other hand.

- Further, it would be wrong to discount freedom of speech concerns because absolute grounds of refusal only affect the registrability of a trade mark (and is therefore a restriction on the existence of a property right) while the use of the term by others remains free and unrestricted. The value of a trade mark registration is not tantamount to an unregistered trade mark, even in jurisdictions where such unregistered rights are recognised. This follows from the very existence of trade mark registration systems, which otherwise would be redundant and from the substantial benefits conferred by registration.

- The right of free speech is affected, even by a mere denial of registration.

- The right of property (Article 17 of the Charter on Human Rights) is effectively relevant as well as the right of freedom of speech (Article 11 of the Charter). First of all, there is a group of trade marks which convey political messages as an indicator of origin for example for NGOs which have a need for registration to be protected, Secondly, recital 21 EUTMR would be redundant if the right of free speech did not already have its impact on registration. Thirdly, the approach to exclude the application of the principle of freedom of speech in the assessment of the registrability of a trade mark would be tantamount to making the right of free speech subject to a condition and thus violate its character as a constitutional principle.

- By clearly stating that freedom of expression applies in the field of trade mark law, and specifically in the assessment of the contrariety of a sign to the accepted principles of morality under Article 7(1)(f) EUTMR, the judgment of the CJEU in Fack Ju Göthe has overruled the previous case-law, whereby refusing a mark would not adversely affect the right to freedom of expression because it would not deprive the application of the opportunity to market its goods under the relevant mark.

- Turning to the case at issue, the examiner and the First Board of Appeal have not established that the relevant public would consider the term "Covidiot" as violating public morality, and not simply perceive some negative connotations. In particular, there is no indication as to a majority of the relevant public being guided by such perception. Nor is there any ban or restriction of the use of the term "Covidiot" on the basis of public order in national legislation.

- the term "Covidiot" basis of public order in national legislation. appears to have been chosen intentionally for the purpose of using this trade mark in the public discourse about dealing with the challenges of the COVID-19 pandemic. The individual intention of the applicant however is irrelevant. For the right of free speech to be invoked it suffices to note that the word "Covidiot" has emerged from public debate and designates attitudes and a behaviour which is under dispute.

- To summarise: The interference with freedom of expression in accordance with Article 7(1)(f) EUTMR is only justified if the disputed reasons of public order have been expressly established at the legislative level or if the reasons of morality are supported by a large majority of the relevant public. Neither of these provisos apply here.

12 On 20 July 2022, the applicant was invited to file observations on the comments received by the INTA on the referral decision of the Grand Board, but he did not do so.

Further hearing of the application

13 On 10 October 2023, the Rapporteur invited the applicant to file further observations on the interim decision of 16 December 2021, by which the case was referred to the Grand Board. The communication indicated the following:

- The applicant had not yet the opportunity to file its observations on the interim decision, and in particular on the aspect of trivialisation.

- The figurative mark applied for might have to be refused under Article 7(1)(f) EUTMR because it trivialised the pandemic by referring to games and the word element could develop into a term that trivialised the original message and could lead to opposition to public measures to combat the pandemic.

- At the time of the relevant filing date, the pandemic had caused severe social and economic disruption worldwide (ultimately leading to the greatest global recession since the Great Depression). Widespread supply shortages, including food shortages, were caused by supply chain disruptions and panic buying. Educational institutions and public spaces were partially or completely closed in many countries, and events were cancelled or postponed. Misinformation was spread via social media and mass media, and political tensions increased.

- A detailed report published by the European Centre for Disease Prevention and Control (ECDC) on 10 August 2020, shortly before the filing date, confirms and documents the massive occurrence of COVID-19 cases at that time and contains information on notification rates, the number of hospitalisations, the number of intensive care unit stays and deaths. The report also provides a detailed overview of the countermeasures taken in each country and clearly presents the risk for the EU/EEA:

<https://www.eddc.europa.eu/en/publication-data/rapid-risk-assessment-coronavirus-disease-2019-covid-19-eueea-and-uk-eleventh>

- The use of the figurative mark applied for in commerce for games, including table games and their parts, as well as game apps, conveys an overall cheerful, unserious image of the pandemic, which light-heartedly trivialises the disease, and therefore trivialises the serious damage that this disease represents for the abovementioned fundamental values of the European Union.

- The contested figurative mark is therefore liable, when used in relation to all the goods applied for, to shock or offend not only the victims of that pandemic and their relatives, but also anyone who comes into contact with that mark in the territory of the European Union and has an average sensitivity and tolerance threshold.

- By ridiculing COVID-19 in the figurative mark applied for in a commercial context, the impression is created that COVID-19 is not so bad after all. This may also harm the fundamental interests of the EU, namely the protection of citizens' welfare, economic interests, solidarity and mutual respect, as enshrined in Article 3(1), (3) and (5) of the Treaty on European Union (TEU), as well as the protection of life and health, as protected in Articles 2, 3 and 6 of the Charter. Weighing up the freedom of expression of the applicant enshrined in Article 11 of the Charter against the limits of Article 7(1) EUTMR, the trade mark application would have to be rejected.

14 On 13 November 2023, the applicant filed the following observations:

- The communication incorrectly creates the impression that the registration of the trade mark applied for could lead to resistance against public measures to combat the pandemic. However, it is far-fetched to consider that the registration in itself, and not only the use, of the trade mark could create resistance to public order. A trade mark registration itself is only known by a few trade mark specialists.

- The Board essentially refers to the wrong reference date. The filing date of 12 August 2020 is not decisive. Rather, it is the date on which the decision on registration or refusal is taken which matters. Today, there are practically no relevant public measures to combat the pandemic that could be jeopardised by a trade mark registration. The applicant refers to the headline of the Tagesschau - the most important news programme in Germany - of 7 April 2023, which states:

...

- The fact that the pandemic is presented in a game and refers to the pandemic ironically and with a certain creativity, does not lead to the result that it ridicules the pandemic in a commercial context and thus trivialises a well-known tragedy and that the mark is likely to shock or offend the victims of this pandemic and their relatives. The opposite is the case. The applicant refers to the brochure *Kitas in Zeiten der Corona-Pandemie* [daycare centres in times of the corona pandemic], published by the Federal Ministry of Health in October 2020:

...

- The brochure emphasises positively on page 17 that educational professionals are already finding creative ways to teach children the rules of social distancing and hygiene through play. There was also a need for older children, young people and adults to approach the pandemic in a playful way from different angles. There is no doubt that a playful approach can provide access to serious topics and teach important lessons. So-called educational games are by no means about trivialisation, but on the contrary about raising awareness.

- Moreover, the INTA has rightly considered the fundamental rights implications in its observations to the Grand Board.

15 The appeal is admissible pursuant to Articles 66, 67 and 68(1) EUTMR.

16 The appeal is, however, not well-founded. The EUTM application must be rejected in accordance with Article 7(1)(f) EUTMR and Article 7(1)(b) EUTMR, for the reasons outlined hereunder.

---

17 The First Board, in essence, referred the case to the Grand Board for reasons of its degree of legal complexity and its importance, in particular in the light of the dictum of the Court of Justice in its judgment 27/02/2020, C-240/18 P, *Fack Ju Göhte*, EU:C:2020:118, § 56, that the "freedom of expression" enshrined in Article 11 of the Charter, must be taken into account when applying Article 7(1) EUTMR (see above paragraph 10).

...

18 ---

19 According to the interim decision of the First Board of 16 December 2021 referring the case to the Grand Board, the trade mark applied for could be refused under Article 7(1)(f) EUTMR as being contrary to morality because the trade mark contains the word COVIDIOT which designates a person or a group of persons in a derogatory manner in connection with COVID. Furthermore, the mark could be perceived as contrary to morality if the name of the virus can be trivialised as a designation for a game and if the applicant wants to make an unjustified profit from the pandemic as a free rider. Further, the term could constitute a breach of public policy should it, for instance, develop into a term that incites a breach of public pandemic measures while trivialising their actual message.

20 Pursuant to Article 7(1)(f) EUTMR, trade marks which are contrary to public policy or to accepted principles of morality are not to be registered.

21 The Court of Justice has established rules on how to determine accepted principles of morality in its judgment *Fack Ju Göhte*, (27/02/2020, C-240/18 P, *Fack Ju Göhte* EU:C:2020:118).

22...

23 Moreover, the first Grand Board decision dealt with the interpretation of Article 7(1)(f) EUTMR (06/07/2006, R 495/2005-G, *Screw you*). Many decisions of the Boards of Appeal, national case-law, offices practice and doctrine have discussed and applied those principles.

24 It is appropriate to focus in the present decision on the criteria to determine the threshold of an offence against accepted principles of morality. In a second step, the principles will be applied to the case at hand. Then, the impact of the fundamental rights, in particular the freedom of expression, on the registration procedure will be analysed in more detail.

2.1 The objectives of Article 7 (1) (f) EUTMR

25 The possibility of registering a trade mark may be limited for reasons relating to the public interest. The various grounds for refusing registration in Article 7 EUTMR must therefore be interpreted in the light of the public interest underlying each of them (06/05/2003, C-104/01, *Libertel*, EU:C:2003:244, § 50-51).

26 The provisions of Article 7(1)(f) EUTMR mirror those of Article 6 quinquies B(3) of the Paris Convention of 20 March 1883 (as revised at Stockholm on 14 July 1967), which provides for the refusal of trade mark applications and the invalidation of registrations of trade marks in the following terms:

B. Trademarks covered by this Article may be neither denied registration nor invalidated except in the following cases: ...

3. when they are contrary to morality or public order and, in particular, of such a nature as to deceive the public. It is understood that a mark may not be considered contrary to public order for the sole reason that it does not conform to a provision of the legislation on marks, except if such provision itself relates to public order.

27 The General Court focusses on the possible use of the trade mark when discussing the public interest underlying Article 7(1)(f) EUTMR. The aim of the regulation is to prevent the registration of signs which, when used in the European Union, would be contrary to THE COAT OF ARMS OF THE SOVIET UNION (fig.), EU:T:2011:498, § 29; 13, Curve, EU:T:2014:836 § SIENTA A LA MESA (fig.), EU:T:2018:146 § EU:T:2024:240, § 43).

28 However, this does not mean that a trade mark may only be refused if the use is prohibited, for example under national laws on obscenity or hate speech (06/07/2006, R 495/2005-G, Screw you, § 13). The refusal under Article 7(1)(f) EUTMR does not depend on the finding that the use would be prohibited. The legislator has chosen not to take up in the EUTMR the option foreseen in Article 4(3)(a) of the Directive to approximate the laws of the Member States relating to trade marks, according to which any Member State may provide that a trade mark is not to be registered or, if registered, is liable to be declared invalid where and to the extent that the use of that trade mark may be prohibited pursuant to provisions of law other than trade mark law of the Member State concerned or of the Union.

29 Rather, the examination of Article 7(1)(f) EUTMR is not limited to cases in which the use may be prohibited under another legal norm. Nonetheless, any prohibition to use a certain sign in certain circumstances may be an important indication, in the context of the two alternative settings of that article, namely public order and accepted principles of morality.

30 The purpose of Article 7(1)(f) EUTMR is not to identify and filter out signs whose use in commerce must at all costs be prevented; rather the rationale of the provision is that the privileges of trade mark registration should not be granted in favour of signs that are contrary to public policy or the accepted principles of morality. The organs of government and public administration should not positively assist people who wish to further their business aims by means of trade marks that offend against certain basic values of civilised society (06/07/2006, R 495/2005-G, Screw you, § 13).

31 The question whether a trade mark can be used is also separate from the question whether it was refused under Article 7(1)(f) EUTMR. No provision of the EUTMR or of European Union law in general says that a trade mark which has been refused registration under Article HIJOPUTA (fig.), EU:T:2012:120, § 26; 14/ EU:T:2013:596 § 40).

32 Conversely, the mere fact that a trade mark of dubious taste has been registered as an EUTM does not mean that its use, in the specific circumstances of the case, must be permitted in the Member States. Article 137(2) EUTMR expressly safeguards the right to prohibit the use of a registered EUTM under the civil, administrative or criminal law of a Member State (06/07/2006, R 495/2005-G, Screw you, § 13).

## 2.2 Definition of accepted principles of morality

33 A sign public as contrary to the fundamental moral values and standards to which a society adheres at a given time. In that connection, it is not sufficient for the sign concerned to be

regarded as being in bad taste, but it must be an affront to accepted principles of morality (P, Fack Ju Göhte, EU:C:2020:118, § 39, 41, 55).

34 As INTA pointed out in its observations, Article 7(1)(f) EUTMR, in the English version, does not simply make reference to the principles of morality as such but adds the filter that

35 the social consensus prevailing in that society. In determining objectively what that society considers to be morally acceptable, due account is to be taken of the social context and the particular circumstances of the part of the Union concerned, including, where appropriate, the cultural, religious or philosophical diversities that characterise that society (P, Fack Ju Göhte, EU:C:2020:118, § 39).

36 When evaluating the circumstances that justify the refusal, the interests of the applicant must be balanced with public interests, as defined in Article 7 EUTMR.

37 The registration of a mark as an EU mark is caught by that absolute ground for refusal if, *inter alia*, it is deeply offensive (05/10/2011, T-526/09, PAKI, EU:T:2011:564, § 12). However, trade marks may be irreverent or distasteful. The ground for refusal in Article 7(1)(f) EUTMR is limited to the cases where a sign crosses the boundary to being seriously abusive and likely to cause deep offence.

38 Moreover, the objection must refer to the trade mark and not to other surrounding circumstances such as the legality of the goods or services, the identity of the applicant or the conduct of the applicant when using that trade mark (1 EU:T:2005:312, § 17).

2.3 ---

39 The Court of Justice determines the perception of the sign by a reference public. As indicated before, at paragraph 33, the benchmark is whether the reference public perceives the contested sign as contrary to the fundamental moral values and standards of society as (P, Fack Ju Göhte, EU:C:2020:118, § 41).

40 The examination is to be based on the perception of a reasonable person with average thresholds of sensitivity and tolerance, taking into account the context in which the mark may be encountered and, where appropriate, the particular circumstances of the part of the re P, Fack Ju Göhte, EU:C:2020:118, § 42, 05/10/2011, T-526/09, PAKI, EU:T:2011:564, § 12; 09/03/2012, T-417/10, HIJOPUTA, EU:T:2012:120, § 21; 14/11/2013, T-54/13, FICKEN LIQUORS, EU:T:2013:593, § 21).

41 Accordingly, the assessment of the existence of that ground for refusal cannot be based either on the perception of that part of the relevant public which is easily offended or on

the perception of that part of that public which is insensitive (05/10/2011, EU:T:2011:564, § HIJOPUTA (fig.), EU:T:2012:120, § , § 28; 15/03/2018, 26).

42 Nor does it need to be the perception of the majority, as suggested by INTA in its submissions. The Court of Justice has indicated that the society in the European Union is characterised by its cultural, religious or philosophical diversities (27/02/2020, P, Fack Ju Göhte, EU:C:2020:118, § 39) and the protection of minorities is a strength of the European Union.

43 Contrary to the position adopted in the contested decision, the relevant public for the purposes of the examination of the ground for refusal provided for in Article 7(1)(f) EUTMR may go beyond the target public of the goods and services of the sign at issue. It must be borne in mind that the signs covered by Article 7(1)(f) EUTMR are likely to cause offence not only to the public to which the goods and services covered by the sign are directed, but also to other persons who, without being interested in those goods and PAKI, EU:T:2011:564 § CKEN, EU:T:2013:596 § 19; , § SIENTA A LA MESA (fig.), EU:T:2018:146, § 27).

44 Whether this is the case depends on the context in which the mark is likely to be encountered. It is particularly important, where goods bearing the sign are displayed in supermarkets or department stores, advertised on prime-time television or worn in the street with the trade mark prominently displayed (06/07/2006, R 495/2005-G, SCREW YOU, § 21). Only the perception of those individuals who can be reasonably excluded from encountering the sign during their daily lives should be disregarded (26/09/2014, 20).

45 It has also been established that the mark is subject to an objection pursuant to Article 7(1)(f) EUTMR as long as at least a non-negligible part of the relevant public will perceive it as offensive, indecent or repulsive (14/11/2013, T-52/13, Ficken, EU:T:2013:596, § :2024:240, § 22, 24, 41).

46 Consequently, in the present case, the relevant public to be taken into account consists of those consumers to which the goods and services are directed and other persons who, without being interested in those goods and services, may come across the sign in the course of their daily lives, taking into account the perception of a reasonable person with average thresholds of sensitivity and tolerance

47 The reference place for the evaluation must be within the European Union. A trade mark must be refused, in accordance with Article 7(2) EUTMR, if the obstacle exists at least in P, Fack Ju Göhte, EU:C:2020:118, § 37).

48 Whereas the criteria and the abstract interpretation of the threshold of acceptability of a trade mark from a morality perspective is a matter of European Union law, and must be the same for the whole Union, it is not necessary for the objection in Article 7(1)(f) EUTMR to apply that there be a violation of a principle of morality existing throughout the entire EU level and which is common to all Member States. Public policy and accepted principles of morality are not always the same in all Member States, inter alia for linguistic, historic, social

ARMS OF THE SOVIET UNION (fig.), EU:T:2011:498, §

Mafia SE SIENTA A LA MESA (fig.), EU:T:2018:146, § 28). These particular circumstances of individual Member States are likely to influence the perception of the relevant public within those States (20/09/2011, T-232/10, DEVICE OF THE COAT OF ARMS OF THE SOVIET UNION (fig.), EU:T:2011:498, § 34;

Pablo Escobar, EU:T:2024:240, § 18).

49 Evidence on websites run outside of the European Union are only relevant, if there are further circumstances that show that they reflect the perception of the relevant public in the Union (05/10/2011, T-526/09, Paki, EU:T:2011:564, § 26-27).

50 The contested decision was based on the perception of the **German-**

2.5 The relevant date

51 The applicant argued in its appeal, by reference to evidence dated after the filing date, that the trade mark did not violate accepted principles of morality. He insisted again in his observations filed on 13 November 2023 that at least now, at the moment of the Board of Appeal decision, COVIDmark applied for have lost any shocking meaning.

52 Therefore, the Board must decide, in the context of Article 7(1)(f) EUTMR, w**hat is the**

53 In principle, the assessment of absolute grounds is examined at the date of filing of the trade mark application (03/06/2009, T-189/07, Flugbörse, EU:T:2009:172; confirmed by 23/04/2010, C-332/09 P, Flugbörse, EU:C:2010:225).53

54 In the context of Article 7(1)(f) EUTMR, t**he Court of Justice P,** Fack Ju Göhte, EU:C:2020:118) referred twice to the date of the decision, namely in 16/05/2024, R 260/2021-G, COVIDIOT (fig.)

16

stressed, in paragraph 39, that principles of morality may change over time. These could have developed in favour of the applicant here.

55 In the view of the Grand Board, the judgment of the Court of Justice in Fack Ju Göthe cannot be interpreted as departing from the basic principle that absolute grounds are assessed on the filing date. Consequently, the subsequent evolution of the perception of the sign is of no relevance when the sign is contrary to Article 7(1)(f) EUTMR already at the date of filing.

56 **hich post-date the d**ate of filing of the trade mark application, or which take effect after that date, are not relevant to determine the

Article 7(1)(f) EUTM

§ 52).

57 Therefore, in the circumstances of the present case, the only date relevant for the purposes of the assessment of the applicability of Article 7(1)(f) EUTMR is the date of filing.57

## 2.6

58 In proceedings concerning absolute grounds for refusal, Article 95(1) EUTMR as well as Article 42(1) EUTMR require the examiner and the Board of Appeal to carry out an ex officio examination of the facts and establish to the requisite legal standards the presence of such grounds. As the Court of Justice has stressed, the examination to be carried out cannot be confined to an abstract assessment of the mark applied for, or even of certain components of it, in particular where an applicant has relied on factors that are liable to cast doubt on the perception of the trade P, Fack Ju Göhte, EU:C:2020:118, § 43).

59

of all the elements specific to the case in order to determine how the relevant public would perceive such a **sign if it were used as a trade mark for the goods**

60 The examiner or the Board of Appeal must establish that the use of that mark in the concrete and current social context would indeed be perceived by that public as being contrary to the fundamental moral values and standards of society (27/02/2020, P, Fack Ju Göhte, EU:C:2020:118, § 43, 51).

61 42) **referred** to any factor which may make it possible to assess the perception of that public, and it mentioned the following by way

legislation;

administrative practices;

public opinion;

the way in which the relevant public has reacted in the past to that sign or similar signs.

62 November 2023, it is not decisive whether the registration itself may go unnoticed by the relevant public, which does not normally consult the EUTM Register. Rather, the examination relies on a prospective assessment considering that the sign is used for the goods applied for.

...

fig

63 The trade mark applied for consists of the word element

IDIOT

bo

64 It is common

ground that COVID-19 is a highly contagious disease of the respiratory tract, especially the lungs, caused by the coronavirus SARS-CoV-2. As such, it is used all over the European Union, which is the relevant territory, and beyond, to name the disease.

65 Since its emergence in December 2019, the SARS-CoV-2 virus has spread globally, infecting millions of individuals worldwide. On 30 January 2020, the World Health Organization (WHO) declared that the outbreak of COVID-19 constituted a public health emergency of international concern (PHEIC). On 11 March 2020, the Director-General of WHO declared the COVID-19 outbreak a pandemic.

66 As of March 2020, in the Member States of the European Union, common public health mitigation measures during the emergency phase included travel restrictions, lockdowns, business restrictions and closures, workplace hazard controls, mask mandates, quarantines, testing systems, and contact tracing of the infected, which, together with treatments, served to control the pandemic.

67 It is a well-known fact that at the beginning of March 2020, infection rates exploded in the entire world, including the European Union. Thousands became infected each day, hospitals collapsed, and high death rates forced governments to reduce circulation drastically and confine people at home. This led to enormous economic problems for many companies. Already on the filing date, the pandemic had triggered severe social and economic disruption around the world (ultimately leading to the largest global recession since the Great Depression). Widespread supply shortages, including food shortages, were caused by supply chain disruptions and panic buying. Educational institutions and public areas were partially or fully closed in many jurisdictions, and events were cancelled or postponed. Misinformation circulated through social media and mass media, and political tensions intensified.

68 Large parts of the population of the European Union had been confined to their houses in the second trimester of 2020. At that time, the first infection wave had passed, the next wave was announced, and practically everybody knew a victim of COVID-19. It was already publicly known on the filing date that vaccines were being developed, but that their development took time. These only came onto the market at the end of 2020.

69 A detailed report published by the European Centre for Disease Prevention and Control (ECDC) on 10 August 2020, just before the filing date, documents the resurgence of COVID-19 cases at that time and includes information on case notification rates, hospitalisation, Intensive Care Units and death rates. It also provides a detailed overview of response

70 The extent of the situation at the time of filing of the contested trade mark application is confirmed by the successive events. As of , the pandemic has caused 775 379 864 confirmed cases of COVID-19, including 7 046 320 deaths, as reported by WHO on <https://covid19.who.int/> (accessed on 16 May 2024), ranking it fifth in the deadliest pandemics in history.

71 , is proper to many languages within the Member States, such as German, English, French, or is recognised and understood, as it resembles variations of that term, such as in Italian, Portuguese and Spanish (idiota), Dutch (idiot), Finnish (idiotti) and Hungarian (idióta).

72 The Oxford English dictionary refers to idiot in the English language as being today frequently derogatory.

[https://www.oed.com/dictionary/idiot\\_n?tab=meaning\\_and\\_use#911361](https://www.oed.com/dictionary/idiot_n?tab=meaning_and_use#911361) (consulted on 13 May 2024)

- 2.a.** Chiefly Law and Psychiatry. A person so profoundly disabled in mental function or intellect as to be incapable of ordinary acts of reasoning or rational conduct; spec. a person permanently so affected, as distinguished from one with a temporary severe mental illness. Now potentially offensive, and historical in technical use. a1400-  
By the older legal authorities in England an idiot was defined as a person congenitally deficient in reasoning powers (cf. quot. 1590), and this remained for a long time the common implication of the term.
- 2.b.** Frequently derogatory. A person who speaks or acts in what the speaker considers an irrational way or with extreme stupidity or foolishness. c1480-


73 However, it still needs to be assessed how the trade mark applied for is perceived. As the applicant has pointed out, the




74 To assess the perception of the contested sign the Grand Board will take into consideration  
75 Starting with the dictionary meanings, the Oxford Learners Dictionary contains the following definition (consulted on 13 May 2024)

<https://www.oxfordlearnersdictionaries.com/definition/english/covidiot?q=covidiot>

## covidiot *noun*

 /kəʊˈvɪdiət/

 /kəʊˈvɪdiət/

(informal, disapproving)

★ a person who annoys other people by refusing to obey the **social distancing** rules designed to prevent the spread of **COVID-19**

• *A gang of covidiots blocked my path and began deliberately coughing at me.*

TOPICS **Personal qualities** **C2**

### — Word Origin

2020: blend of **COVID-19** and *idiot*

76 The Cambridge Dictionary defines the expression as follows (first consulted by the applicant on 8 April 2021:



## covidiot

**noun** [C] • informal (also **Covidiot**)  
UK /kəʊˈvɪd.i.ə.t/ US /koʊˈvɪd.i.ə.t/

**someone who behaves in a stupid way that risks spreading the infectious disease Covid-19:**

• *Covidiots were still holding parties as the region recorded its highest ever death toll this week.*

### — More examples

- *A covidiot doesn't take COVID-19 and the risks of the virus seriously, despite what government and health officials say.*
- *It's easy for the press to rail against "covidiots" and ignore the government's failures.*
- *A covidiot might declare it's their constitutional right to ignore social distancing guidelines and local regulations.*
- *People think it's alright to bend the rules for themselves, but everyone else is a Covidiot.*

77 The Collins Dictionary contains the following suggested definition.

<https://www.collinsdictionary.com/submission/22152/covidiot> (consulted on 29 April 2024)

## covidiot

### New Word Suggestion

person who ignores guidelines and rules on public safety around COVID-19, unnecessarily hoards supplies, etc

Submitted By: AlloyMiner - 27/03/2020

Status: This word is being monitored for evidence of usage.

78 Further, the examiner referred to the Urban dictionary. The Urban dictionary is a platform where definitions and examples of new expressions may be uploaded and then be voted on

(extracted)

on 24 April 2024):



79 Checking further the approximately 70 definitions in the Urban Dictionary, they all concern the behaviour in the Covid pandemic, in particular in relation to social contacts and to confinement, whereby the majority criticise those that did not follow the scientific recommendations at that time. However also those that were criticised, counterattacked by also

80 or

blogs are another source to facilitate the understanding of the context. Explicit reference is made to the evidence filed by the applicant and quoted by the examiner during the examination proceedings and which were mentioned in the interim decision of the First Board of 16 December 2021, namely referring to the UK and Germany.

81 The same understanding is confirmed for Ireland. For example, an article by Harry Brent, dated 24 March 2020, in the IRISH POST Urban Dictionary. After referring to the definition mentioned before, the newspaper continues:

In recent weeks, the internet has been going crazy with photos and videos of people being "socially irresponsible" amid the coronavirus outbreak. Many have resorted to panic buying and stockpiling of goods, prompting governments around the world to discourage any such behaviour. Over the weekend across Ireland and the UK, people were pictured in parks, shops and beaches around the country, failing to adhere to social distances measures, again drawing criticism from government.

The term 'covidiot' is all too welcome, it seems. The urban dictionary, for those living under a rock in the world of internet hilarity, is an online dictionary used for slang words and phrases. While nothing on there is likely to feature in the official Oxford version, much of it holds a certain unofficial legitimacy. After all, we all know a covidiot or two don't we? It's like we've known that phrase all our lives.

82 The various examples listed during the procedure show that the conduct regarded as idiotic includes a wide variety of behaviour, most of them regarding social distancing or hoarding goods, but also following uncritically health recommendations by any authority.

83 As the impact of the pandemic was **strong, emotions** flew high. The use which was made of a certain behaviour. The evidence shows that the term was rather used in animated would contract COVID, to extremists, who believed in or spread misinformation or conspiracy theories on the COVID-19 pandemic. It had no relevant use in any commercial environment.



84 Besides the word element, the trade mark applied for contains figurative elements, namely the stylised representation of headgear composed of blu

3.2

85 The trade mark applied for can be seen from different angles, which may lead to a refusal under accepted principles of morality, as indicated by the First Board in its referral decision.

86 The Grand Board is of the opinion that the most important issue is the trivialisation of the pandemic by the trade mark applied for. The trade mark applied for ridicules, in a commercial context, one of the deadliest and most destructive pandemics and thereby trivialises a well-known tragedy. As the applicant admits in his statement of grounds, he has filed a trade mark that is part of a heated debate.

87 As pointed out before, COVID-19 had a devastating effect all over the world. That does not violate accepted principles of **morality through**, for instance, trivialisation or causing offence or provided they do not fall foul of other absolute grounds for refusal.

88 However, **to pumark in the commercial context of games grossly trivialises the pandemic. It creates the impression that the pandemic is something to take lightly and have a laugh about, which can lead to trivialising its deadly and devastating impact. What is fine for a socially conducted debate, is not necessarily entitled to registration as a trade mark.**



89 The values of solidarity and respect for human dignity as laid down in Article 2 TEU are indivisible and make up the spiritual and moral heritage of the European Union. The European Union responded, and is still responding, to the outbreak of COVID-19 and its consequences by adopting a wide range of measures in many areas (health, economy, research, borders, mobility, etc.). Considerable efforts have been made and many resources are devoted to combating COVID-19, at local, national, EU and worldwide level.

90 Contrary to the applicant opinion, and in line with the principles established before, the application must not be examined according to the standards of today. At the filing date in August 2020, one of the important means to combat the pandemic was to stop the propagation of the virus through masks and social distancing and to work on vaccines and pharmaceutical preparations as well as medical techniques. In order to slow down the infection rate and thereby stopping the health system becoming blocked, everybody was asked to be responsible. By ridiculing COVID-19 in the trade mark applied for, in a commercial context, people have the impression that COVID-19 is not so bad after all and that the rules and regulations that were adopted by governments and other authorities can even be laughed about in trade. This may also affect the fundamental EU interests of protecting the well-being of citizens, their economic interests, solidarity and mutual respect, as enshrined in Articles 3(1), (3) and (5) TEU and those of life and health as protected in Articles 2, 3 and 6 of the Charter.

91 Using the trade mark applied for in trade for games, including board games, flippantly downplays the seriousness of the pandemic, and, therefore, trivialises the serious harm done by that disease to the fundamental values of the European Union referred to above. The contested mark is therefore likely to shock or offend not only the victims of that pandemic and their families, but also any person who, on EU territory, encounters that mark and has average sensitivity and tolerance thresholds.

92 The applicant argues that the trade mark is intended to be used for educational games and that it is recommended to find creative ways to teach the rules of distancing and hygiene. This might be the case but has no impact on the examination of the trade mark applied for. The relevant question is not whether the goods applied for are in line with accepted principles of morality, but whether the trade mark applied for passes the threshold (see above paragraph 38).

93 Insofar as the applicant considers the term ironic in the context of the goods claimed or assumes that the public will at most find it distasteful, this cannot be followed.

94 Trade mark protection must neither trivialise offensive signs nor give them a stage or accustom the public to them. Even ambiguous or witty references that appear merely sarcastic, must prevent trade mark protection, a fortiori where people have become victims. Even witty statements then cause offence.

95

completely taken into consideration. However, the gravity of the effect of trivialisation is so important that the application must be refused under Article 7(1)(f) EUTMR, as further shown below at point 3.4.

96 La Mafia SE SIENTA A LA MESA (fig.), EU:T:2018:146, § 47) and Pablo Escobar (§ 22). Without doubt, there are

important differences between the Mafia or the Medellín cartel, and COVID-19: One is organised crime, while COVID-19 is a disease that led to a pandemic. However, the judgment for the word mark Pablo Escobar reasons in particular that the trade mark application will be perceived as apology of crime and a trivialisation of the suffering caused to thousands of people who were killed or injured. The La Mafia judgment stressed further that the figurative trade mark conveyed a globally positive image,



through the addition of se sienta a la mesa [takes a seat at the table] and the depiction of a rose. The application, consequently, trivialises the serious damage that the mafia has inflicted and continues to inflict on the fundamental values of the European Union. From a trade mark perspective, the situation is comparable for the figurative mark



where the deadly COVID pandemic through the play on words and the figurative elements receives a positive image.

97 For the sake of completeness, the applicant has not provided any evidence of widespread P, Fack Ju Göhte, EU:C:2020:118, § 39, 49-55, see also above paragraphs 59-61).

98 As to the other trade marks s, for entirely different goods case. The fact that a potentially objectionable mark has made its way onto the Register cannot bind the Grand Board to follow suit in another case. Other mechanisms exist to regulate such situations. In addition, the other trade marks referred to by the applicant that trivialise COVID-19 or any other catastrophic event.

### 3.3.

99 The use of the trade mark applied for will be seen as trivialising COVID-19 in the area of the goods at issue:

Class 6: Metal clips.

Class 9: Computer gaming software; Mobile apps.

Class 28: Board games; Toys.

100 As pointed out above at paragraph 93, the combination of the sign applied for with board games, toys and computer gaming software is hurtful and offensive to persons who have suffered because of the pandemic. It reduces the trauma of the pandemic to a game, which may be even played by children. In connection with games, where children and young people but in particular adults are supposed to be able to learn and exercise fair competition, words which may encourage rough, downright brutish behaviour or even give the impression that this is desired and possible, are completely out of place. In this respect, even the appearance of calling for or condoning behaviour that trivialises the pandemic is unacceptable.

101 As to mobile apps in Class 9, the same applies in an even broader sense, as it may cover trivialised than in the context of games.

102 Finally, as indicated by the applicant, the metal clips in Class 6 which can be attached not only to play blocks, but also to garments as a reference to a player, include goods that may

be essential parts to play the games and hence share the same objectionability as board games.

103 In the light of the foregoing, it appears that the application is contrary to human dignity and hence contravenes the accepted principles of morality. This must, however, be expressed, in order to ensure the correct overall balancing of the rights and interests (opinion of Advocate General Bobek, P, Fack Ju Göhte, EU:C:2020:118, § 56)

### 3.4

104 The applicant invokes fundamental rights, in particular freedom of expression, in view of its claim that the trade mark includes a term protected in political debate, and by freedom of art, in particular satire. This raises the question whether fundamental rights are extra criteria that may be added to the examination of trade mark applications.

### 105

fundamental rights must be balanced, namely those of the applicant and those that protect public interests, when defining the threshold under which a trade mark must be refused under Article 7(1)(f) EUTMR (see above paragraph 95). Article 7(1) EUTMR must be interpreted in the light of fundamental rights.

#### 3.4.1

106 The impact of the freedom of expression on the examination of a trade mark having a political or satirical message is one of the main issues to be decided in the present case, and it is hence appropriate to go into more depth.

107 P, Fack Ju Göhte, EU:C:2020:118, § 56) enshrined in Article 7(1)(f) EUTMR.

108 Fack Ju Göhte, EU:T:2018:27, § 29) had indicated that

'in the field of art, culture and literature, the protection of freedom of expression is always sought, which does not exist in the field of trade mark law'.

109 The Court of Justice was not in agreement with that statement and reasoned by express sentence of the 21st recital of the EUTMR. These considerations of the legislator read, in its essential part, as follows:

21 The exclusive rights conferred by an EU trade mark should not entitle the proprietor to prohibit the use of signs or indications by third parties which are used fairly and thus in accordance with honest practices in industrial and commercial matters. ... Use of a trade mark by third parties for the purpose of artistic expression should be considered as being fair as long as it is at the same time in accordance with honest practices in industrial and commercial matters. Furthermore, this Regulation should be applied in a way that ensures full respect for fundamental rights and freedoms, and in particular the freedom of expression.

110 The passage from the opinion of the Advocate General Bobek of 2 July 2019, Case C-240/18 P, Fack Ju Göhte, to which the Court refers, reads as follows (footnotes not

reproduced):

47. In fact, freedom of expression plays a role in trade mark law.

48. First, respect for fundamental rights is a prerequisite for the lawfulness of any Union action. The scope of application of the Charter of Fundamental Rights of the European Union ('the Charter') and the fundamental rights guaranteed therein extends to every act or omission of the institutions and bodies of the Union. The same must obviously apply in the trade mark area to acts and omissions of Union bodies such as the EUIPO.

49. Secondly, the commercial nature of an activity is not a reason to limit or even exclude the protection of fundamental rights. It should be noted that the European Court of Human Rights (hereinafter: ECtHR) has ruled that the freedom of expression guaranteed in Art. 10 ECHR applies regardless of the nature of the information, even when it is commercial advertising. It has applied the principle of freedom of expression precisely to review restrictions imposed by national legislation on trademarks or other forms of advertising.

50. Thirdly, the validity of freedom of expression in the trade mark area was confirmed in the recitals of Regulation (EU) 2015/2424 amending Regulation 207/2009 and is now recognised in Regulation 2017/1001).

51. Fourthly, and in addition, it should be noted that this legal opinion is also in line with the previous case-law of the Court of First Instance and with EUIPO's own decision-making practice.

52. It is therefore clear that the right to freedom of expression must also be observed in trade mark law. However, this statement raises more questions than it answers. As fascinating as the problem and the discussion are in theory, the question remains as to what exactly this finding means for the solution of the present case.

53. On the one hand, the EUIPO's assumption that the legislator had already taken fundamental rights and their balancing into account when drafting Art. 7(1)(f) of Regulation No. 207/2009 is hardly defensible. There is no indication whatsoever as to how exactly such a balancing should be achieved in the individual case. The assumption that this issue is already adequately addressed by the mere insertion of the concepts of public policy and morality in Article 7(1)(f) is simply untenable in view of the multi-layered interests at stake.

54. In addition, when questioned on this point at the hearing, the appellant also had some difficulty in explaining exactly how the criteria in Article 7(1)(f) should be amended to expressly include the right to freedom of expression. The appellant's proposals were essentially limited to saying that the EUIPO and the General Court would have allowed registration of the disputed mark if they had taken into account its right to freedom of expression in the registration procedure; the EUIPO had been too strict and should have given greater weight to the freedom of expression contained in or expressed by the disputed mark.

55. This argument is closely related to the appellant's fundamental criticism of the EUIPO's imputed sensitivity to public morality, which, according to the appellant, does not correspond to the perception of the expression 'Fack Ju Göhte' by the relevant public and the German authorities. Freedom of expression is therefore hardly an independent criterion for assessment, but should, in the appellant's view, have led the EUIPO to a different (more liberal) view of public morality. This in turn leads the argument to the core of the first ground of appeal already referred to above: What do the concepts of public policy and morality refer to, and in what way are they to be determined?

56. Thus, even if freedom of expression is not a primary objective of trade mark law, it is clearly present in it. Against this background, it could be that the court's statement in paragraph 29 of the reasons for the judgment may have intended to express a different idea: not that freedom of expression plays no role at all in trade mark law, but that, in contrast to the fields of art, culture and literature, the weight attached to freedom of expression in the field of trade mark law is somewhat different, perhaps somewhat lighter, when weighing up the rights and interests.

57. In the former (literal) sense, the statement in para. 29 of the judgment under appeal is clearly wrong. Such a statement is, in my view, defensible if it is to be understood in the second sense just outlined. Even if the right to freedom of expression, as well as other fundamental rights which may be at issue, must be taken into account as a whole in the balancing exercise, the protection of freedom of expression is not the primary objective of trade mark protection.

### 3.4.2

111 The European Union recognises the rights, freedoms and principles set out in the Charter (Article 6(1) TEU).

112 The Office, as a body of the European Union as well as the Member States in the application of EU law are required to guarantee in any act or omission the application of fundamental rights of the Charter (Article 51(1) of the Charter).

113 Article 11 of the Charter provides the following:

## Article 11 - Freedom of expression and information

(1) Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers.

(2) The freedom and pluralism of the media shall be respected.

114 In addition, Article 52(1) of the Charter, provides that:

## Article 52 – Scope and interpretation

(1) Any limitation on the exercise of the rights and freedoms recognised by this Charter must be provided for by law and respect the essence of those rights and freedoms. Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others.

115 Any person may rely on freedom of expression in Article 11 of the Charter, whether it is a natural or a legal person, and whether it is a citizen of the Union or comes from a third country.

116 Freedom of expression is an essential foundation of a democratic and pluralistic society reflected in the values of the European Union set out in Article 2 Treaty of the European Union (TEU) (06/09/2011, C-163/10, Patricielli, EU:C:2011:543, § 31; 22/01/2013, C-283/11, Sky Österreich v Österreichischer Rundfunk, ECLI:EU:C:2013:28, § 52).

117 However, freedom of expression in the sense of Article 11 of the Charter does not stop at the freedom to hold opinions in the strict sense, in the political debate. The wording also mentions the freedom to receive and express information and ideas and is understood to also include the commercial expression.

118 The scope of protection and possibility to interfere with the right of freedom of expression has been developed in the case-law on Article 10 ECHR by the ECtHR (*Mouvement raëlien suisse v Switzerland* ([GC] no 16354/06, § 48, ECtHR 2012) and the case-law of the ECJ on general principles of EU law (26/06/1997, *United Familiapress Zeitungsverlags- und vertriebs GmbH v Heinrich Bauer Verlag*, C-368/95, in reference to the publication of crosswords; see also, *mutatis mutandis*, Opinion of Advocate General Fennelly in *Germany v Parliament and Council*, 15/06/2000, C-376/98, ECLI: EU:C:2000:324, § 154-155).

119 The case-law of the ECtHR is relevant. Article 52(3) of the Charter provides:

(3) In so far as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention.

120 Article 10 ECHR corresponds to Article 11 of the Charter; their meaning and the scope of those rights are, at least for the circumstances of the present case, the same. In particular, the first two sentences of Article 10 ECHR (Freedom of expression) are identical to Article 11(1) of the Charter (Freedom of expression and information).

## Article 10 – Freedom of expression

(1) Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.

(2) The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

121 Consequently, it results from the text of both provisions that in principle, anybody is free to hold and to express opinions and to receive and impart information and ideas, but that this freedom is subject to exceptions, which must have a legal basis and must be proportionate, i.e. must be necessary and aim to protect specific general interests.

122 A trade mark application falls within the scope of protection of the freedom of expression enshrined in Article 10 ECHR and Article 11 of the Charter. This was already clear from the decision of the Grand Board 06/07/2006, R 495/2005-G, SCREW YOU, § 15. The first judgment of the ECtHR on Article 10 ECHR in relation to a trade mark application was rendered in 2015 (25/08/2015, 55153/12, DOR v Romania [Crucifix (fig.)], ECLI:CE:ECHR:2015:0825DEC005515312).

123

with the Romanian Trade Mark Office, for legal services, today classified in Class 45. The refusal was based on the argument that the trade mark was deceptive (Article 7(1)(g) EUTMR), because the average consumer would perceive the religious character of the mark and therefore believe that there is a link between the church and the proprietor offering legal services. The applicant challenged the rejection, relying on Article 10 ECHR, arguing that a trade mark constitutes an important element of the advertising and commercial strategy.

124 The ECtHR held that a trade mark is an important element of the advertising and commercial strategy, since, by filing a trade mark, the applicant intends to make the goods/services in question known to the public while at the same time distinguishing them from other undertakings (§ 42). Article 10 ECHR protects commercial advertising, and hence, trade mark applications fall within the scope of Article 10 (§ 43).

125 Nonetheless, the ECtHR held that the rejection of the mark due to its deceptive nature was a justified limitation on the right of freedom of expression (17/09/2015, 55153/12, DOR v Romania [Crucifix (fig.)], CE:ECHR:2015:0825DEC005515312, §52-54).

126 The refusal of a trade mark application is an interference with the exercise of the right to freedom of expression. Limitations are only permitted under specified conditions.

127 Firstly, the limitation must be based in law. Article 7(1)(f) EUTMR meets that standard, although the legal basis does not contain a clearer definition of the concepts. The ECtHR has already acknowledged that in spheres such as competition, in which the situation is constantly changing in accordance with developments in the market and the field of communication, laws are frequently framed in a manner that is not absolutely precise, and the case-law helps to control its application (ECtHR, 20/11/1989, 10572/83, Markt Intern Verlag GmbH and Klaus Beermann v Germany, ECLI:CE:ECHR:1989:1120JUD001057283, § 30).

128 Second, the limitation in accordance with Article 52 of the Charter must be necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedom of others.

129 It further follows from Article  
the prevention of disorder or crime, for the protection of health or morals can be  
necessary.

130 Similar values may be found in the first Recital of the Charter's Preamble:

The peoples of Europe, in creating an ever closer union among them, are resolved to share a peaceful future based on common values.

Conscious of its spiritual and moral heritage, the Union is founded on the indivisible, universal values of human dignity, freedom, equality, and solidarity; it is based on the principles of democracy and the rule of law. It places the individual at the heart of its activities, by establishing the citizenship of the Union and by creating an area of freedom, security and justice.

131 The General Court has provided a non-exhaustive list of provisions that summarise basic values within the European Union in its judgment of 05/10/2011, T-526/09, PAKI, EU:T:2011:564, § 15.

132 For instance, Article 2 TEU s human dignity, freedom, democracy, equality, the rule of law and respect for human rights, common to the Member States in a society in which pluralism, non- (see above paragraph 89).

133 Other provisions of the TEU, such as Articles 3, 9, 10 and 21 also make statements concerning the fundamental values of the Union, such as the principle of the equality of its citizens and the right to participate in the democratic debate. Further values are protected in the more detailed secondary legislation.

134 Moreover, Article 6(1) TEU explicitly states that the Union recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union, such

as, for instance the right to life, to respect for physical and mental integrity, to liberty and to non-discrimination on any ground, which are enshrined in Articles 2, 3, 6 and 21 TEU respectively. It may also include the freedom of expression of third parties.

135 These are merely examples of the values which are relevant for these purposes. In the case at hand, the examination relied on the protection of the well-being of citizens, their economic interests, solidarity and mutual respect, and those of life and health (see above paragraphs 90, 95).

136 Next, the conflicting interests must be balanced. The case-law of the ECtHR shows that there is categorisation of expression of an opinion according to the importance of its content in order to determine the extent of the protection granted. This hierarchical model of expression puts commercial expression at a lower level than others, especially when compared to political forms of expression. An expression containing a commercial message may be subject to different restrictions than a political speech (25/08/2015, 55153/12, DOR v Romania [Crucifix (fig.)], ECLI:CE:ECHR:2015:0825DEC005515312, § 48, 51; 20/11/1989, 10572/83, Markt Intern Verlag GmbH and Klaus Beermann v German, ECLI:CE:ECHR:1989:1120JUD001057283; 24/02/1994, 15450/89, Casado Coca v Spain, ECLI:CE:ECHR:1994:0224JUD001545089, § 50).

137 Advertising may be subject to restrictions aimed, inter alia, at ensuring fair competition and preventing unfair competition through, for example, misleading or deceiving advertising. In certain contexts, even the publication of objective and truthful advertising messages may be subject to restrictions aimed at safeguarding the rights of others or based on the particularities of a specific commercial activity or profession (24/02/1994,

CE:ECHR:1994:0224JUD001545089, Casado Coca v Spain, § 51). As to the specific trade mark application of the Crucifix mark mentioned above (paragraph 123), the ECtHR accepted that the interest in rejecting the crucifix as a trade mark as being deceptive for the nature of the legal services provided, was justified (17/09/2015, 55153/12, DOR v Romania [Crucifix (fig.)], CE:ECHR:2015:0825DEC005515312, §52-54).

138 The fact that a trade mark applied for may contain political content does not entitle it to a greater protection in so far as freedom of expression is concerned, because a trade mark is not essential to the expression of that political opinion. The registration of an opinion as a trade mark does not bring any advantage to political debate. In addition to the function of indication of commercial source the Court has also recognised that, inter alia, advertising may be an additional trade mark function (22/09/2011, C-323/09, Interflora, EU:C:2011:604, § 58) but so far no similar acknowledgement has been made in relation to terms used in political statements or debate.

139 This approach has also been confirmed by the ECtHR in its judgment of 04/06/2019, CSIBI v. Romania [Székelyföld nem Románia!], CE:ECHR:2019:0604DEC001663212, in which the applicant applied for a trade mark containing the text in Hungarian Székelyföld nem Románia! which means in Romania for, inter alia, printed matter in Class 16, for breach of public policy (cf. Article 7(1)(f) EUTMR). The slogan called into question the territorial unity of -speaking part of Romania, 16/05/2024, R 260/2021-G, COVIDIOT (fig.)

31  
the disintegration of the Romanian state and therefore in breach of the

140  
mark applied for not from the point of view of a political opinion, but from an economic perspective, emphasising that the subject matter of its appeal was exclusively commerce was not made impossible by the refusal of the trade mark application (ECtHR, 04/06/2019, CSIBI v. Romania [Székelyföld nem Románia!], CE:ECHR:2019:0604DEC001663212, § 43, 45).

141 The ECtHR explicitly distinguished the trade mark application procedure before it from the other parallel measures by the national authorities, which concerned the use of the mark, such as criminal prosecution and seizure of the T-shirts bearing the mark (ECtHR, 04/06/2019, CSIBI v. Romania [Székelyföld nem Románia!], CE:ECHR:2019:0604DEC001663212, § 43-45).

142 This is in line with the case-law that the refusal of an application under Article 7(1)(f) EUTMR is independent of the possibility to use the sign in trade (see above paragraphs 27-32) and a fortiori, to use a certain expression in political debate.

143 As the Advocate General explained in paragraph 53 of its opinion in the Fack Ju Göhte

-  
protection of freedom of expression. In that context, Recital 21 EUTMR, quoted by the CJEU in paragraph 56 of that judgment, mostly refers to the use of a trade mark. Such use may refer either to third parties, wishing to make unauthorised trade mark, copyright (03/09/2014, C-201/13, Johan Deckmyn, Vrijheidsfonds VZW v Helena Vandersteen et al., ECLI:EU:C:2014:2132) or name (ECtHR judgment referred to by the applicant, 23/04/2019, 37 898/17, Karl-Heinz Grasser v. Austria [KHG Korrupte haben Geld], ECLI:CE:ECHR:2019:0423DECO03789817) for reasons they consider socially significant. They may also apply to the use by the proprietor of a business that has its promotional campaigns prohibited by authorities (ECtHR, 30/01/2018, 69317/14, promotional campaigns], CE:ECHR:2018:0130JUDO06931714, § 79). In all those cases it is important to assess whether the prohibition of the use of the sign strikes a good balance between freedom of expression and accepted principles of morality. The need to protect the freedom of expression is necessarily higher where the use of a certain expression in the context of actual commercial or even political activities is concerned, as opposed to the mere registration, in particular because failure to register a mark does not prohibit the applicant from using the sign (see above paragraph 31).

#### 3.4.5 Freedom of Art

144 The applicant argues that he is also protected by the freedom of the arts enshrined together with the freedom of science in Article 13 of the Charter, which states as follows:

*Article 13 - Freedom of the arts and sciences*

*The arts and scientific research shall be free of constraint. Academic freedom shall be respected.*

However, Union law does not provide a definition of the concept of art. In principle, the notion of art must be open and not bound to techniques or content. Art can be described as specific form (freie schöpferische Gestaltung, in der Eindrücke, Erfahrungen oder Erlebnisse des Künstlers durch eine bestimmte Form vermittelt zum Ausdruck gebracht werden). (Calliess/Ruffert, , 6th edition, 2022, Article 13 of the Charter, § 3).

In particular, the applicant argues that the trade mark is a caricature, using satirical elements. Satire is a form of artistic expression and social commentary and, by its inherent features of exaggeration and distortion of reality, naturally aims to provoke and agitate. Accordingly, any interference with an artist's right to such expression must be examined with particular care (ECHR, 25/01/2007, Vereinigung bildender Künstler v Austria, ECHR:2007:0125JUDO06835401, § 33).

145 However, not any figurative trade mark with a provocative term is art or satire. The simple figurative sign applied for outside of any particular context, does not reach the threshold of art. The applicant never substantiated that the trade mark was meant to be art and there is nothing to indicate that the public perceives the contested sign as art. Consequently, the application is not within the scope of protection of Article 13 of the Charter. And even if it was, the freedom of art is also subject to the limits of Article 52(1) of the Charter in conjunction with Article 7(1)(f) EUTMR (see above paragraph 114).

146 To summarise, it is important that within the interpretation of the conditions of Article 7 EUTMR, the interests of the applicant must be balanced with public interests. An application for trade mark registration does not enjoy a stronger scope of protection under the right of freedom of expression because the word is also part of the political debate. Rather, it is treated merely as a commercial term. Such trade mark applied for must be refused like any other sign, once the conditions of Article 7 EUTMR are met.

147 Article 7(1)(f) EUTMR is a valid limitation to, inter alia, the freedom of expression in accordance with Article 11(2) of the Charter in conjunction with Article 52(1) of the Charter, in particular because it protects the rights and interests of others, by preventing the registration of marks which would be perceived by the relevant public at the filing date as contrary to the fundamental moral values and standards of society.

148 In the present case, the freedom of commercial expression weighs less in balance with the overriding and important principles established above, and the application must be refused for all the goods in accordance with Article 7(1)(f) EUTMR, in particular because the applicant may still use the mark, like any third party, in trade, unless the use of the trade mark would be forbidden under national law (see above paragraph 32). The prohibition to register the trade mark is also proportionate as it is necessary for the protection of the interests which it is intended to guarantee and is less restrictive than would be the prohibition of use. There are no other less restrictive measures than the refusal to register.

149 Consequently, the trade mark applied for must be refused in accordance with Article 7(1)(f) EUTMR, because when used as a trade mark for the contested goods, such as games and similar products, it would trivialise one of the deadliest pandemics ever, in a way that is contrary to human dignity and hence accepted principles of morality.

4.

150 The trade mark applied for must also be refused in accordance with Article 7(1)(b) EUTMR, because it is devoid of any distinctive character.

151 The First Board further raised the issue of distinctiveness in accordance with Article 7(1)(b) EUTMR of a political buzzword as a trade mark, to the Grand Board. To address the various issues of the referral decision and for reasons of procedural economy, the decision is also based on that ground for refusal. Pursuant to Article 71(2) EUTMR, the Boards have the power to base the decision also on grounds for refusal which the examiner has not invoked. In the proceedings before the Board of Appeal, the applicant had the opportunity to submit observations on the ground for refusal set out in Article 7(1)(b) EUTMR.

152 It is clear from settled case-law that, for a trade mark to possess distinctive character for the purposes of that provision, it must serve to identify the goods in respect of which registration is applied for as originating from a particular undertaking, and thus to distinguish those goods from those of other undertakings (21/01/2010, C-398/08 P, *Vorsprung durch Technik*, EU:C:2010:29, § 33). The subject matter of the examination is always the trade mark applied for as a whole.

153 However, the application of those principles must lead to the refusal of the application for registration.

154

websites around the world at the time of filing of the application, the trade mark in question



is understood only as a general reference to individuals who behave in an idiotic way in the context of the COVID pandemic.

155

arded as a play on words. A play on words may militate in favour of distinctiveness. However, there is no automaticity in that regard.

156

a buzzword expression for a specific temporary phenomenon such as Brexit (30/01/2019, R 958/2017-G, Brexit, § 50) or World Cup 2006 Germany (30/06/2008, R 1470/2005-1, WORLD CUP 2006 GERMANY, § 51).

157 The fact that a word is a term for a particular temporary phenomenon does not preclude it from also being understood as an indication of a particular commercial origin. However, undertaking.

158 The relevant consumers will recognise the meaning of the word

a term coinciding with a historical, social and political event. They will perceive the trade mark only as a reference to the event in question and, in the case of didactic games, to the topic when playing that game. That perception will prevent any possibility of perception 16/05/2024, R 260/2021-G, COVIDIOT (fig.)

of the trade mark as an indication of a specific industrial or commercial origin of the goods (20/10/2021, R 547/2021-2, Bring Corona nicht zur Oma).

159 To that extent, the slogan case-law also applies to political slogans. Since the function of a trade mark as an indication of origin is the essential function of a trade mark, a trade mark that merely is perceived as a political message lacks inherent distinctive character (13/09/2019, R 2419/2018-2, LLIBERTAT PRESOS POLITICS OMNIUM LENGUA CULTURA PAIS (fig.), § 19, see also Spanish Tribunal Superior de Justicia Madrid (20/02/2020, 72/2020, ES:TSJM:2020:1629, LLIBERTAT PRESOS POLITICS OMNIUM LENGUA CULTURA PAIS (fig.)), which based the refusal on public policy (Article 7(1)(f) EUTMR).

160 Thus, as long as a trade mark is perceived exclusively as a political term describing the content of the game and not as an indication of a particular undertaking or other commercial origin (including a political party), it lacks intrinsic distinctiveness.

161 As a rule, purely political slogans, no matter who wields them, and no matter whether they are critical or complimentary, do not function as source indicators. There is no reason grounded in legitimate trade mark policy to protect such marks, unless they have acquired distinctive character through use.

162 The public will necessarily associate a sign that is used intensively in a non-trade context i.e., political, historical, etc. with the context in question. In order to acquire distinctive character as a trade mark, such a sign must have been sufficiently met by consumers in a commercial context (30/01/2019, R 958/2017-G, Brexit (fig.), § 52).

163 The mark applied for



is further represented graphically in capital letters on a rectangle outlined with a frame, on a yellow background, the word name plate, and the yellow colour is a simple prominence. The shape and colour of the sign have only a typical promotional effect for the public (03/07/2003, T-122/01, Best Buy (fig.), EU:T:2003:183, § 33).

164 In addition to the word element, the colour and the frame, the mark applied for includes a figurative element, namely the stylised representation of a blue, a yellow, and a red cone resemble those that are used as figures in board games. It is also apparent from the submissions of the applicant during the examination procedure that the game is played with conical figures. The figurative element, thus, will simply be perceived as a reference to the characters in the game or to the hat worn by a jester. The protagonists of the game necessary to play.

165

is not distinctive for games, as it only accentuates the semantic content conveyed by the

166 As regards the metal clips in Class 6, these can be attached, as nameplates of the 16/05/2024, R 260/2021-G, COVIDIOT (fig.)

are important to the game. The trade mark applied for is not distinctive for such printed clips that are seen solely as part of the game.

167 of the trade mark, albeit that the trade mark is devoid of any distinctive character, the same principles apply (see above point 4). Article 7(1)(b) EUTMR puts limits on the freedom of commercial expression of the applicant, pursuant to Article 11 of the Charter. As the trade mark applied for is not distinctive in line with the findings established before and the applicant, like any third party, may still use the expression in trade for the goods applied for or in political debate, the argument relating to fundamental rights must also be rejected here.

168 Therefore, the trade mark is also rejected under Article 7(1)(b) EUTMR, in its entirety.

5.

169 Although the First Board, that remitted the case to the Grand Board, also raised the ground of Article 7(1)(c) EUTMR, it is not necessary to also decide on this ground for refusal in the present case.

6

170 The appeal is dismissed because the trade mark applied for must at least be refused in accordance with Article 7(1)(f) EUTMR and Article 7(1)(b) EUTMR.

Order

On those grounds,

THE GRAND BOARD

hereby:

Dismisses the appeal.

5pqobqu1id - Il Sole 24Ore S.p

o 24ORE RIPRODUZIONE RISERVATA

5pqobqu1id - Il Sole 24Ore S.p.A. - Grupp

IPRODUZIONE RISERVATA



5pqobqu1id - II Sole 24Ore S.p.A. - Gruppo 24ORE R

ONE RISERVATA



5pqobqu1id - Il Sole 24Ore S.p.A. - Gruppo 24ORE RIPRODUZI

RVATA

5pqobqu1id - Il Sole 24Ore S.p.A. - Gruppo 24ORE RIPRODUZIONE RISEF