



Press and Information

Court of Justice of the European Union

**PRESS RELEASE No 86/19**

Luxembourg, 2 July 2019

Advocate General's Opinion in Case C-240/18 P  
Constantin Film Produktion GmbH v European Union Intellectual Property  
Office (EUIPO)

## **Advocate General Bobek: EUIPO's decision rejecting the registration of the trade mark 'Fack Ju Göhte' should be annulled**

*The offensive or vulgar nature of this trade mark has not been proved with reference to a specific social context at a given time*

In 2015, Constantin Film Produktion GmbH (Constantin Film) asked the European Union Intellectual Property Office (EUIPO) to register the word sign 'Fack Ju Göhte' – after the title of a successful German film – as an EU trade mark for a wide variety of goods and services. The application was rejected, since this word sign was considered as contrary to 'accepted principles of morality'. EUIPO considered that the pronunciation of the words 'Fack ju' was identical to that of the English expression 'Fuck you' and that, consequently, it was an insult in bad taste, shocking and vulgar, offending posthumously the respected writer Johann Wolfgang von Goethe.

In 2017, Constantin Film brought an action before the General Court, seeking the annulment of EUIPO's decision. In its judgment,<sup>1</sup> the General Court dismissed that action.

Constantin Film appealed that judgment before the Court of Justice, alleging errors in the interpretation and application of the Regulation on the EU trade mark,<sup>2</sup> according to which European trade marks shall not be registered if they are 'contrary to public policy or to accepted principles of morality', and breach of the principles of equal treatment, legal certainty and good administration.

In today's opinion, Advocate General Michal Bobek proposes that **the Court should set aside the judgment of the General Court and annul EUIPO's decision.**

The Advocate General observes that **freedom of expression clearly applies in the field of trade marks**, even though its protection is not the primary goal of trade marks, the aim of which is essentially to guarantee to consumers the origin of the goods or services.

The Advocate General notes that EUIPO has a role to play in the protection of public policy and accepted principles of morality, even though this is not its primary role.

As regards the concepts of 'public policy' and 'accepted principles of morality' to which the Regulation refers, while acknowledging a certain overlap, the Advocate General **distinguishes between them and suggests that different elements have to be taken into account for their assessment.** When EUIPO wishes to rely, specifically, on the absolute ground for refusal of accepted principles of morality, which was the case in the present proceedings, it must establish why it believes that a given sign would offend those principles. **Importantly, that assessment must be grounded in a specific social context, and it cannot ignore factual evidence that either confirms or possibly casts doubt on EUIPO's own views on what does or does not conform to accepted principles of morality within a given society at a given time.** In other words, that assessment cannot be carried out having regard solely to the word sign, in isolation

<sup>1</sup> Case [T-69/17](#), Constantin Film Produktion v EUIPO (Fack Ju Göhte).

<sup>2</sup> Council Regulation (EC) No 207/2009 of 26 February 2009 on the European Union trade mark (OJ 2009 L 78, P.1), since replaced 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).

from the broader societal perception and context. As regards the present case, the Advocate General concluded that the EUIPO assessment, endorsed by the General Court, failed to meet those standards.

In this respect, the Advocate General discusses the evaluation conducted by EUIPO and by the General Court of certain factors put forward by Constantin Film, such as the success of the film 'Fack Ju Göhte'; the absence of controversy as to its title; the fact that the film title was duly authorized and released for screening to younger audiences; and that it has been incorporated into the learning programme of the Goethe-Institut. While none of those factors is conclusive for the assessment under the Regulation, they constitute strong evidence about the social perception of morality by the relevant public. Thus, much more convincing arguments should have been provided by EUIPO and the General Court to conclude that the eponymous trade mark still cannot be registered on account of it being an affront to accepted principles of morality caused to exactly the same public.

Lastly, the Advocate General argues that **the General Court erred in not sanctioning the failure, on the part of EUIPO, to appropriately explain the departure from its past decision-making practice**, or to state a plausible reason why the application for the sign 'Fack Ju Göhte' had to be decided differently compared to the outcome reached in a similar case,<sup>3</sup> which was brought to the attention of EUIPO by Constantin Film to support their application.

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**NOTE:** The Advocate General's Opinion is not binding on the Court of Justice. It is the role of the Advocates General to propose to the Court, in complete independence, a legal solution to the cases for which they are responsible. The Judges of the Court are now beginning their deliberations in this case. Judgment will be given at a later date.

**NOTE:** An appeal, on a point or points of law only, may be brought before the Court of Justice against a judgment or order of the General Court. In principle, the appeal does not have suspensive effect. If the appeal is admissible and well founded, the Court of Justice sets aside the judgment of the General Court. Where the state of the proceedings so permits, the Court of Justice may itself give final judgment in the case. Otherwise, it refers the case back to the General Court, which is bound by the decision given by the Court of Justice on the appeal.

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The [full text](#) of the Opinion is published on the CURIA website on the day of delivery.

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<sup>3</sup>Decision of the Fourth Board of Appeal of the EUIPO of 28 May 2015 (R 2889/2014-4, DIE WANDERHURE). *Die Wunderhure* concerned a sign, 'DIE WANDERHURE', that was also the name of a German novel and its film adaptation. The word 'hure' is in the German language a synonym for prostitute. In this case, EUIPO's approach was rather liberal and the trade mark was not considered immoral.