

Provisional text

JUDGMENT OF THE COURT (Fifth Chamber)

27 February 2020 (*)

(Appeal — EU trade mark — Regulation (EC) No 207/2009 — Article 7(1)(f) — Absolute ground for refusal — Mark contrary to accepted principles of morality — Word sign ‘Fack Ju Göhte’ — Rejection of the application for registration)

In Case C-240/18 P,

APPEAL under Article 56 of the Statute of the Court of Justice of the European Union, brought on 4 April 2018,

Constantin Film Produktion GmbH, established in Munich (Germany), represented by P. Baronikians and S. Schmidt, Rechtsanwälte,

appellant,

the other party to the proceedings being:

European Union Intellectual Property Office (EUIPO), represented by D. Hanf, acting as Agent,

defendant at first instance,

THE COURT (Fifth Chamber),

composed of E. Regan, President of the Chamber, I. Jarukaitis, E. Juhász, M. Ilešič (Rapporteur) and C. Lycourgos, Judges,

Advocate General: M. Bobek,

Registrar: C. Strömholm, Administrator,

having regard to the written procedure and further to the hearing on 13 February 2019,

after hearing the Opinion of the Advocate General at the sitting on 2 July 2019,

gives the following

Judgment

- 1 By its appeal, Constantin Film Produktion GmbH asks the Court to set aside the judgment of the General Court of the European Union of 24 January 2018 in *Constantin Film Produktion v EUIPO (Fack Ju Göhte)* (T-69/17, not published, EU:T:2018:27; ‘the judgment under appeal’), by which it dismissed its action for annulment of the decision of the Fifth Board of Appeal of the European Union Intellectual Property Office (EUIPO) of 1 December 2016 (Case R 2205/2015-5; ‘the decision at

issue'), concerning an application for registration of the word sign 'Fack Ju Göhte' as an EU trade mark.

Legal context

2 Council Regulation (EC) No 207/2009 of 26 February 2009 on the European Union trade mark (OJ 2009 L 78, p. 1) was amended by Regulation (EU) 2015/2424 of the European Parliament and of the Council of 16 December 2015 (OJ 2015 L 341, p. 21), which entered into force on 23 March 2016. Regulation No 207/2009, as amended, was repealed and replaced, with effect from 1 October 2017, by Regulation (EU) 2017/1001 of the European Parliament and of the Council of 14 June 2017 on the European Union trade mark (OJ 2017 L 154, p. 1). In view of the date on which the application for registration in question was submitted, namely 21 April 2015, the facts of the case are governed by the substantive provisions of Regulation No 207/2009.

3 Article 7 of Regulation No 207/2009, entitled 'Absolute grounds for refusal', provides in paragraphs 1 to 3 thereof:

'1. The following shall not be registered:

...

(f) trade marks which are contrary to public policy or to accepted principles of morality;

...

2. Paragraph 1 shall apply notwithstanding that the grounds of non-registrability obtain in only part of [the European Union].

3. Paragraph 1(b), (c) and (d) shall not apply if the trade mark has become distinctive in relation to the goods or services for which registration is requested in consequence of the use which has been made of it.'

4 Article 75 of Regulation No 207/2009, entitled 'Statement of reasons on which decisions are based', states:

'Decisions of the Office shall state the reasons on which they are based. ...'

5 Article 76 of Regulation No 207/2009, entitled 'Examination of the facts by the Office of its own motion', provides in paragraph 1 thereof:

'In proceedings before it the Office shall examine the facts of its own motion; however, in proceedings relating to relative grounds for refusal of registration, the Office shall be restricted in this examination to the facts, evidence and arguments provided by the parties and the relief sought. ...'

6 Recital 21 of Regulation 2015/2424 states:

'(21) ... 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.'

7 Recital 21 of Regulation 2017/1001 reproduces verbatim the wording of recital 21 of Regulation 2015/2424 set out in the preceding paragraph.

Background to the dispute and the decision at issue

- 8 On 21 April 2015, the appellant, Constantin Film Produktion, filed an application for registration of an EU trade mark with EUIPO, pursuant to Regulation No 207/2009.
- 9 The trade mark applied for is the word sign ‘Fack Ju Göhte’ which is, in fact, the title of a German film comedy produced by the appellant and which was one of the most successful films of 2013 in Germany. Two sequels to that film comedy were produced by the appellant and were released in theatres under the titles ‘Fack Ju Göhte 2’ and ‘Fack Ju Göhte 3’ in 2015 and 2017 respectively.
- 10 The goods and services in respect of which registration was sought are in Classes 3, 9, 14, 16, 18, 21, 25, 28, 30, 32, 33, 38 and 41 of the Nice Agreement concerning the International Classification of Goods and Services for the Purposes of the Registration of Marks of 15 June 1957, as revised and amended, and correspond, for each of those classes, to the following description:
- Class 3 — ‘Bleaching preparations and other substances for laundry use; cleaning, polishing, scouring and abrasive preparations; soaps; perfumery, essential oils, cosmetics, hair lotions; dentifrices’;
 - Class 9 — ‘Recorded data media of all kinds; electronic publications (downloadable), namely audio, video, text, images and graphics in digital format; photographic, cinematographic and teaching apparatus and instruments; apparatus for recording, transmitting, reproducing sound or images; ...’;
 - Class 14 — ‘Jewellery, precious stones; ...’
 - Class 16 — ‘Printed matter; photographs; stationery; office requisites ...’;
 - Class 18 — ‘Trunks and suitcases; umbrellas and parasols; walking sticks; luggage; ...’
 - Class 21 — ‘Glassware, porcelain and earthenware not included in other classes; candlesticks’;
 - Class 25 — ‘Clothing, footwear, headgear’;
 - Class 28 — ‘Games, toys; gymnastic and sporting articles not found in other classes; decorations for Christmas trees’;
 - Class 30 — ‘Coffee, tea, cocoa and coffee substitutes; rice; tapioca and sago; flours and preparations made from cereals, bread, pastry and confectionery; ice cream; sugar, honey, molasses; yeast, baking powder; ...’
 - Class 32 — ‘Beers; mineral and aerated waters and other non-alcoholic beverages; fruit drinks and fruit juices; ...’
 - Class 33 — ‘Alcoholic beverages (except beers)’;
 - Class 38 — ‘Telecommunication services; provision of Internet chat rooms and forums, data transmission over the Internet ...’;
 - Class 41 — ‘Education; providing of training; entertainment, in particular film and television entertainment, compilation of radio and television programmes, radio, television and film production, rental of films, presentation of films in cinemas; sporting and cultural activities’.

- 11 By decision of 25 September 2015, the examiner refused the application for registration on the basis of Article 7(1)(f) of Regulation No 207/2009, read in conjunction with Article 7(2) of that regulation, for the goods and services referred to in the preceding paragraph.
- 12 On 5 November 2015, the appellant filed a notice of appeal with EUIPO, pursuant to Articles 58 to 64 of Regulation No 207/2009, against the examiner's decision.
- 13 By the decision at issue, the Fifth Board of Appeal of EUIPO dismissed that appeal.

The procedure before the General Court and the judgment under appeal

- 14 By application lodged at the Registry of the General Court on 3 February 2017, the appellant brought an action for the annulment of the decision at issue.
- 15 In support of its action, the appellant relied on two pleas in law, alleging (i) infringement of Article 7(1)(f) of Regulation No 207/2009 and (ii) infringement of Article 7(1)(b) of that regulation.
- 16 By the judgment under appeal, the General Court dismissed those two pleas and, therefore, the action in its entirety.

Forms of order sought by the parties before the Court of Justice

- 17 The appellant submits that the Court should:
- set aside the judgment under appeal, and
 - order EUIPO to pay the costs.
- 18 EUIPO submits that the Court should:
- dismiss the appeal, and
 - order the appellant to pay the costs.

The appeal

- 19 In support of its appeal, the appellant raises three grounds of appeal, alleging (i) infringement of Article 7(1)(f) of Regulation No 207/2009, (ii) infringement of the principle of equal treatment and (iii) infringement of the principles of legal certainty and sound administration.
- 20 It is appropriate to consider, in the first place, the first ground of appeal alleging infringement of Article 7(1)(f) of Regulation No 207/2009.

Submissions of the parties

- 21 By its first ground of appeal, the appellant submits, in essence, that the General Court, in its examination as to whether the mark applied for infringes accepted principles of morality, erred in its interpretation and application of Article 7(1)(f) of Regulation No 207/2009. That ground of appeal is divided into four parts.
- 22 In the first place, the appellant submits that the General Court breached the principle of individual

examination in that it did not examine the mark applied for, namely Fack Ju Göhte, but rather the sign ‘Fuck you, Goethe’.

- 23 Moreover, the appellant claims that the expressions ‘Fuck’ and ‘Fuck you’ have lost their vulgar meaning due to the evolution of language in society. It submits that there is no general refusal to register expressions including these terms as trade marks, as evidenced by the registration of signs such as ‘Fucking Hell’ and ‘MACAFUCKER’ as EU trade marks.
- 24 In the second place, the appellant submits that the General Court applied the absolute ground for refusal relating to accepted principles of morality in Article 7(1)(f) of Regulation No 207/2009 too broadly, by applying the assessments concerning the words ‘Fuck’ and ‘Fuck you’ to the mark applied for in its entirety, and by finding that the word sign ‘Fack Ju Göhte’ is imbued with an intrinsic vulgarity that cannot be attenuated by the element ‘Göhte’.
- 25 The appellant takes the view, in particular, that the General Court failed to show the requisite caution and sensitivity in applying that ground of refusal which, whilst relating to subjective values, ought to be applied restrictively and as objectively as possible in order to avoid the risk that signs might be excluded from registration solely on the ground that they are not to the personal taste of the person carrying out the examination. It submits that the General Court ought to have taken account of the fact that the overall impression of the mark applied for is — in view of the phonetic transcription in German of the expression ‘Fuck You’ combined with the element ‘Göhte’ — understood as designating unpopular school subjects, or a harmless, childlike and playful personality expressing frustration at school.
- 26 In the third place, the appellant submits that the General Court wrongly found that it has not been established that the German-speaking public is not shocked by the sign applied for in relation to the goods and services at issue. In that connection, the appellant argues that the General Court misapplied the rules on the burden of proof. Furthermore, it submits that the General Court failed to have regard to the fact that the perception of the mark applied for by the relevant public cannot be determined in an abstract manner and detached from any empirical basis, on the sole basis of subjective values, but must be assessed by taking into account the factors which provide clues as to the actual perception by that public. The great success of the film of the same name and the use of that film by the Goethe Institute (Germany) for educational purposes demonstrate that the German-speaking general public, which is the relevant public in the present case, understands the humorous character of the mark applied for and does not consider it to be in any way offensive or vulgar.
- 27 In the fourth place, the appellant submits that, on account of its erroneous assessments, the General Court erred in law when balancing (i) the appellant’s interest in the registration of the mark applied for and (ii) the public interest in not being confronted with marks which are contrary to accepted principles of morality and, therefore, with marks which are disturbing, coarse, insulting or even threatening.
- 28 EUIPO submits that the first ground of appeal should be rejected.
- 29 First, EUIPO takes the view that the appellant’s argument that the General Court examined the sign ‘Fuck you, Goethe’ and not the mark applied for, namely ‘Fack Ju Göhte’, is based on an incorrect reading of the judgment under appeal. Paragraphs 17, 18 and 20 of that judgment should be read in the light of the premiss, set out in paragraph 16 of that judgment, that the consumer ‘normally perceives a trade mark as a whole’, which does not prevent him from identifying ‘word elements which, to him, suggest a specific meaning or resemble words known to him’.
- 30 Secondly, it is argued that the appellant’s submission that the terms ‘Fuck’ and ‘Fuck you’ have lost their original sexual meaning, so that they are no longer perceived as vulgar and offensive, is inadmissible as it relates to a finding of fact. In any event, that argument is unfounded as the General

Court found that the expression ‘Fuck you’ was inherently vulgar, even if, as a result of the evolution of language, it is no longer understood in its sexual connotation.

- 31 Thirdly, EUIPO submits that, in paragraph 18 of the contested judgment, the General Court explicitly took into account the change in meaning of the expression ‘Fuck you’, explaining that it can also be used to express anger, mistrust or contempt for a person.
- 32 Fourthly, EUIPO takes the view that the appellant’s argument that the General Court erred in its interpretation of Article 7(1)(f) of Regulation No 207/2009 by finding that the great success of the film *Fack Ju Göhte* does not mean that the relevant public is not shocked by the mark applied for, is unfounded. Contrary to the appellant’s submission, the General Court did not apply a purely subjective criterion when examining the accepted principles of morality, but explicitly examined, in paragraphs 28 to 30 of the judgment under appeal, the possibility that the mark applied for may not be vulgar but may be understood as a ‘joke’.
- 33 EUIPO submits, in this context, that the purpose of the exclusive right granted by a trade mark is to ensure undistorted competition and not freedom of expression, whereas the title of a film serves to distinguish one artistic work from another and to designate its content while expressing freedom of expression and artistic freedom. The average consumer would be aware of this difference and would therefore not necessarily perceive brands and film titles in the same way. Therefore, even for consumers who are familiar with the film in question, it is not possible to presume that the trade mark applied for is perceived as a ‘joke’. Furthermore, the relevant consumers in this case would be significantly more numerous than those who are familiar with the film in question and who are familiar with ‘youth slang’.
- 34 Fifthly, EUIPO submits that the General Court correctly found that, if the mark applied for consists of a term which is perceived by the relevant public as intrinsically vulgar and therefore offensive, it is a ‘manifestly obscene trade mark’ and contrary to ‘accepted principles of morality’.
- 35 Sixthly, EUIPO takes the view that the appellant is wrong to claim that the General Court unlawfully reversed the burden of proof in paragraph 30 of the judgment under appeal by finding that it had not been established that the relevant public recognises the title of the film in question in the trade mark applied for and, therefore, a ‘joke’. That finding ought to be read in context. While it is true that, pursuant to Articles 75(1) and 76(1) of Regulation No 207/2009, absolute grounds for refusal should be examined ex officio by EUIPO, and that the existence of such grounds should be reasoned in a consistent manner, the fact remains that, when EUIPO or the General Court — to which those same legal requirements apply when rejecting an appeal against the refusal of a trade mark application by EUIPO — confront the applicant with well-known facts or an assessment based on the unsuitability of the sign for registration, it is up to the applicant to refute them with specific and well-founded information. It is EUIPO’s submission that the General Court complied with those legal requirements in the judgment under appeal.
- 36 Seventhly and lastly, EUIPO submits that the appellant’s argument that the General Court failed to strike a fair balance between the interests of the applicant and the public is unfounded.

The Court’s assessment

- 37 Pursuant to Article 7(1)(f) of Regulation No 207/2009, trade marks which are contrary to public policy or to accepted principles of morality are not to be registered. Furthermore, it follows from Article 7(2) of that regulation that the absolute grounds for refusal set out in Article 7(1) thereof are applicable even if they obtain in only part of the European Union.
- 38 As the General Court found in paragraph 24 of the judgment under appeal, without being contradicted

by the appellant, EUIPO refused, on the basis of Article 7(1)(f) of Regulation No 207/2009, to register the word sign ‘Fack Ju Göhte’, not on the ground that that sign might be contrary to public policy, but on the sole ground that it would be contrary to accepted principles of morality. It is therefore only in the light of the latter absolute ground of refusal that the first ground of appeal should be examined.

- 39 As regards that ground for refusal, it should be noted that, since the concept of ‘accepted principles of morality’ is not defined by Regulation No 207/2009, it must be interpreted in the light of its usual meaning and the context in which it is generally used. However, as the Advocate General observes in essence in point 77 of his Opinion, that concept refers, in its usual sense, to the fundamental moral values and standards to which a society adheres at a given time. Those values and norms, which are likely to change over time and vary in space, should be determined according to the social consensus prevailing in that society at the time of the assessment. In making that determination, due account is to be taken of the social context, including, where appropriate, the cultural, religious or philosophical diversities that characterise it, in order to assess objectively what that society considers to be morally acceptable at that time.
- 40 Moreover, in the context of the application of Article 7(1)(f) of Regulation No 207/2009, the examination as to whether a sign, in respect of which registration as an EU trade mark is sought, is contrary to accepted principles of morality requires an examination 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 or services claimed.
- 41 In that connection, in order to come within the scope of Article 7(1)(f) of Regulation No 207/2009, it is not sufficient for the sign concerned to be regarded as being in bad taste. It must, at the time of the examination, be perceived by the relevant public as contrary to the fundamental moral values and standards of society as they exist at that time.
- 42 In order to establish whether that is the case, 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 Union concerned. To that end, elements such as legislation and administrative practices, public opinion and, where appropriate, the way in which the relevant public has reacted in the past to that sign or similar signs, as well as any other factor which may make it possible to assess the perception of that public, are relevant.
- 43 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, but it must be established, in particular where an applicant has relied on factors that are liable to cast doubt on the fact that that mark is perceived by the relevant public as contrary to accepted principles of morality, 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.
- 44 It is in the light of those principles that the merits of the first ground of appeal, alleging that the General Court erred in its interpretation and application of Article 7(1)(f) of Regulation No 207/2009, must be examined.
- 45 In the present case, it is not disputed, as the General Court found in paragraphs 14 and 17 of the judgment under appeal by upholding the assessment of the Board of Appeal in that regard, that the relevant public consists of the German-speaking general public of the Union, namely that of Germany and Austria in particular.
- 46 As regards the perception of the mark applied for by that public, the General Court noted, in

paragraph 18 of the judgment under appeal, that that public will assimilate that mark to the English phrase ‘Fuck you’ along with the surname Goethe, the whole written with a different spelling resulting from a phonetic transcription in German of those terms. Although, in its original meaning, the English phrase ‘Fuck you’ had a sexual connotation and was vulgar, it could also be used in a different context to express anger, mistrust or contempt for a person. However, even in such a situation, that phrase would still be intrinsically vulgar, and the addition of the element ‘Göhte’ at the end of the sign at issue — while it would make it possible to identify to whom the terms making up the beginning of the sign are ‘addressed’ — could not attenuate its vulgarity.

- 47 In paragraph 19 of the judgment under appeal, the General Court added that, contrary to the appellant’s suggestion, the fact that the film *Fack Ju Göhte* was seen by several million people at the time of its cinema release does not mean that the relevant public would not be shocked by the mark applied for.
- 48 It concluded in paragraph 20 of the judgment under appeal that, in those circumstances, the Board of Appeal had rightly found that the English expression ‘Fuck you’ — and, therefore, the mark applied for as a whole — were inherently vulgar and liable to offend the relevant public. Consequently, the Board had been right to infer that the mark applied for had to be refused registration on the basis of Article 7(1)(f) of Regulation No 207/2009.
- 49 In that connection, it must be held that the examination carried out by the General Court does not meet the standards required by Article 7(1)(f) of Regulation No 207/2009, as set out in paragraphs 39 to 43 of this judgment.
- 50 In fact, having regard to the social context and the factors relied on in that regard by the appellant — and in particular the fact that the word sign ‘Fack Ju Göhte’ corresponds, as the General Court noted in paragraphs 2 and 19 of the judgment under appeal, to a German cinematic comedy produced by the appellant, having been one of the greatest film successes of 2013 in Germany and having been seen by several million people when it was released in cinemas — the General Court, in order to establish to the requisite legal standard that the mark applied for is perceived by the German-speaking public at large as contrary to accepted principles of morality, could not confine itself to an abstract assessment of that mark and of the English expression to which the first part of it is assimilated by that public.
- 51 Thus, the fact that it is that mark itself which is to be examined does not mean that, in the course of that examination, contextual elements capable of shedding light on how the relevant public perceives that mark could be disregarded.
- 52 As the Advocate General observes in point 94 of his Opinion, those factors include the great success of the comedy of the same name amongst the German-speaking public at large and the fact that its title does not appear to have caused controversy, as well as the fact that access to it by young people had been authorised and that the Goethe Institute — which is the cultural institute of the Federal Republic of Germany, active worldwide and tasked, inter alia, with promoting knowledge of the German language — uses it for educational purposes.
- 53 In so far as those factors are, a priori, capable of constituting an indication that, notwithstanding the assimilation of the first part of the mark applied for to the English phrase ‘Fuck you’, the German-speaking public at large does not perceive the word sign ‘Fack Ju Göhte’ as morally unacceptable, the General Court, in concluding that that sign is incompatible with accepted principles of morality, could not rely solely on the intrinsically vulgar character of that English phrase without examining those factors or setting out conclusively the reasons why it considered, despite those factors, that the German-speaking public at large perceives that sign as running counter to the fundamental moral values and standards of society when it is used as a trade mark.

- 54 In particular, mere statements such as that in paragraph 19 of the judgment under appeal, reproduced in paragraph 47 of this judgment, or that in paragraph 30 of the judgment under appeal — according to which it has not been established that, in the course of activities in which the relevant public is likely to be confronted with the trade mark applied for, that public recognises in that mark the title of a successful film and perceives that mark as a ‘joke’ — are not sufficient to satisfy those requirements of examination and reasoning.
- 55 As regards the latter claim in particular, it is important to note, first, that the General Court was required, in the judgment under appeal, to ascertain that EUIPO had not infringed Article 76(1) of Regulation No 207/2009 which, in proceedings concerning absolute grounds for refusal, requires the latter to carry out an ex officio examination of the facts and establish to the requisite legal standard the presence of such grounds. Secondly, the need to examine contextual factors such as those set out in paragraph 52 of the present judgment for the purposes of a concrete assessment of how the relevant public perceives the mark applied for is in no way subject to the condition that it must be established that that public recognises in that mark the title of the eponymous comedy or that it perceives that mark as a ‘joke’, since the absence of those two circumstances does not, in fact, serve to establish an affront to accepted principles of morality.
- 56 Lastly, it should also be added that, contrary to the General Court’s finding in paragraph 29 of the judgment under appeal, that ‘there is, in the field of art, culture and literature, a constant concern to preserve freedom of expression which does not exist in the field of trade marks’, freedom of expression, enshrined in Article 11 of the Charter of Fundamental Rights of the European Union, must, as EUIPO acknowledged at the hearing and as the Advocate General states in points 47 to 57 of his Opinion, be taken into account when applying Article 7(1)(f) of Regulation No 207/2009. Such a finding is corroborated, moreover, by recital 21 of Regulation No 2015/2424, which amended Regulation No 207/2009 and recital 21 of Regulation 2017/1001, both of which expressly emphasise the need to apply those regulations in such a way as to ensure full respect for fundamental rights and freedoms, in particular freedom of expression.
- 57 It follows from all of the foregoing considerations that the interpretation and application of Article 7(1)(f) of Regulation No 207/2009, as carried out by the General Court in the judgment under appeal, are vitiated by errors of law, which are sufficient in themselves for the Court of Justice to allow the first ground of appeal, without it being necessary to examine the other arguments relied on by the appellant in support of that ground of appeal.
- 58 Consequently, the judgment under appeal must be set aside, without there being any need to examine the other grounds of appeal.

The action before the General Court

- 59 Pursuant to the first paragraph of Article 61 of the Statute of the Court of Justice of the European Union, if the appeal is well founded, the Court may itself give final judgment in the matter, where the state of the proceedings so permits.
- 60 That is so in the present case.
- 61 By its first plea in law, the applicant before the General Court claimed that the decision at issue infringes Article 7(1)(f) of Regulation No 207/2009.
- 62 However, it must be noted that that decision, and in particular the examination carried out in paragraphs 21 to 41 of the perception by the relevant public of the mark applied for, largely presents the

same errors as those which vitiate the judgment under appeal.

- 63 Thus, having found, in essence, in paragraphs 21 to 23 of the contested decision that the relevant public recognises in the first part of the trade mark applied for the English phrase ‘Fuck you’, the Board of Appeal noted in paragraphs 24 to 28 of that decision that that phrase is vulgar and offensive. It subsequently found, in paragraphs 29 to 33 of that decision, that the addition of the element ‘Göhte’ is not capable of substantially altering the perception of the insult ‘Fack ju’, on the basis of a largely abstract assessment of the English phrase ‘Fuck you’ and without taking into account the contextual factors mentioned in paragraph 52 of the present judgment.
- 64 With regard to those factors, the Board of Appeal accepted, in paragraph 36 of the decision at issue, that it can be deduced beyond doubt from the documents produced by the appellant that the comedy *Fack ju Göhte* — which was seen by almost 7.4 million spectators in Germany — and the comedy *Fack ju Göhte 2* are among the most successful German films in terms of number of spectators and have also been very successful in Austria. The Board of Appeal found that it can therefore be presumed that the relevant German-speaking public at large has, at the very least, already heard of these comedies. However, the Board of Appeal considered, in paragraph 37 of that decision, that it would not be possible to infer from the wide success of those comedies with the relevant public that the latter would not be shocked by their title, since the title is not descriptive of the content of those comedies and Goethe, in particular, plays no part in them. Instead, the use of the insult ‘Fack ju’ as a film title does not say anything about the acceptance of that insult in society.
- 65 On the one hand, however, the title of a film need not be descriptive of its content in order to constitute a relevant contextual factor in assessing whether the relevant audience perceives that title and an eponymous word sign as contrary to accepted principles of morality.
- 66 On the other hand, although the success of a film does not automatically prove the social acceptance of its title and of a word sign of the same name, it is at least an indication of such acceptance which must be assessed in the light of all the relevant factors in the case in order to establish, in concrete terms, the perception of that sign in the event of use of that sign as a trade mark.
- 67 In that connection, it is important to note that, in the present case, not only were the comedies *Fack ju Göhte* and *Fack ju Göhte 2* (to which, moreover, there was a further sequel in 2017) popular specifically with the relevant audience — the films having been so successful that the Board of Appeal even found that it may be presumed that the consumers forming that audience have at least already heard of those comedies — but furthermore, and despite the high visibility accompanying such a success, the title of those comedies does not appear to have stirred up controversy among that audience. Furthermore, access by young people to those comedies, which take place in schools, had been authorised under that title and, as is apparent from paragraph 39 of the decision at issue, they received funds from various organisations and were used by the Goethe Institute for educational purposes.
- 68 It should therefore be noted that all of these contextual factors consistently indicate that, despite the assimilation of the terms ‘Fack ju’ to the English phrase ‘Fuck you’, the title of the comedies was not perceived as morally unacceptable by the German-speaking public at large. It should also be noted in that connection that the perception of that English phrase by the German-speaking public is not necessarily the same as the perception thereof by the English-speaking public, even if it is well known to the German-speaking public and the latter knows its meaning, since sensitivity in the mother tongue may be greater than in a foreign language. For the same reason, the German-speaking public also does not necessarily perceive the English phrase in the same way as it would perceive the German translation of it. Furthermore, the title of the comedies at issue, and therefore the mark applied for, does not consist of that English phrase as such but of its phonetic transcription in German, accompanied by the element ‘Göhte’.

- 69 Under these circumstances, and in view of the fact that no concrete evidence has been put forward plausibly to explain why the German-speaking public at large will perceive the word sign ‘Fack Ju Göhte’ as going against the fundamental moral values and standards of society when it is used as a trade mark, even though that same public does not appear to have considered the title of the eponymous comedies to be contrary to accepted principles of morality, it must be held that EUIPO has failed to demonstrate to the requisite legal standard that Article 7(1)(f) of Regulation No 207/2009 precludes registration of the mark applied for.
- 70 It should also be added that, contrary to what the Board of Appeal suggests in paragraph 38 of the decision at issue, the relevance of the success of the eponymous comedies as one of the contextual factors is in no way invalidated by the fact that the absolute ground for refusal in Article 7(1)(f) of Regulation No 207/2009 cannot be overcome by proof of the distinctive character acquired through use, within the meaning of Article 7(3) of that regulation, of the mark applied for. Indeed, the success of the eponymous comedies with the relevant public and, in particular, the absence of controversy as regards their title must be taken into account in order to determine whether the relevant public perceives the mark applied for as contrary to accepted principles of morality and, therefore, to establish whether that absolute ground for refusal precludes its registration, and not with a view to disregarding that ground once its applicability to the case in point has been established.
- 71 It follows from the foregoing that the Board of Appeal erred in its interpretation and application of Article 7(1)(f) of Regulation No 207/2009 in the present case, and that the decision at issue should therefore be annulled.

Costs

- 72 Under Article 184(2) of the Rules of Procedure of the Court of Justice, where the appeal is well founded and the Court itself gives final judgment in the case, the Court is to make a decision as to costs.
- 73 Under Article 138(1) of those rules, which applies to appeal proceedings by virtue of Article 184(1) thereof, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party’s pleadings.
- 74 Since the appellant has applied for costs and EUIPO has been unsuccessful, the latter must be ordered to pay the costs both of the proceedings at first instance in Case T-69/17 and of the appeal.

On those grounds, the Court (Fifth Chamber) hereby:

- 1. Sets aside the judgment of the General Court of 24 January 2018, *Constantin Film Produktion v EUIPO (Fack Ju Göhte)* (T-69/17, not published, EU:T:2018:27);**
- 2. Annuls the decision of the Fifth Board of Appeal of the European Union Intellectual Property Office (EUIPO) of 1 December 2016 (Case R-2205/2015-5) relating to an application for registration of the word sign ‘Fack Ju Göhte’ as an EU trade mark;**
- 3. Orders the European Union Intellectual Property Office (EUIPO) to bear its own costs and pay those incurred by Constantin Film Produktion GmbH in relation both to the proceedings at first instance in Case T-69/17 and on appeal.**

[Signatures]

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_ Language of the case: German.