

**DECISION  
of the Fourth Board of Appeal  
of 25 October 2022**

In case R 226/2022-4

**Neleman Group Holding B.V.**

Eefde

The Netherlands

Applicant / Appellant

represented by Boekx Trademarks B.V., Amsterdam, the Netherlands

APPEAL relating to European Union trade mark application No 18 494 445

**THE FOURTH BOARD OF APPEAL**

composed of N. Korjus (Chairperson), L. Marijnissen (Rapporteur) and C. Govers (Member)

Registrar: H. Dijkema

gives the following

## Decision

### Summary of the facts

- 1 By an application filed on 16 June 2021, the predecessor-in-title of Neleman Group Holding B.V. ('the applicant'), claiming the priority of Benelux trade mark No 1 442 360 filed on 7 May 2021, sought to register the figurative mark



as a European Union trade mark for the following goods:

Class 33 - *Wine; sparkling wines.*

- 2 On 5 July 2021, the examiner issued a notice of grounds of refusal on the basis of Article 7(1)(f) EUTMR with regard to all the goods applied for, based essentially on the following reasoning:
  - In light of the definition of the English word 'FUCKING' (according to the *Oxford Lexico dictionary*: 'vulgar slang attributive - Used to emphasize or express annoyance with someone or something; vulgar slang as submodifier - Used for emphasis or to express annoyance, frustration, or surprise'), the English-speaking relevant public would understand the sign as having the following meaning: Angrily emphasizing in a vulgar way that the wine is good.
  - The word element 'FUCKING' is an extremely offensive, taboo slang phrase, used in particular to express anger. The relevant public would perceive the sign as contrary to accepted principles of morality as it is shocking or offensive. The inclusion of the swear word is gratuitous, there is no humorous shade of meaning.
  - The goods at issue are everyday goods, which can be seen by children, who can also see the advertising for such goods. It is not unusual for the goods to be bought from the internet and to be advertised at locations and times and via media that are accessible to all, including children and adolescents. As a result, a very significant part of the relevant public, with a normal level of sensitivity and tolerance, will perceive the message and connotations conveyed by the inclusion of the word 'FUCKING' in the sign, and will feel offended or

outraged at being customarily exposed to the goods at hand or advertising for them.

- As such, the expression ‘FUCKING GOOD WINE’ is offensive and contrary to the accepted principles of morality that society expects. The fact that many people do not find certain words offensive or have even adopted them into their everyday vocabulary does not alter the fact that these words are not used in normal language. There is a public interest that children and young people, in particular, are not confronted with offensive words in shops that are accessible to the general public.
  - Signs which contain manifestly profane language or depict gross obscenity have no place on the register (06/07/2006, R 495/2005-G ‘SCREW YOU’, § 19). The use of ‘FUCKING’ to mean ‘very’ is not only vulgar but also offensive, even though it is used as a modern-day superlative when combined with another word, since such meaning has not yet become so well established in all social strata that the original meaning of the word ‘fucking’ has become remote and forgettable (01/09/2011, R 168/2011-1, *fucking freezing! By TÜRPIZ*’, § 21 and 22).
- 3 The applicant maintained its request for registration notwithstanding the objections raised by the examiner.
- 4 On 16 December 2021, the examiner took a decision (‘the contested decision’) entirely refusing the trade mark applied for, under Article 7(1)(f) EUTMR in conjunction with Article 7(2), EUTMR, based essentially on the reasoning of the notice of grounds of refusal, summarised above. The following, in particular, was added:
- The applicant’s reliance upon the judgment of the Court of Justice of 27/02/2020, C-240/18 P, *Fack Ju Göhte*, EU:C:2020:118 is misplaced since this concerned a different sign, goods and services to those at issue here, and indeed the issue there was whether a different relevant public (German speakers) would perceive such a comedy title as offensive.
  - The sign applied for here is not merely in bad taste, instead it is also vulgar and offensive. This is irrespective of the fact that the word ‘fucking’ refers to ‘good’; the banal use of sign with a positive connotation could also be offensive.
  - The Office did not pay attention solely to the word ‘fucking’, omitting the other elements of the sign, but indeed objected to that offensive word in the sign: the use of the contested sign in full does not disguise the obvious crude and offensive message, and the relevant public will recognise immediately in the sign as a whole the impressive use of foul language. ‘FUCKING’ is not written in a discreet position but in large black letters in the middle of the sign.
  - The argument that the meaning the European public gives to the word ‘fucking’ has changed and that the word is nowadays used predominantly as a superlative, and not as a reference to the verb ‘to fuck’, and that its use has been more socially accepted and is no longer perceived as vulgar, fares no

better, since the situation is as clearly set out in the case-law (01/09/2011, R 168/2011-1, fucking freezing! By TÜRPIZ'). As for the assertion that this decision is over 10 years old, and that fundamental moral values change over time, the Office find that the objection pursuant to Article 7(1)(f) EUTMR is still valid. The Office must make its assessment on the basis of the EUTM as interpreted by the European judicature. It is sufficient for it to make its assessments by applying decision-making criteria as interpreted by the case-law without having to rely on evidence.

- The assertion that the applicant's wines sold under the sign applied for are best-sellers and are not considered offensive also does not undermine the Office's conclusion. A certain clientele may not consider a sign offensive, but this does not mean that it should be granted protection.
  - As for an alleged trend of acceptance of trade marks which used to be considered as profanities, the assessment at hand must always be made vis-à-vis the relevant goods (in this case everyday goods, available for everyone to see in supermarkets whether online or on advertising material), and the relevant public, including whether the sign would be on view to the public at large including children and adolescents, while children merit a special protection against offensive terms.
  - The acceptance of the Benelux trade mark for which priority was claimed is not decisive either, since the EU trade mark regime is an autonomous system and applies independently of any national system. The cited 10 examples of registered EUTMs containing the word 'FUCK' are firstly not comparable, but in any case do not change the fact that the registrability of a sign as an EUTM must be assessed solely on the basis of the EUTMR as interpreted by the EU judicature, and the principle of equal treatment must be reconciled with the principle of legality.
- 5 On 7 February 2022, the applicant filed an appeal against the contested decision, requesting that the decision be set aside in its entirety. The statement of grounds of the appeal was received on 7 March 2022.
- 6 On 30 May 2022, the applicant informed the Office that it also relied upon a recent Board of Appeal decision (03/02/2022, R 1131/2021-5, Fucking awesome) which held that the contested sign was not offensive pursuant to Article 7(1)(f) EUTMR, since the expression did not address any specific group of individuals, would not be perceived as an offensive message but merely as a slightly vulgar promotion of the high quality of the goods at hand.

### **Grounds of appeal**

- 7 The arguments raised in the statement of grounds may be summarised as follows:
- The contested decision misapplied the Court of Justice case-law because it failed to take into account that, besides for cinematographic goods and film entertainment services, the EUTM 'Fack Ju Göhte' has also been accepted and

registered for ‘beers’ and ‘alcoholic beverages (except beers)’. Thus, the goods are identical to those at issue here.

- Due to that false premise, the Office also wrongly assumes in the contested decision that the relevant public would be different in the case at hand. Instead, the relevant public for the alcoholic beverages concerned in Classes 32 and 33 is identical.
- The reasoning with regard to children is misplaced. These are goods that are not meant for (use by) children. In stores, (sparkling) wines are usually separated from goods that do not contain alcohol. Furthermore, in online stores, consumers have to confirm that they are 18 or older in order to be able to continue browsing.
- The reasoning of the Board of Appeal in its decision of 20/11/2017, R 601/2017-4, Fuck Winter, § 10 equally applies to the case at hand. There is no absolute right of a person (be it a parent of a child) not to be exposed to ‘undesired’ words.
- The contested decision failed to consider the mark as a whole: the word ‘fucking’ is clearly merely used as a superlative in the application. Especially combined with the words ‘JUST’ and ‘GOOD WINE’, the mark expresses that the wine is extremely good. It therefore has a positive connotation. The relevant public will perceive the element ‘fucking’ and the mark (in its entirety) as a positive superlative rather than as offensive or shocking.
- An interpretation that the mark incites sexual intercourse can be also ruled out, as such would be impossible in regard to wine nor is there any semantic indication that could refer to a certain person or group of people. Nor does it incite a particular act (21/01/2010, R 385/2008-4, ‘Fucking Hell’, § 10).
- The contested decision fails to recognise that customs in society have changed and that words such as ‘fuck’ and ‘fucking’, that were once considered offensive, have more and more entered everyday language. Various studies show that during the last decades, the use of the word ‘fuck’ has become increasingly acceptable and it has progressively lost its vulgar or offensive nature. As an effect, the word is more and more often used in mainstream media. Even the use of swear words in children’s television series is increasing. Nowadays, the word ‘fucking’ is very often used as a means of emphasis, instead of the traditional vulgar offensive use. The Office’s consideration that the original meaning has not become more remote and forgettable, is therefore incorrect, outdated and paternalistic.
- Use of the word ‘fucking’ in the manner as done in the application is not ‘impermissible use of language’, as the examiner argues. There is no reason to assume that use of the word constitutes a criminal offence under national law.
- Instead of relying upon case-law over 10 years old (01/09/2011, R 168/2011-1, fucking freezing! by TÜRPIITZ) the Board of Appeal should have taken into account the more recent judgment of the Court of Justice (C-240/18 P, ‘Fack Ju Göhte’).

- Furthermore, the examiner’s reference to the ‘original meaning’ of the word ‘fucking’ is irrelevant and can be ruled out, as such would be impossible in regard to wine.
- The contested decision should have taken into account that the applicant has never experienced anyone being offended by the sign and that the wine in question is one of its best sold wines which has received several awards. These are at the very least indications that the sign is not contrary to accepted principles of morality. The success of the wines sold under the sign applied for and the absence of any controversy are both strong indications of public acceptance.
- The cited EUTM registrations mentioned in the applicant’s observations at first instance which include the element ‘FUCK’ or ‘FUCKING’ and which have been accepted by the Office are registered for various types of regular consumer goods, such as clothing. These products are offered for sale to the general public, including in places and websites where also children have access to.
- The acceptance of the cited EUTMs for general consumer goods requires the Office to adhere to the principle of equality and ‘treat like cases alike’. Since the Office did allow the registration of various other FUCK/FUCKING marks, it can, especially in light of the recent far more liberal course that follows from the ‘Fack Ju Göhte’ judgment of the Court of Justice, not refuse the sign applied for for reasons of accepted principles of morality. Contrary to what the examiner found, there are no grounds to assume that use of this sign in the concrete and current social context would indeed be perceived by the general public as being contrary to the fundamental moral values and standards of society.

### **Reasons**

- 8 All references made in this decision should be seen as references to the EUTMR (EU) No 2017/1001 (OJ 2017 L 154, p. 1), codifying Regulation (EC) No 207/2009 as amended, unless specifically stated otherwise in this decision.
- 9 The appeal complies with Articles 66, 67 and Article 68(1) EUTMR. It is admissible.

#### *Article 7(1)(f) EUTMR*

- 10 Article 7(1)(f) EUTMR prohibits the registration of trade marks which are contrary to public policy or to accepted principles of morality. By virtue of Article 7(2) EUTMR, the grounds of non-registrability set out in Article 7(1) EUTMR do not have to exist throughout the European Union; it is sufficient if they obtain in only part of the Union.
- 11 The purpose of Article 7(1)(f) EUTMR is to ensure that the privileges of trade mark registration are not granted in favour of signs, which are contrary to public policy or to accepted principles of morality. In other words, 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; 03/02/2022, R 1131/2021-5, Fucking awesome, § 47).

- 12 Signs that have no place in the register are certainly those which contain manifestly profane language or depict gross obscenity (14/11/2013, T-52/13, Ficken, EU:2013:596, § 24-34; 06/07/2006, R 495/2005-G, SCREW YOU, § 19; 03/02/2022, R 1131/2021-5, Fucking awesome, § 50).
- 13 The offensive character of a sign has to be assessed in each case taking into account the specific circumstances, i.e. contextual elements capable of shedding light on how the relevant public perceives the mark. For example, the Court of Justice has held that, in assessing whether the assimilation to the English phrase ‘Fuck you’ of the first part of the sign ‘Fack Ju Göhte’ would be perceived by the German-speaking public as morally unacceptable, the General Court could not rely solely on the intrinsically vulgar character of that English phrase without examining those contextual elements 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 (27/02/2020, C-240/18 P, Fack Ju Göhte, EU:C:2020:118, § 51-53).
- 14 When assessing whether a sign is ineligible for registration pursuant to Article 7(1)(f) EUTMR, it is irrelevant whether the sign consists exclusively of one or more components that are contrary to public policy or to accepted principles of morality or also contains other components. All that matters when it comes to assessing the facts is whether the component that is contrary to public policy or to accepted principles of morality will be perceived by the public (01/09/2011, R 168/2011-1, fucking freezing! by TÜRPIZ, § 17).
- 15 It is not only signs with a ‘negative’ connotation that can be offensive. The banal use of some signs with a highly positive connotation can also be offensive (17/09/2012, R 2613/2011-2, ATATURK, § 31; 06/07/2015, R 1727/2014-2, OVAL SHAPE (fig.) / OVAL SHAPE (fig.), § 34; 10/09/2015, R 510/2013-1, REPRESENTATION OF A CROSS (fig.), § 58).

*The relevant public and territory*

- 16 When assessing the applicability of Article 7(1)(f) EUTMR, it is the criteria of the reasonable consumer with an average threshold of sensitivity and tolerance that needs to be taken into account (05/10/2011, T-526/09, Paki, EU:T:2011:564, §12; 09/03/2012, T-417/10, ¡Que Buenu Ye! HIJOPUTA, EU:T:2012:120, § 21; 15/03/2018, T-1/17, La Mafia se sienta a la mesa, EU:T:2018:146, § 26).
- 17 The relevant public cannot be limited, for the purpose of the examination of the ground for refusal under Article 7(1)(f) EUTMR, to the public to which the goods and services in respect of which registration is sought are directly addressed. Consideration must be given to the fact that the signs caught by that ground for refusal will shock not only the public to which the goods and services designated by the sign are addressed, but also other persons who, without being concerned by

those goods and services, will encounter that sign incidentally in their day-to-day lives (05/10/2011, T-526/09, PAKI, EU:T:2011:564, § 18; 09/03/2012, T-417/10, ¡Que Buenu Ye! HIJOPUTA, EU:T:2012:120, § 14; 15/03/2018, T-1/17, La Mafia se sienta a la mesa, EU:T:2018:146, § 27).

- 18 It must also be borne in mind that the relevant public within the European Union is, by definition, within a Member State and that the signs likely to be perceived as being contrary to public policy or to accepted principles of morality are not the same in all Member States, inter alia for linguistic, historic, social and cultural reasons (20/09/2011, Coat of arms of the Soviet Union, T-232/10, EU:T:2011:498, § 31-33; 15/03/2018, T-1/17, La Mafia se sienta a la mesa, EU:T:2018:146, § 28-29).
- 19 It follows that, in order to apply the absolute ground for refusal laid down in Article 7(1)(f) EUTMR, it is necessary to take account both of the circumstances common to all Member States of the European Union and of the particular circumstances of individual Member States which are likely to influence the perception of the relevant public within those Member States (20/09/2011, Coat of arms of the Soviet Union, T-232/10, EU:T:2011:498, § 34; 15/03/2018, T-1/17, La Mafia se sienta a la mesa, EU:T:2018:146, § 29).
- 20 In the case at hand the examiner correctly focused on the English-speaking public.

*Accepted principles of morality*

- 21 The Board agrees with the examiner's assessment of the meaning of the words 'JUST FUCKING GOOD WINE' as shocking or offensive at least for the English-speaking part of the public, due to the gratuitous inclusion of the taboo swear word 'FUCKING', which furthermore have no humorous shade of meaning at all, this in line with previous decisions of the Boards of Appeal (01/09/2011, R 168/2011-1, fucking freezing! by TÜRPIITZ; 23/02/2015, R 793/2014-2, FUCK CANCER and, for the German-speaking public, 18/10/2021, R 493/2021-1, Ficken, confirmed by the General Court in its judgment 14/11/2013, T-52/13, Ficken, EU:T:2013:596).
- 22 The examiner correctly identified that 'fucking' is a vulgar slang attributive used for emphasis (relying on the *Oxford Lexico dictionary*). The authoritative *Oxford English Dictionary* confirms that the word 'fucking', whether used as meaning engaged in sexual intercourse or as an intensifier, is a 'coarse slang' word in English (<https://www.oed.com/view/Entry/270263?rskey=Lcl5NF&result=3&isAdvanced=false#eid>; information retrieved on 13 September 2022).
- 23 Moreover, lest it be necessary (*quod non*), the online *Collins English Dictionary* also confirms that the use of the word 'fucking' as an intensifier (e.g. 'a fucking good time') is still considered as 'taboo, slang' (<https://www.collinsdictionary.com/dictionary/english/fucking>; information retrieved on 13 September 2022).
- 24 It is the view of the Board that, although it is true that the term 'fucking' is used as a modern-day superlative when combined with another word (in particular, between close friends or in extremely informal settings, where use of such taboo slang may be exceptionally acceptable), this meaning has not yet become so well



established in all social strata that it has made the original meaning of the word ‘to fuck’ or ‘fucking’ more remote and forgettable (01/09/2011, R 168/2011-1, *fucking freezing!* by TÜRPIITZ, § 21).

- 25 This is as true now as it was in 2011; indeed, the applicant has provided no proof of the contrary, only unsubstantiated general assertions. Even though recent years may have seen certain media channels, such as music videos or television programmes, using the word ‘fucking’ in this modern-day superlative sense, it is still not an acceptable word in general social interactions (such as communication with strangers, those of different age groups such as those much older or younger). At least for the native English-speaking public in the European Union (i.e. in Ireland, Malta and Cyprus) the use of this word, even when used in a modern-day superlative, will be perceived as coarse and vulgar, and thus should be avoided in general social interaction lest great offence be caused.
- 26 Although ‘FUCKING GOOD WINE’ may be seen as an observation that the wine is very good, by choosing the word ‘FUCKING’ the sign is not only vulgar but taboo and offensive in which respect reference is made to paragraph 15 above.
- 27 The goods in question are everyday goods that can be seen by anyone in shops and displays. People of any age who consider the term ‘fucking’ to be offensive may perceive these goods, and therefore also the trade mark that may appear on them, at any time. The fact that the goods at hand are not consumed by or sold to children does not alter the fact that such goods are normally prominently displayed in shops and supermarkets, and thus can be seen by children, as well as, for example, people of any age who will find such use of an extremely vulgar and offensive swear word as morally unacceptable.
- 28 There is a public interest in ensuring that children and young people, in particular, are not confronted with offensive words in shops that are accessible to the general public. As society - and dictionaries reflect a society’s attitude to certain words - accords the term ‘fucking’ an offensive meaning, this word is contrary to the accepted principles of morality that society expects. The fact that many people do not find certain words offensive or have even adopted them into their everyday vocabulary does not alter the fact that these words are not used in normal language (01/09/2011, R 168/2011-1, *fucking freezing!* by TÜRPIITZ, § 25-27). Again, this is as true today as it was, for example, in 2011, the contrary certainly not having been proven and not being self-evident. Obviously, such changes do not have to be promoted by trade mark law (01/09/2011, R 168/2011-1, *fucking freezing!* by TÜRPIITZ, § 24).
- 29 While there indeed is no absolute right of a person (be it a parent of a child) not to be exposed to ‘undesired’ words, this misses the point. The issue is whether or not a significant part of the relevant public would view the use of a coarse taboo profanity such as ‘FUCKING’ as morally acceptable in the public sphere, where different age groups and indeed parents with their children would encounter it. The Board has no doubt that a very significant part of the English-speaking relevant public, in particular the native English-speaking part, will consider the use of this word in a trade mark as repugnant and morally unacceptable.

- 30 As for the applicant's reliance upon the decision of the Boards of Appeal 20/11/2017, R 601/2017-4, Fuck Winter, firstly that case concerned a different sign and no 'superlative' or laudatory use of the word 'fucking', and so must be distinguished from the present case. Secondly, in any case, in that case the Board held that goods for which it could be argued that the applied-for sign could be used prominently visible on the front were expressly been excluded in the list of goods and services. This clearly is not analogous to the case at hand, where the sign can and is likely to be used as a label on wine bottles, with the wording 'FUCKING GOOD' being prominently visible on the front. Accordingly, that case is not analogous to this one, and must be distinguished, in which respect the Board also refers to its further reasoning below in paragraphs 41 to 44.
- 31 In contrast, like in the so far repeatedly cited decision 01/09/2011, R 168/2011-1, fucking freezing! by TÜRPIZ, in the decision 23/02/2015, R 793/2014-2, FUCK CANCER, the Board confirmed the examiner's decision and refused to register the sign. The Board held that, even if the expression 'FUCK CANCER' may be perceived as an expletive used against cancer, this does not alter the fact that the element 'FUCK' is an expression which the public with a normal level of sensitivity and tolerance, will perceive as a particularly vulgar and offensive expletive. As such, the Board found that use of the word 'FUCK', irrespective of the fact that it is followed by another word, makes the trade mark so offensive and indecent, that it must be considered to be contrary to accepted principles of morality within the meaning of Article 7(1)(f) EUTMR.
- 32 As for the assertion that there is no reason to assume that use of the word in issue constitutes a criminal offence under national law, if the Office construed Article 7(1)(f) EUTMR too narrowly, by for example refusing to register only those signs which violate the criminal law, the Office would effectively abrogate its responsibility to ensure that the privileges of trade mark registration are not extended to trade marks which are deeply offensive, vulgar and disgusting or potentially capable of causing outrage. It would also amount to ignoring the spirit of the provision, which refers to 'accepted principles of morality'. Article 7(1)(f) EUTMR clearly imposes a duty on the Office to exercise a degree of moral judgment in assessing the suitability of signs to be granted trade mark protection (06/07/2006, R 495/2005-G – SCREW YOU, § 18; 01/09/2011, R 168/2011-1, fucking freezing! by TÜRPIZ, § 12).
- 33 With regard to the decision of the Board of Appeal of 21/01/2010, R 385/2008-4, Fucking hell, it should be pointed out that the facts differ already owing to the different signs covered by the trade marks, the one in the other case making reference to a beer speciality with the name of a village plus a generic indication for a specific kind of beer, and so this decision cannot help the applicant in which respect the Board furthermore also refers to paragraphs 41 to 44 below.
- 34 With regard to the decision of the Board of Appeal of 04/02/2021, R 1131/2021-5, Fucking awesome, as set out in paragraph 12 above, this reasoned that signs that have no place in the register are certainly those which contain manifestly profane language (underline added), and 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. In the view of the Board, for the reasons set out above, this is

precisely the case here. ‘Profane’ is defined in English as meaning, inter alia, ‘coarse, indecent’ (<https://www.oed.com/view/Entry/152024?rskey=OT8JvH&result=1&isAdvanced=false#eid>). There can be no doubt whatsoever that the expression ‘FUCKING GOOD’ as opposed to ‘very good’ or ‘extremely good’ will be perceived by a very substantial part of the native English-speaking relevant public as extremely coarse, indecent and indeed offensive, regardless of the fact that it does not constitute an insult aimed at any particular group or individual and regardless of the fact that it may be perceived as promotional.

- 35 As for the applicant’s reliance upon the judgment of the Court of Justice 27/02/2020, C-240/18 P, Fack Ju Göhte, EU:C:2020:118, as also relied on in the decision of the fifth Board as referred to in the previous paragraph, § 52 in particular (as cited by the applicant in its submission of 30 May 2022 and in which respect the Board also refers to paragraphs 41 to 44 below), as set out in paragraph 13 above, this case not only concerned a completely different sign to the one at issue here, but it also centred on a different relevant public, namely the perception of the German-speaking relevant public. Accordingly, this judgment is neither analogous to the case at hand (even though it also concerned alcoholic beverages) nor does it undermine the reasoning set out above.
- 36 In that judgment, the Court of Justice held that the assimilation to the English phrase ‘fuck you’ with the first part of the mark ‘Fack Ju Göhte’ has an intrinsically vulgar character, but the issue was how the German-speaking relevant public would perceive it in the very specific circumstances of the case. Those included 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. The Court held 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 and 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 (27/02/2020, C-240/18 P, Fack Ju Göhte, EU:C:2020:118, § 52, 64-68).
- 37 In the case at hand, all these specific contextual factors are missing: The issue concerns the intrinsically vulgar and morally offensive character of the taboo English word ‘FUCKING’ for the English-speaking relevant public, native speakers in particular, without any contextual factors being present which can justify a conclusion otherwise.
- 38 In this respect the Board adds that the fact that the outcome of the judgment of the Court in the ‘Fack Ju Göhte’ case was highly affected by the extremely specific contextual factors of the case is in fact underlined by the judgment of the General Court (14/11/2013, T-52/13, Ficken, EU:T:2013:596, § 24-34), confirming the refusal of the trade mark application ‘Ficken’ (German for ‘fuck’) for goods in Classes 25, 32 and 33, the sign being contrary to public policy and morality

pursuant Article 7(1)(f) EUTMR. The General Court found that there was no doubt that the word ‘Ficken’ is not only of bad taste, but also intrinsically offensive, indecent and repulsive for the general consumer. The fact that there could be somebody that does not perceive this word as shocking, does not exclude that it is vulgar *per se* and that the rest of the public would still feel shocked. Furthermore, the fact that the word ‘ficken’ may have other meanings is not relevant as the consumers will perceive it in its first meaning which remains offensive.

- 39 Finally, the assertion that the applicant has never experienced anyone being offended by the sign applied for and that the wine in question is one of its best sold wines which has received several awards, and that this supposedly indicates that the sign is not contrary to accepted principles of morality and is accepted by the public, misses the point. Apart from consisting of an unproven assertion, these allegations state merely that these wines are made in Spain and exported to fifteen countries, including eight in the European Union, and have won awards and praise, without proving any details of which countries these were, in particular whether they concerned native English-speaking relevant publics, or even whether the ‘NELEMAN JUST FUCKING GOOD WINE’ sign was accepted for registration as a trade mark in any EU Member States with English as an official language (instead it merely asserts that ‘all across Europe’ trade marks containing ‘fuck’ are ‘more and more accepted’, but then mentions only a few examples, none concerning Ireland, Malta or Cyprus). As such, these assertions do not bear scrutiny either.
- 40 In this respect, the Board further notes that the applicant’s arguments that it had received many awards and no complaints are in any event irrelevant because what matters is the intrinsic meaning a word has (as appears from the dictionary) for the relevant public, which meaning is not influenced by a lack of consumer complaints and reputation not being an intrinsic quality (09/03/2012, T-417/10, ¡Que Buenu ye! HIJOPUTA, EU:T:2012:120, § 23-26; 14/11/2013, T-52/13, Ficken, EU:T:2013:596, § 33; 15/03/2018, T-1/17, La Mafia se sienta a la mesa, EU:T:2018:146, § 34, 42).

#### *Previous registrations*

- 41 As for the existence of EUTMs registered by the Office, in the first place, none of the ten EUTMs cited concern the sign vis-à-vis the same goods at issue here, and accordingly are not analogous since they do not bear the same semantic content as the sign at hand. Secondly, and most importantly, even if these registrations were relevantly similar to this application (*quod non*) in any case the registrability of a sign as an EUTM must be assessed solely on the basis of the EUTMR, as interpreted by the EU judicature, and not on the Office’s previous practice (05/12/2002, T-130/01, Real People, Real Solutions, EU:T:2002:301, § 31, 03/07/2003, T-129/01, Budmen, EU:T:2003:184, § 61).
- 42 It is true that, in light of the principles of equal treatment and of sound administration, the EUIPO must, when examining an application for registration of an EU trade mark, take into account the decisions already taken in respect of similar applications and consider with special care whether it should decide in the same way or not. However, those principles must be reconciled with respect for legality.

Consequently, a person who files an application for registration of a sign as a trade mark cannot rely, to his or her own benefit, on any unlawful act committed in favour of another in order to secure an identical decision. Moreover, for reasons of legal certainty and sound administration, the examination of any trade mark application must be stringent and full, in order to prevent trade marks from being improperly registered. That examination must be undertaken in each individual case. The registration of a sign as a mark depends on specific criteria, which are applicable in the factual circumstances of the particular case and the purpose of which is to ascertain whether the sign at issue is caught by a ground for refusal (18/05/2017, T-374/16, INSTASITE, EU:T:2017:348, § 64-66).

- 43 In the present case, it is clear from the contested decision that the examiner carried out a full and specific examination of the application before correctly refusing it on the basis of the absolute grounds for refusal referred to in Article 7(1)(f) and Article 7(2) EUTMR. Since the examination of the application, in light of those provisions, could not, in itself, lead to a different conclusion, the applicant's claims relating to the failure to take into consideration the registration of allegedly comparable marks cannot succeed. The applicant may thus not usefully rely on previous decisions of the EUIPO in order to cast doubt on the conclusion that registration of the sign applied for in respect of the refused goods is incompatible with the EUTMR.
- 44 In this respect the Board adds that, apart from EUTM No 6 025 159 'fucking hell' and No 1 305 198 'Fuck Winter', both registered on the basis of very special circumstances, the Boards of Appeal have not examined the registrability of any of the other eight trade marks to which the applicant refers. The Board further notes that the list of trade marks which contain or are based on the word 'fuck' and which have not been registered by the EUIPO is a multiple of the number of eight marks registered. The Board concurs with the applicant that the Office should endeavour to ensure consistent practice in assessing trade marks in relation to absolute non-registrability. However, registration practice develops over time, and it is unfortunately inevitable that doubtful trade marks are sometimes registered. There are therefore procedures for rescinding them.
- 45 As for the applicant's reliance upon alleged registered trade marks in France, Sweden, Germany, the Benelux and Spain, firstly, again none of these cited marks, with the exception of one of the two cited for the Benelux, concerns the same sign and no details are given as to the goods and services registered, and, secondly, in any event it suffices to note that the European Union trade mark regime is an autonomous system with its own set of objectives and rules peculiar to it; it is self-sufficient and applies independently of any national system (12/02/2009, C-39/08 & C-43/08, Volks.Handy, EU:C:2009:91, § 17-19; 13/02/2008, C-212/07 P, Hairtransfer, EU:C:2008:83, § 44; 05/12/2000, T-32/00, Electronica, EU:T:2000:283, § 47). Consequently, the registrability of a sign as a European Union trade mark must be assessed by reference only to the relevant EU rules. Accordingly, the Office is not bound by a decision given in a Member State or other country that the sign in question is registrable there as a national mark, in which respect it cannot be disregarded that linguistic differences may be directly decisive in the examination and, furthermore, that the practice of the various offices may differ, but this even being so if such a decision was adopted under the harmonised national legislation of a Member State of the Union or in a country

belonging to the linguistic area in which the word sign in question originated (16/05/2013, T-356/11, Equipment, EU:T:2013:253, § 74; 15/09/2009, T-471/07, Tame it, EU:T:2009:328, § 35).

- 46 In sum, the legality of the contested decision must be assessed solely on the basis of the EUTMR as interpreted by the EU judiciary, and not on the basis of a purported previous practice of the Office or of other IP Offices. Such an assessment has been correctly carried out in this case.

*Conclusion*

- 47 Taking into account the above considerations, the appeal must be dismissed as unfounded. Due to its inclusion of the vulgar and offensive word ‘FUCKING’, which is immediately visible and striking, the sign applied for is contrary to accepted principles of morality and is therefore ineligible for registration pursuant to Article 7(1)(f) and 7(2) EUTMR.

**Order**

On those grounds,

THE BOARD

hereby:

**Dismisses the appeal.**

Signed

N. Korjus

Signed

E. Marijnissen

Signed

C. Govers

Registrar:

Signed

p.o. M. Chaleva

