

**DECISION
of the Second Board of Appeal
of 1 June 2023**

In Case R 2305/2022-2

Käselow Holding GmbH

Große Straße 11
22926 Ahrensburg
Germany

Applicant/Appellant

represented by NACHTWEY IP RECHTSANWÄLTE, Buschhöhe 10, 28357 Bremen,
Germany

Appeal relating to European Union trade mark application No 18 622 650

THE SECOND BOARD OF APPEAL

composed of S. Stürmann (Chairperson), K. Guzdek (Rapporteur) and S. Martin (Member)

Registrar: H. Dijkema

gives the following

Language of the case: German

Decision

Established Facts

- Summary of the facts 16. By an application filed on December 2021, Käselow Holding GmbH ('the applicant') sought to register figurative mark No 18 622 650



as a European Union trade mark in respect of the following services:

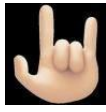
Class 36: Consultancy relating to investment in real estate affairs; Consultancy with regard to the purchase of real estate; Consultancy relating to real estate ownership; Real estate consultancy; Real estate appraisal; Evaluation and management of real estate; Evaluation of real estate for tax purposes; Evaluation of insurance claims for real estate; Providing computerised information relating to real estate; Real estate acquisition services for others (real estate affairs); Real estate consultation; Real estate management; Real estate investment services; Real estate agency services relating to the sale and rental of buildings; Real estate agency services relating to the sale and rental of businesses; Real estate agency services; Real estate booking services; Brokerage of financial investments in real estate; Real estate investment; Real estate rental services; Real estate renewal services; Collection of debt on real estate rental; Preparation of investment plans in real estate affairs; Providing information on the property market; Providing information relating to real estate; Financial services relating to the acquisition of real estate; Financial services relating to real estate and buildings; Financial valuation of real estate and real estate; Financial evaluation in real estate affairs; Financing of building facilities; Real estate loans financing; Financing of real estate development projects; Real estate investment; Real estate acquisition [on behalf of others]; Financial planning of building properties; Leasing of real estate; Real estate brokerage; Real estate leasing; Real estate management services provided by authorised representatives; Real estate investment; Financing of capital for real estate participation; Administrative services relating to real estate investment; Research relating to the acquisition of real estate (real estate affairs); Assisting third parties in the acquisition of shares in real estate companies (financial services); Assisting in the acquisition of real estate (financial services); Rental of exhibition space (real estate affairs); Rental of offices (immobile); Brokerage of moving goods; Arranging the rental of real estate; Arranging of loans with real estate security (basic debt loans); Arranging

the provision of finance for real estate purchase; Real estate procurement for others; Arranging the sale of real estate tridges; Arranging rental agreements for real estate; Leases (arranging of -) [real estate property only]; Real estate property services; Real estate property management and land management; Management of real estate companies; Property management services; Management of investments in the form of real estate ownership; Management of temporary use of real estate; Real estate appraisal; Accommodation bureaux (real estate affairs).

Class 37: Cleaning of buildings [exterior surface]; Building refurbishment services; Maintenance of buildings; Cleaning (hygienic services); Custom refurbishment of buildings; Repair of buildings; Insulation of old buildings; Management (supervision) of repairs to buildings; Renovation and refurbishment of buildings; Building demolition; Sealing of foundations to protect against moisture; Waterproofing of buildings to prevent vermin; Waterproof Interior sealing and combs; Sealing buildings to prevent dust; Protection of buildings against intrusion of water during construction work; Refurbishment of installations; Application of rendering to buildings; Application of protective coatings for buildings; Construction information; Providing information relating to the repair of buildings and relating to civil engineering works; Construction, assembly and demolition work; Construction of steel buildings; Construction of residential and commercial buildings; Supervision of buildings; Monitoring construction of real estate projects; Supervision of construction supervision in the execution of remedial work; Quality control of construction works; Construction information; Building services relating to building for industrial purposes; Temporary building services; Project management of a building site in the field of house construction (construction supervision); Development (land); Roofing repair; Consultancy relating to the construction of buildings and other structures; Consultancy and information relating to building construction; Consultancy and information relating to the execution of public works; Consultancy relating to the repair of buildings; Repair of concrete; Concrete renovation; Roofing services; Construction of commercial buildings; Construction of buildings; Construction; Construction services (cleaning); Repair of the interior of buildings; Installation of residential solar panel systems; Installation of solar heating systems; Installation of solar modular systems for business buildings; Installation of solar energy systems; Individual building construction; Individual construction of factories; On site project management; Renovation of property.

- 2 The application was objected to. The applicant maintained its request for registration.
- 3 By decision of 18 November 2022 ('the contested decision'), the examiner refused the application pursuant to Article 7(1)(b) EUTMR in conjunction with Article 7(2) EUTMR in respect of all the services applied for. The examiner based the decision on the following reasons in particular:
 - The distinctive character of a trade mark is assessed in relation to the goods or services for which protection is sought and the perception of the relevant public. In this case, the relevant consumer (including the specialist public) would recognise the sign as what is known as an emmoticone, that is to say a pictogram that refers to a emotional situation.

- The sign applied for consists of a realistic (common) illustration of a hand sign with a set thumb. It is a well-known sign that comes from the US sign language and is now internationally known as an ‘I love you’ hand sign.



- The relevant public will therefore simply perceive the sign applied for as a pictogram (emmoticone) without distinctive character. The sign applied for is not capable of making an impression on the consumer, as it is too simple as an emmoticone. This finding is also in line with established case-law, according to which pictograms such as emblems or smiley are generally used both in advertising and in private communication to express positive feelings, such as joy, consent, enthusiasm or happiness. On account of this wide variety of use in respect of any kind of positive message, the targeted consumer understands such pictograms in connection with any category of goods or services as a purely decorative element or general advertising message. The simple basic shapes such as smiley or emmoticons are therefore incapable of indicating origin from a particular undertaking in respect of any type of product or service (see, inter alia, 04/10/2013, R 788/2013-4, Darstellung eines Smileys, § 13).
- The services objected to are, on the one hand, financial services (Class 36) and services in the field of building construction and cleaning on the other (Class 37). In connection with these services, the sign applied for therefore does not enable the consumer to distinguish the services thus identified from those of other undertakings. The simple basic shape of a smiley is therefore incapable of indicating that goods or services of any kind originate from a particular undertaking. 4 In connection with the services objected to, the consumer will merely infer from the claimed emoticon a positive connotation of a general nature, be it in the sense of an attractive decoration, be it as a general laudatory statement and incitement to purchase. As a simple representation of an emmoticon, the sign does not contain anything that would enable the targeted consumer to assign the goods thus identified to a commercial origin.
- The applicant’s arguments are essentially based on the fact that the figurative sign applied for is neither a smiley nor an emmoticon or a gesture (hand sign), but rather, at most, a pictogram in the broadest sense. Even the classification as an emmoji was doubtful.
- In fact, it is clear from the corresponding evidence to which the applicant refers, namely the corresponding *Wikipedia* articles, that a smiley or emmoticon is graphic representations of a face expression, which is clearly not the case here.
- It is also clear from the evidence submitted (Annex 3, *Wikipedia*-article on ‘Emoji’) that the use of the term ‘Emoji’ is not uniform, as ‘In each case only ASCII sign combinations such as: -) are understood thereby; sometimes Smiley-Unicode signs are also understood as meaning ‘human spect, sometimes also any stylised objects of the one-line ASCII-type like a Rose @}’.
- It is not disputed that the sign applied for is a realistic (common) illustration of a hand with relaxed down thumb, elongated lines and small fingers and folded-in ring

and middle fingers. Contrary to the view taken by the applicant, it is therefore not a simple depiction of a hand, but rather that of a gesture.

- It follows from the above that the sign applied for is therefore not an embroicon, as incorrectly listed in the letter of objection. In this respect, the Office would like to excuse the confusion of terms brought about by the imprecise use of the term. However, it is clearly a pictogram, specifically an emoji, which, as a generic term, covers not only faces or face terms, but also faces (hand signs).
- Even if the depiction is therefore not an embroidered expression in the narrower sense, the Office is still of the opinion that, in relation to the services in question, the sign applied for will not be perceived as anything other than in everyday use, namely as an emoji, i.e. a type of specific pictogram, as is generally used both in advertising and in private communication, in order to express positive feelings such as joy, consent, enthusiasm or gloss.
- The applicant also argues that the trade mark applied for is not a representation of a specific gesture, and in particular not the ‘I Love You’ symbol of the American Sign Language (ASL), but merely a graphic representation, but merely a graphic representation, since the application clearly reveals a left-hand hand, whereas the ASL structure showed a right hand.
- In this respect, it should firstly be noted that the public perceives a mark as a whole and does not proceed to analyse its various details (-22/06/1999, 342/97, Lloyd Schuhfabrik, EU:C:1999:323, § 25). A trade mark must enable purchasers of the goods in question to distinguish them from the goods of other undertakings without conducting an analytical or comparative examination and without paying particular attention (12/02/2004, C-218/01, Perwoll, EU:C:2004:88, § 53; 12/01/2006, C-173/04 P, Standbeutel, EU:C:2006:20, § 29).
- It must also be found that although the so-called ‘I Love You’ Emoji generally shows a right hand, there are also variations with a left-hand hand (i.e. with pre-defined thumb on the left of the viewer).
- In this connection, the applicant claims that the ‘I Love You’ sign is-a handsign merely of American Sig Language, but not every other sign language, and that other, considerably different sign languages are used within the European Union, with the result that this handsign would not be readily understood by the relevant public. In this respect, however, it should be noted that the objection letter merely stated that the sign depicts a handmark ‘which comes from the US sign language and is now internationally known as ‘I love you’ -hands’. Reference was therefore merely made to the origin of the emoji. In the Office’s opinion, there is also no need for any knowledge of a particular sign language in order to understand the message of ‘I Love You’ -Emoji. Moreover, this would also contradict general life experience. In this respect, the applicant’s statements regarding the ASL and the other sign languages within the European Union are incorrect.
- It follows that, in view of the fact that the public perceives a trade mark as a whole and does not proceed to analyse its various details, and there are also variations of the ‘I Love You’ emoji which depict a left-hand hand, it must be assumed that the targeted public will indeed perceive the sign applied for as a common variant of the

said emoji. They will not recognise anything else therein, in particular a sign that can serve as an indication of origin, as this emoji stands for a clear and specific statement, namely ‘I Love You’ (I love you). This corresponds to an indication of tongue of the highest kind. Insofar as the ground for refusal under Article 7(1) (b) EUTMR applies.


- Moreover, this would apply even if, as argued by the applicant, the sign had several meanings for the public, for example as an emoji, which shows a so-called ‘Pommesgabel’. Pursuant to Article 7(2) EUTMR, the provisions of Article 7(1) EUTMR shall apply notwithstanding that the grounds of non-registrability obtain in only part of the European Union. A European Union trade mark is therefore to be refused registration where it is devoid of distinctive character for only part of the targeted public in the European Union.
- The applicant also argues that the Office’s statement regarding the lack of distinctive character of the sign applied for gives the impression that the sign must also have another component which allows a specific assignment. In this respect, the Office finds that it is in fact the case that the sign ‘does not have anything at all’. The reverse is true: the consumer is intended (not necessarily) to remember a sign.
- The concept of public interest underlying Article 7(1)(b) EUTMR and the essential function of a trade mark, which are to guarantee the identity of the origin of the marked product or service to the consumer or end user, are indissociable. The public interest in not establishing exclusive rights to signs which are unable to fulfil the essential function of a trade mark, namely that of being capable of serving as an indication of a particular commercial origin, is in the public interest.
- The absolute ground for refusal pursuant to Article 7(1)(b) EUTMR is therefore intended to ensure that the consumer or end user can distinguish this product or service from goods or services of a different origin without any possibility of confusion. Accordingly, for a trade mark to possess distinctive character for the purposes of that article, it must serve to identify the product or service in respect of which registration is applied for as originating from a particular undertaking, and thus to distinguish that product or service from those of other undertakings.
- As the applicant rightly argues, this does not require the trade mark to convey precise information about the identity of the manufacturer of the product or the provider of the services. It suffices that it enables the relevant public to distinguish the product or service it designates from goods or services of a different commercial origin and allow the conclusion that all the goods and services it designates have been manufactured, marketed or supplied under the control of the proprietor of that mark, who may be held responsible for their quality (21/01/2011, T-310/08, executive edition, EU:T:2011:16, § 22).
- Contrary to the view taken by the applicant, however, this is precisely not the case with the sign applied for. It is not a variant of a pictogram that departs significantly from the usual shape, specifically an emoji, which, as a human gesture, merely conveys to the consumer a positive connotation of the most general nature, either in the sense of an attractive decoration, be it as a general promotion and incitement to purchase. In this respect, the findings of decision R 788 2013-4 are in no way

‘overstretched’ in the present case, as the applicant argues, but rather is indeed to be applied.

- Finally, it must be stated in relation to the services objected to that the Office did not give any reasons in the letter of objection for each individual service. However, if the message is so general in nature that it relates to entire categories of goods and services, it is sufficient for the Office to make an overall assessment in relation to the goods and services (31/05/2016, T-301/15, Du bist, was du erlebst, EU:T:2016:324, § 47).
 - In this case, the message of the sign in question, as an indication of tongue, is so general that it can refer to all the services objected to, as this is used in such a variety as a purely decorative element or general advertising message that it is incapable, in connection with any category of goods or services, of indicating origin from a particular undertaking.
- 4 The applicant filed a notice of appeal on 24 November 2022, requesting that the contested decision be annulled in its entirety. On 2 The grounds of appeal were received by the Office on 6 December 2022.

Grounds of appeal

- 5 The applicant’s arguments in the grounds of appeal may be summarised as follows:
- Placed in front of and before examining the sign in detail, it must be borne in mind that the sign claims services in Classes 36 (in particular financial services) and 37 (in particular building cleaning). The Office’s assumption that an ‘I Love You’ sign — which the sign expressly represents NICHT — as explained below — is not distinctive in this respect, is incomprehensible. Nor is the reason given by the Office that the sign contains a positive connotation and incitement to purchase, which means that the sign is devoid of distinctive character in respect of all the goods and services. In this respect, reference is made to the EUIPO Guidelines for Examination, Part B, Section 4, Chapter 3, which states:

‘Distinctive character within the meaning of Article 7 (1) (b) EUTMR [...] means that the sign serves to identify the product or service in respect of which registration is applied for as originating from a particular undertaking, and thus to distinguish that product or service from those of other undertakings [...]. This distinctive character can only be assessed by reference to, first, the product or service for which registration is sought and, second, the perception of the sign by the relevant public [...]. A minimum degree of distinctive character is sufficient to prevent the application of the absolute ground for refusal under Article 7 (1) (b) EUTMR [...].’ [underlining by the signatory].
 - Distinctive character is to be examined in a first step in relation to goods/services and signs and then on the basis of public understanding and signs. This was not done by the sweeping statement at the Office. The examination of distinctive character in relation to the services claimed, namely those of financial services (Class 36) and, inter alia, building cleaning (Class 37), and the sign  can only lead to the conclusion that distinctive character exists here.

- The Office is to be agreed with in that the sign does not represent either a smiley or an emmoticon. It may be an emoji in the broadest sense. However, the classification as emoji does not automatically mean that it is devoid of any distinctive character, especially not in respect of all of the services.
- Nor can it be concluded from the classification as an emmoji that this is a sign with a positive connotation. On the other hand, the fact that an emoji is used in daily private communication between people does not mean that the sign is devoid of distinctive character per se.
- In addition, the sign is not an emoji which is used in everyday use. The sign differs significantly from similar representations of various platforms.
- Firstly, the signs of the platforms are in each case depicted with the right hand. Furthermore, the projecting tab of the trade mark application is striking. Together with the line finger, it forms a ‘J’. In this respect, the Office’s view that it was undisputed that it was a realistic depiction of a hand with an elongated thumb cannot be accepted either. Rather, it is a representation of a left hand with an angled thumb, among other things. Precisely because of the unusual nature of the thumb, the sign suggests that it imitates it. It is therefore striking that the thumb is not only stitched — as is the case with the emojis represented — but rather condensed and folded upwards in the top thumb.
- The consumer does not have to analyse the sign, as, on an overall view and without the forking of imitations with their own hand, the condition of thumb is of decisive significance and indicates to the consumer a clear distinction from other signs which may be used in everyday use.
- The sign therefore does not constitute a customary emoji for everyday use, but rather the representation of a finger receipt without any significance. In this respect, the sign also has no recognisable positive connotation to the consumer.
- The objection that the emphasis of a positive connotation by a sign is precluded by the fact that, for example, no trade mark may possess distinctive character which constitutes a ‘V’ is precluded, as this could be understood as a sign for ‘Victory’ and therefore Sieg/profit. In addition, generally speaking, signs that possess an attractive figurative component or even contain a positive word component should not have distinctive character.
- This would have to lead to such trade marks being devoid of distinctive character in the same way as many other registered or still to be registered trade marks which are positively accustomed to a particular word or a particular figurative component which are even positively characterised by a friendly colour and could cause the public to acquire a positive feeling and to see itself for purchase. In this case, the overall concept of a trade mark register should come to nothing, as a trade mark is usually intended to convey a positive feeling to the public and does not obscure it.
- Nor is the sign a representation of the ‘I Love You’ sign originating from the ASL.
- It must still be noted that the targeted public within the European Union is not necessarily familiar with the ASL, as it is the US sign language. Based on different

pronunciations and ways of writing, the sign language from various countries also differs significantly from one another in some cases.

- If the figurative mark, which is the subject of these proceedings, comes from the ASL, then the question arises as to why US groups such as Microsoft, Apple or Facebook deviate therefrom, in that they all choose a sign that looks different from the sign at issue here, allegedly depicting the ASL.
- It should once again be pointed out here that the public does not perceive the sign analytically, but does not recognise from the outset a representation of the ‘I Love You’ sign. It is necessary to concur with the Office when it believes that the consumer does not pay attention to various details. However, it cannot be agreed with when it believes that the public will also not perceive the details of the present sign. The sign objected to is a minimalistic sign. The public will not perceive at first glance how long the fingers are depicted or how the proportions of the hand are per se. Nor will they take any further note of the colour of the hand, as a hand in one of many possible skin colours is involved.
- They are a few features that distinguish the sign from signs under comparison on close inspection. Such a comparison is not necessary under trade mark law. Nevertheless, the public recognises such characteristics that create a significantly different impression from the signs they have in their mind. Such characteristics, even if only details may be involved, are precisely the folding thumb and the left-hand hand, as this feature differs significantly from comparable signs which are remembered by the public.
- The screenshot attached by the Office and depicting the image search ‘I love you emoji’ is also not meaningful, as only one of a total of 34 different illustrations shows the representation of a left-hand hand. This is not representative and does not prove that the public also recognises the sign with the left hand as ‘I Love You’ sign.
- For other reasons, the sign also does not represent the ‘I Love You’ sign. Firstly, the left-hand hand is used. Even if it were assumed that what was involved was the combined representation of the letters ‘ILY’, the letters would be depicted incorrectly according to the Fingeralt. It is debatable whether the public would even recognise this. Secondly, and this is clearly significant, the thumb is not simply stitched, but folded-over, and forms a ‘J’ together with the line finger. In this respect, the letters ‘L’ and ‘Y’ are no longer depicted even after the Fingbon alphabet.
- Precisely the combination of left-hand and folded-down thumb no longer merely reveals a possibly existing sign, but rather depicts a face that has no meaning. And precisely these features, which may be detail but have an enormous impact on the overall impression, prove that it is a distinctive sign.
- The mere fact that other signs have been registered does not justify the assumption that the sign at issue also had to be registered. However, the list demonstrates that, according to the decision-making practice of the EUIPO, the mere fact that a sign constitutes a gesture does not mean that the gesture is devoid of distinctive character in respect of the respective goods/services claimed.

- In addition to the acts which the EUIPO certainly classifies as distinctive on the basis of its decision-making practice, the EUIPO also classifies smileys as distinctive, contrary to the cited decision R 788 2013-4.
- In this respect, it is not apparent that a connection with decision R 788/2013-4 must be drawn from the present case and the fact that the sign is (possibly) an emoji which constitutes a gesture. Rather, a decision on a case-by-case basis must remain.

Reasons

- 6 The admissible appeal remains unsuccessful.

Article 7 (1) (b) EUTMR

- 7 According to established case-law, for a sign to possess distinctive character for the purposes of Article 7(1)(b) EUTMR, it must serve to identify the goods or services in respect of which registration is applied for as originating from a particular undertaking, and thus to distinguish those goods or services from those of other undertakings, with the result that the consumer who acquired the marked product or service has the opportunity, on the occasion of a subsequent acquisition, to repeat that experience if it proves to be positive, or to avoid it if it proves to be negative (11/12/2012, T-22/12, *Qualität hat Zukunft*, EU: T: 2012: 663, § 22 and the case-law cited therein; 01/09/2021, 96/20, *Limbic ® Types*, EU:T:2021:527, § 66). That is the case, inter alia, for signs which are commonly used in connection with the marketing of the goods or services concerned (cf. 20/10/2021, T-211/20, *\$Cash App (fig.)*, EU:T:2021:712, § 18).
- 8 It is also apparent from the case-law that the descriptive signs referred to in Article 7(1)(c) EUTMR are likewise devoid of distinctive character within the meaning of Article 7(1)(b) EUTMR. Conversely, a sign may be devoid of distinctive character within the meaning of Article 7(1)(b) EUTMR for reasons other than the fact that it may be descriptive (10/03/2011, C-51/10 P, 1000, EU:C:2011:139, § 46). Furthermore, Article 7(2) EUTMR provides that the grounds for refusal under Article 7(1) EUTMR shall apply notwithstanding that they obtain in only part of the Union. According to established case-law, each of the grounds for refusal listed in Article 7(1) (b) to (d) EUTMR is independent of the others and requires separate examination (cf. 08/05/2008, C-304/06 P, *Eurohypo*, EU:C:2008:261, § 54).
- 9 A minimum degree of distinctive character is sufficient to rule out the application of the absolute ground for refusal under Article 7(1)(b) EUTMR (24/01/2017, T-96/16, *STRONG BONDS. TRUSTED SOLUTIONS.*, EU:T:2017:23, § 14).
- 10 The distinctive character of a trade mark must be assessed, first, by reference to the services in respect of which registration has been applied for and, second, by reference to the perception of the relevant public, which consists of the consumers of those services (21/01/2010, C-398/08 P, *Vorsprung durch Technik*, EU:C:2010:29, § 34).

Relevant public

- 11 The relevant public consists of the potential users of the services in question. It is specifically to be assumed that average consumers who are reasonably well informed and

reasonably observant and circumspect are to be taken as a basis (21/12/2021, T-6/20, Alpenrausch Dr. Spiller/RAUSCH, EU:T:2021:920, § 52).

- 12 The services in question in Classes 36 and 37 target both the general public and a specialist public. The level of attention is above average to high, because — particularly in the case of the general public — these services are generally associated with considerable financial expenditure and may relate to their own residence (09/09/2011, T-197/10, Austria Leasing, EU:T:2011:455, § 20; 10/06/2015, T-514/13, AGRICAPITAL, EU:T:2015:372, § 28; 19/09/2012, T-220/11, f@ir Credit, EU:T:2012:444, § 21; 08/07/2020, T-328/19, Scorify, EU:T:2020:311, § 36; see also, by analogy, 08/12/2022, R 695/2022-4, DEVICE OF A NEST OF TWO ORANGE Circles (fig.)/DEVICE OF A NEST OF Five ORANGE Circles (fig.), § 18 in relation to Class 37).
- 13 However, the above-average level of attention does not usually play a decisive role in the examination of the eligibility for registration of a trade mark application (12/07/2012, 311/11-P, Wir machen das Besondere einfach, EU:C:2012:460, § 48; 02/12/2020, 26/20-, FOREX, EU:T:2020:583, § 39; 10/02/2021, 341/20-, Radioshuttle, EU:T:2021:72, § 35). As found by the Court, the relevant public may understand the meaning of the trade mark applied for more easily on account of its experience and professional training (11/10/2011-, 87/10, Pipeline, EU:T:2011:582, § 28; 07/05/2019, 423/18-, vita, EU:T:2019:291, § 13-14).
- 14 Furthermore, it is apparent from the case-law that the level of attention of the relevant public may be relatively low when it comes to promotional indications, irrespective of whether they target the average end consumer (17/11/2009, -473/08, Thinking ahead, EU:T:2009:442, § 33; 25/03/2014, 291/12-, Passion to Perform, EU:T:2014:155, § 32) or a more observant public composed of experts or observant consumers (05/12/2002, 130/01-, Real People, Real Solutions, EU:T:2002:301, § 24; 03/07/2003, 122/01-, Best Buy, EU:T:2003:183, § 25; 15/09/2005, 320/03-, Live richly, EU:T:2005:325, § 74), even though the relevant goods and services generally require a high level of attention (15/09/2005, 320/03-, Live richly, EU:T:2005:325, § 73-74; 25/03/2014, 291/12-, Passion to Perform, EU:T:2014:155, § 33; -29/01/2015, 59/14, INVESTING FOR A NEW WORLD, EU:T:2015:56, § 27).

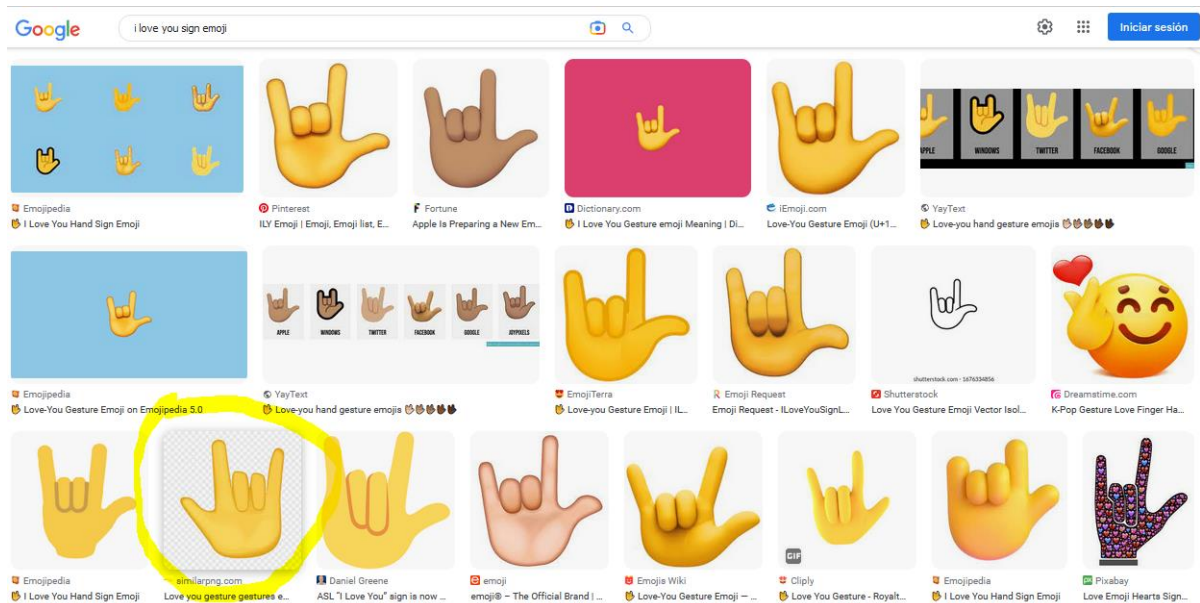
Meaning of the sign

- 15 The subject of the application is the following sign:



- 16 As already stated by the examiner, the sign applied for is a realistic (common) illustration of a hand with lowered down thumb, elongated lines and small fingers and folded-in ring and middle finger, which represents a gesture. It is a pictogram, more precisely an emoji, as this, as a generic term, includes not only faces or facial terms, but also faces (hand signs).
- 17 The examiner has established that this emoji has a clear and specific message, namely ‘I Love You’ (I love you), i.e. an indication of the highest kind of tongue.

- 18 The applicant argues that the sign may be an emoji. However, the sign did not constitute an ‘I Love You’ sign. Rather, the sign that is the subject of these proceedings had no clear meaning. The applicant refers to differences between the sign and the ‘I Love You’ - Emoji and in particular to the fact that the ‘I Love You’ Emoji depicts the right hand side by hand, whereas the sign that is relevant to the proceedings is the left hand.
- 19 However, it should be pointed out that the examiner has already provided examples which show that there are various variations of the ‘I Love You’ emoji. The emoji is also represented underneath by the left-hand hand:



(retrieved on 15/11/2022 under
[https://www.google.com/search?q=i+love+you+sign+emoji&tbm=isch&ved=2ahUKEwjfwL6nl7X7AhXatKQKHZmUCmAQ2-cCegQIABAA&oeq=i+love+you+sign+emoji&gs_lcp=CgNpbWcQAzIHCAAQgAQQEzIICAAQBxAeEBMyCggAEAUQBxAeEBMyCAGAEAgQHhATMggIABAIEB4QEzoECAAQQzoFCAAQgAQ6BggAEAcQHjoICAAQBRAHEB46CAGAEAgQBxAeUMElWLYrYOkwaABwAHgAgAHWAogByAaSAQczLjIuMC4xmAEAoAEBqgELZ3dzLXdp ei1pbWfAAQE&scient=img&ei=ZiR2Y9_1KNrpkGWZqaqABg&bih=578&biw=1158&hl=es\).](https://www.google.com/search?q=i+love+you+sign+emoji&tbm=isch&ved=2ahUKEwjfwL6nl7X7AhXatKQKHZmUCmAQ2-cCegQIABAA&oeq=i+love+you+sign+emoji&gs_lcp=CgNpbWcQAzIHCAAQgAQQEzIICAAQBxAeEBMyCggAEAUQBxAeEBMyCAGAEAgQHhATMggIABAIEB4QEzoECAAQQzoFCAAQgAQ6BggAEAcQHjoICAAQBRAHEB46CAGAEAgQBxAeUMElWLYrYOkwaABwAHgAgAHWAogByAaSAQczLjIuMC4xmAEAoAEBqgELZ3dzLXdp ei1pbWfAAQE&scient=img&ei=ZiR2Y9_1KNrpkGWZqaqABg&bih=578&biw=1158&hl=es).)

- 20 It follows from this that the public can certainly perceive the sign that is the subject of these proceedings as the ‘I Love You’ Emoji.
- 21 It should also be pointed out that the public must rely on an incomplete recollection of the sign (27/11/2018, T-824/17, H2O + (fig.), EU:T:2018:843, § 27). The relevant trade circles associate the specific gesture with the meaning ‘I love you’. It is not decisive whether it is carried out using the right or left hand. Nor is the left hand a feature capable of making the sign distinctive. The same applies to the other differences emphasised by the applicant, such as, for example, the proportions and the colour of the hand.
- 22 In general, it should be pointed out that the main function of an emojis is to provide emotional references which are otherwise lacking in tilted entertainment. Emojis therefore function as a parallel language, which convey a nuanced meaning and make it

easier to express feelings. They are often connected with positive communication. As a rule, they are not perceived as an indication of origin.

- 23 This finding is also in line with the case-law, which states that it is sufficient for the finding of a lack of distinctive character if the sign exclusively conveys an abstract promotional statement and is primarily interpreted as an advertising slogan and not as an indication of the origin of the service (05/12/2002, T-130/01, REAL PEOPLE, REAL SOLUTIONS, EU:T:2002:301, § 29-30).
- 24 It also corresponds to the decision-making practice of the Board, according to which the average consumer is accustomed to a large number of pictograms such as emblems and emojis which represent emotions and are generally used in private communication to express generally positive feelings, such as joy, consent, enthusiasm or happiness. Such pictograms (including emojis) are perceived by the relevant public as a general advertising message or purely decorative elements that are devoid of any distinctive character (see, inter alia, 17/01/2018, R 1489/2017-1, DEVICE OF AN emoji WITH A SMILING FACE (fig.); § 24-26 and 34; 04/10/2013, R 788/2013-4, representation of a smiley, § 13; 16/10/2014, R 602/2014-1, LUBILATED:), § 16-17). The pictograms are often also devoid of distinctive character because they are simple geometric shapes, design elements customary in advertising, stylised instructions on the use of the product or the reproduction of the product itself (29/06/2017, R 2034/2016-4, REPRESENTATION OF ZWEI HÄNDEN (fig.), § 11; 21/03/2006, R 1243/2006-4, Biigsame Welle, § 8; see also 02/04/2020, R 2189/2019-4, REPRESENTATION OF A RED (fig.); 02/10/2017, R 570/2017-4, CIRCULAR FIGURE).
- 25 In connection with the services claimed, namely financial services (Class 36) and, inter alia, building cleaning (Class 37), the sign in question will therefore be perceived as a general advertising message, which means that customers will be particularly satisfied with the services offered under the sign and will think of them on account of their satisfaction with loved affection.
- 26 In connection with the services objected to, the consumer therefore merely infers from the sign claimed a positive connotation of a general nature, either in the sense of an attractive decoration, in the sense of a general laudatory statement and incitement to purchase. As a simple representation of a positive gesture, the sign does not contain anything that would enable the targeted consumer to assign the goods thus identified commercially.
- 27 In summary, it must therefore be stated that the sign is not capable of serving to the public concerned as an indication of the origin of the relevant goods.
- 28 The sign applied for is therefore devoid of the minimum degree of distinctive character required pursuant to Article 7(1)(b) EUTMR.
- 29 The applicant's appeal is therefore unsuccessful.

Order

On those grounds,

THE BOARD

hereby:

Dismisses the appeal.

Signed

S. Stürmann

Signed

K. Guzdek

Signed

S. Martin

Registrar

Signed

H. Dijkema

