

**DECISION
of the First Board of Appeal
of 20 October 2023**

In case R 850/2022-1

Spin Master Toys UK Limited

Boston House, Boston Drive
Bourne End SL8 5YS
United Kingdom

EUTM Proprietor / Appellant

represented by BOMHARD IP, S.L., C/ Bilbao, 1, 5º, 03001 Alicante, Spain

v

Verdes Innovations S.A.

Chiliomodi
20008 Corinthos
Greece

Cancellation Applicant / Defendant

represented by Kunze Rechtsanwälte - Solicitor (England & Wales) PartG mbB,
Maximiliansplatz 12 b, 80333 München, Germany

APPEAL relating to Cancellation Proceedings No 7 527 C (European Union trade mark registration No 5 696 232)

THE FIRST BOARD OF APPEAL

composed of M. Bra (Acting Chairperson), E. Fink (Rapporteur) and C. Bartos (Member)

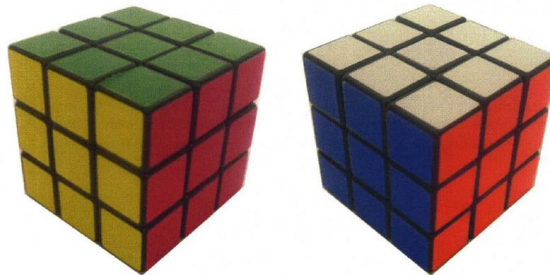
Registrar: H. Dijkema

gives the following

Decision

Summary of the facts

- 1 On 9 January 2008, Seven Towns Ltd. obtained registration of European Union trade mark No 5 696 232 for the three-dimensional mark in colour



filed on 6 February 2007 for the following list of goods:

Class 28: *Toys, games, playthings and jigsaw puzzles, three dimensional puzzles; electronic games; hand-held electronic games.*

- 2 The description reads as follows:

Six surfaces being geometrically arranged in three pairs of parallel surfaces, with each pair being arranged perpendicularly to the other two pairs characterized by (i) any two adjacent surfaces having different colours which are red (PMS 200C), green (PMS 347C*), blue (PMS 293C*), orange (PMS 021C*), yellow (PMS 012C*) and white and (ii) each such surface having a grid structure formed by black borders dividing the surface into nine equal segments; the graphic representation of the mark shows two three-dimensional views of the mark from a side angle and a front view of each of the six sides.*

- 3 On 25 January 2013, Verdes Innovations S.A. ('the cancellation applicant') filed an application for a declaration of invalidity of the registered EUTM ('the contested mark') for all the above goods, based on Article 52(1)(a) in conjunction with Article 7(1)(a), (b), (c) and (e) of Regulation No 207/2009.

- 4 The cancellation applicant argued essentially the following:

- The contested mark should be declared invalid pursuant to Article 7(1)(a) of Regulation No 207/2009 because its graphic representation does not comply with the legal requirements under Article 4 EUTMR. The graphic representation is not clear, precise and self-contained. It covers an infinite number of permutations of different sizes, compositions and perspectives.
- The contested mark should be declared invalid pursuant to Article 7(1)(e)(ii) of Regulation No 207/2009 because it consists exclusively of the shape of the goods which is necessary to obtain a technical result. The contested mark has been disclosed in a number of patents which have lapsed. The technical solution and characteristics are to be examined with reference to *three-dimensional puzzles* for which the mark is registered. The so-called Rubik's cube to which the contested mark refers has three layers per each direction, with nine planar square surfaces on in each face, each of identical colours, which must be rotated until each face of the cube has the same colour, meaning that the layers perform the function of rotation of the cube. The

existence of an orthogonal segmentation for having the cubic logic toy rotate reinforces the technical function of the shape of the cube which is also shown by the 43 quintillion incorrect rotations as opposed to one correct (Attachments 13 to 19).

- The contested mark also falls within the scope of Article 7(1)(e)(iii) of Regulation No 207/2009, given that the overall design, i.e. the shape of the cube is an essential element of its branding and the 3x3x3 grids confer a high substantial value to the products protected by the contested mark.
- The contested mark should also be declared invalid within the meaning of Article 7(1)(b) of Regulation No 207/2009 since the shape of a cube is a variation, if at all, of a normal cube shape for toys. Many three-dimensional puzzles using a 3x3x3 cube representation are very famous puzzles which are not limited to a rotational mechanism. The shape is not so striking that it establishes in the minds of the relevant public a mental association between the sign and the origin of the products claimed.

5 In support of its claim, the cancellation applicant submitted the following evidence:

- Attachment 1: European patent No 1 599 261 granted to the cancellation applicant for a ‘cubic logic toy’ as well as catalogues of its goods, awards, lists of registered patents around the world, samples of its products and various advertisements in famous trade magazines of the toy industry;
- Attachment 2: Database printouts (CTM-Online) for the cancellation applicant’s EUTMs Nos 7 034 044 and 6 972 211;
- Attachment 3: Database printout (RCD-Online) regarding Community designs registered in Locarno Class 21.01 ‘play cubes’ or logic toys’;
- Attachment 4: Two screenshots from the EUTM proprietor’s website www.seventowns.com;
- Attachment 5: Warning letter dated 27 January 2012 addressed by the EUTM proprietor to the cancellation applicant;
- Attachment 6: Response to the warning letter dated 2 February 2012;
- Attachment 7: Warning letter dated 31 January 2012 addressed by the EUTM proprietor to the cancellation applicant;
- Attachment 8: Response to the warning letter dated 9 February 2012;
- Attachment 9: Order of the Tribunal of Budapest-Capital issued on 3 August 2012 in response to the EUTM proprietor’s request for a grant of an interim injunction against the cancellation applicant (in Hungarian);
- Attachment 10: Decision issued in Budapest on 7 November 2012 in Hungarian;
- Attachment 11: Three screenshots from the EUTM proprietor’s website www.seventowns.com;
- Attachment 12: Judgment issued by the Chancery Division, High Court of Justice, on 28 November 2012;
- Attachment 13: Extracts from ‘The Art of the puzzle’, Katonah Museum of Art, and ‘The Cube’ by Jerry Slocum;
- Attachment 14: Extract from ‘Humble masterpieces 100 everyday marbles of design’ by Paola Antonelli, 2005;
- Attachment 15: Extracts from ‘Phaidon Design Classics’, Volume Three, 2008, and the ‘The Design Encyclopedia’ by Mel Byars, 2004;
- Attachment 16: Wikipedia entry for the Rubik’s cube;
- Attachment 17: Several patents for logical toys granted in the years from 1975 to 1981 in favour of Mr Rubik;

- Attachment 18: Screenshot from the copyright notice on the website www.rubiks.com;
- Attachment 19: Email from the EUTM proprietor to the cancellation applicant dated 5 November 2003;
- Attachment 20: Screenshots of the various websites regarding the length, area and volume of cubes;
- Attachment 21: Various pictures of different 3D puzzles.

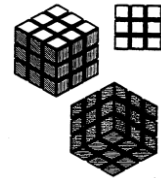
6 Seven Towns Ltd replied essentially the following:

- The Rubik’s cube has been awarded several prizes in 1989 and 1981 and is widely considered by the toy industry to be the best-selling toy in the world.
- The contested mark complies with Article 7(1)(a) and Article 4 of Regulation No 207/2009. The representation of the contested mark consists of two perspectives of a 3x3x3 cube. Each surface of the cube has a specific grid structure formed by thick black borders dividing the surface into nine equal square elements and each surface has different, particular and arbitrary chosen colours.
- In relation to Article (7)(1)(e)(ii) of Regulation No 207/2009, it follows from the Logo brick judgment (14/09/2010, C-48/09 P, Lego brick, EU:C:2010:516) that this ground for refusal applies where the sign consists exclusively of the shape of goods incorporating essential characteristics necessary to obtain a technical result, which is to be assessed with respect to the goods for protection is sought or was granted. The goods at issue are *toys, games, playthings and jigsaw puzzles, three dimensional puzzles; electronic games; hand-held electronic games* that can be embodied in indefinite forms and shapes with many various functions to achieve as well as numerous technical solutions or have a very specific outside appearance. The essential characteristics of the subject matter of the contested mark, i.e. the cube shape with a black grid structure and colours, have no connection to any technically-functional purpose of the goods registered. In particular, *jigsaw puzzles* have a specific outside appearance with cut puzzle parts that has nothing to do with the representation of the contested mark. *Three-dimensional puzzles* cover a wide category of products with no particular outside appearance, function or technical mechanism. The cube shape with a grid structure does not convey any information with regard to its function and the grid structure itself does not confer any technical effect to the cube. The black grid structure and the particular colours are major non-functional elements which have no impact on the registration of the contested mark in accordance with the Lego brick judgment.
- With regard to Article 7(1)(e)(iii) of Regulation No 207/2009, the notion of aesthetic value is not clearly settled in the case-law and must be interpreted narrowly. It follows from the Loudspeaker judgment (06/10/2011, T-508/08, Loudspeaker, EU:T:2011:575) that only the shape has to be examined and in order to give a substantial value to the goods this shape has to be very specific. The cube shape is not a specific design and the aesthetic value of the subject matter of the contested mark does not result from the shape itself but rather from the black grid structure as an essential element of the mark. The 3x3x3 cube shape is not the shape generally used for three-dimensional puzzles.
- In any case, the contested mark has acquired distinctiveness through use within the meaning of Article 7(3) of Regulation No 207/2009.

- 7 In support of the reply, the following evidence was submitted:
- Exhibit 1: Wikipedia entry for the Rubik's cube;
 - Exhibit 2: Chronological description of the history of the Rubik's cube;
 - Exhibit 3: Online articles related to the Rubik's cube;
 - Exhibit 4: Articles and book extracts related to the Rubik's cube;
 - Exhibit 5: List of 'Rubik distributors' in the EU and printouts from their websites;
 - Exhibits 6-7: Listed in the annex to the reply but not attached;
 - Exhibit 8: Examples of licensed use of the Rubik's cube for promotional purposes;
 - Exhibit 9: Affidavit dated 5 September 2013 of Mr D. E.-S., authorized representative of Seven Towns Limited;
 - Exhibit 10: Affidavits of several toy distributors dated in September 2013 who sell the Rubik's cube in the EU markets;
 - Exhibit 11: Google image search results for three-dimensional puzzles;
 - Exhibit 12: Wikipedia entry for mechanical puzzles;
 - Exhibit 13: Database extract (ROMARIN) of IR No 715 571;
 - Exhibit 14: Decision No A715571/19 of 23 June 2009 in Hungarian.
- 8 In its rejoinder, the cancellation applicant essentially reiterated its arguments. With respect to Article 7(1)(e) of Regulation No 207/2009, it added that the fact that the shape concerned has been the subject of a claim in a patent application constitutes prima facie evidence that those aspects of the shape identified as being functional in the patent claim are necessary to achieve a technical result. The grid structure as such is a necessary result of the technical product configuration and its absence would prevent the product from technically functioning. Whether it serves such a technical function or as a mere decorative element is irrelevant as even if classified as a decorative element the overall functionality of the product as displayed by the subject matter of the contested mark cannot be questioned. Such technicality is also reflected in Exhibits 1, 3 and 4 submitted by the EUTM proprietor.
- 9 On 10 February 2014, the transfer of the contested mark to Rubik's Brand Limited was entered into the Register.
- 10 In reply to the cancellation applicant, Rubik's Brand Limited maintained its arguments. As regards Article 7(1)(e)(ii) of Regulation No 207/2009, it submitted essentially the following:
- The cube shape, the thick black grid structure and the specific colours constitute the essential characteristics of the contested mark.
 - The colours do not have any technical function but are purely decorative, as conceded by the cancellation applicant. US patent No 4 378 116 does not contain any references to any colour.
 - The black grid structure is not necessary for reaching a technical solution. Even assuming that the relevant public perceives the grid structure as dividing the cube into elements, it is impossible to find out what function this structure refers to. And, even if the rotating function of the Rubik's cube is presumed, it is not required for the rotation of small parts as the gridlines can be different in thickness and colour, and does not need to consist of square elements of equal size or of nine elements. There exist alternative shapes with the same function as can be seen in Attachments 1 and 4 submitted by the cancellation applicant. The black grid structure was not subject of a patent claim in US patent No 4 378 116.

- The cube shape is not necessary to obtain a technical result. US patent No 4 378 116 does not refer to the cube shape but to a ‘spatial logical toy’ having the shape of a regular ‘geometrical body’, which is a shape that can be embodied in numerous different shapes.

- 11 On 4 June 2014, the Cancellation Division suspended the present proceedings in view of the action T-450/09 pending before the General Court against appeal decision R 1546/2008-2 of 1 September 2009. By this decision, the Board of Appeal had confirmed the rejection of cancellation application No 1 956 C brought by Simba Toys GmbH & Co. KG based on Article 52(1)(a) in conjunction with Article 7(1)(a) to (c) and (e) of



Regulation No 207/2009 against the three-dimensional EUTM No 162 784

The mark had been filed on 1 April 1996 by Seven Towns Ltd for *three-dimensional puzzles*, registered on 6 April 1999 and later transferred to Rubik’s Brand Limited.

- 12 By judgment T-450/09 of 25 November 2014 (CUBES (3D), EU:T:2014:983), the General Court dismissed the action as unfounded.
- 13 By judgment C-30/15 P of 10 November 2016 (CUBES (3D), EU:C:2016:849), upon the appeal brought by Simba Toys GmbH & Co. KG, the Court of Justice set aside the judgment of the General Court and annulled the decision R 1546/2008-2. It held that the claim of an infringement of Article 7(1)(e)(ii) of Regulation No 207/2009 was well founded.
- 14 By a new decision R 452/2017-1 issued on 19 June 2017, the Board of Appeal annulled the decision No 1 956 C of the Cancellation Division and declared EUTM No 162 784 invalid in respect of all the goods for having been registered in breach of Article 7(1)(e)(ii) of Regulation No 207/2009.
- 15 By judgment T-601/17 of 24 October 2019 (CUBES (3D), EU:T:2019:765), the General Court dismissed the action brought by Rubik’s Brand Limited against the decision R 452/2017-1 as unfounded.
- 16 The appeal brought by Rubik’s Brand Limited was not allowed to proceed, order C-393/19 of the Court of Justice of 23 April 2020.
- 17 On 22 January 2021, the present cancellation proceedings were resumed.
- 18 On 5 March 2021, the transfer of the contested mark to Spin Master Toys UK Limited (‘the EUTM proprietor’) was entered into the Register.
- 19 On 8 March 2021, the parties were invited to file further observations.
- 20 In its writ of 13 July 2021, the cancellation applicant essentially maintained its previous observations. With regard to Article 7(1)(e)(ii) of Regulation No 207/2009, it added the following:
 - In its decision R 452/2017-1, the Board of Appeal summarised the guidance given by the Court of Justice in paras. 26 to 45, to which little is to be added. The findings of the Board have been reinforced by the General Court in paras. 81 to 88 in its judgment T-601/17. The General Court also rejected the argument of alternative shapes (paras. 90 to 98) and that the different colours on the six faces of the cube show a technical characteristic (para. 99).

- In his statutory declaration before the Landgericht Hamburg, Mr Rubik confirmed to specifically have chosen bright colours in order to distinguish where each cube was going.
 - As set out by the Advocate General in his opinion of 25 May 2016 in the case C-30/15 P in para. 30, the underlying reason for the refusal enshrined in Article 7(1)(e)(ii) of Regulation No 207/2009 lies in keeping within the public domain the essential characteristics of particular goods which are reflected in their shape.
- 21 Together with its reasoning, the cancellation applicant submitted the following documents:
- Attachment 22: Written statement of Mr Rubik of 26 February 2015;
 - Attachment 23: Written statement of Mr Rubik dated 25 November 1998;
 - Attachment 24: Copy of an action for infringement filed by Rubik’s Brand Limited at Landgericht Hamburg on 9 April 2014 (in German).
- 22 In reply, the EUTM proprietor added in respect to Article 7(1)(e)(ii) of Regulation No 207/2009 essentially the following:
- The intended technical result of the shape at issue is the rotating capacity of individual elements in a three-dimensional puzzle. The cube shape, the grid and the colours are not necessary to obtain that result.
 - The colours are decorative, aesthetic elements resulting from the choice of the creator of the product. The cancellation applicant’s reference to the written statement of Mr Rubik’s is without merit because he could have chosen different colours.
 - The Arnhem-Leewarden Court of Appeal confirmed that the Rubik’s cube enjoys copyright protection and that the colours result from the choice of the designer of the cube.
 - The due and fair consideration of the interests of the trade mark proprietors and their right to property requires that the public interest underlying the rationale of Article 7(1)(e)(ii) of Regulation No 207/2009 may not be the only and absolute aspect to be taken into account when assessing the functionality of shapes.
 - While the existence of alternative shapes is not sufficient to prove that a sign is not functional, it may be relevant in the assessment of the grounds for invalidity and the underlying public interest. Given that the indefinite number of other shapes available to be used by competitors for the same technical solution, the public interest does not require the contested mark to be declared invalid.
- 23 The EUTM proprietor attached the following documents:
- Exhibit 15: Judgment No 200.236.204/03 of the Arnhem-Leewarden Court of Appeal dated 13 July 2021 together with an English translation;
 - Exhibit 16: Communication of an examiner dated 28 October 2011 whereby an objection based on absolute grounds for refusal was waived in relation to EUTM No 9 976 788.
- 24 By decision of 25 March 2022 (‘the contested decision’), the Cancellation Division upheld the application for a declaration of invalidity, declared the contested mark invalid in its entirety pursuant to Article 7(1)(e)(ii) of Regulation No 207/2009 and ordered the EUTM proprietor to bear the costs.
- 25 It gave, in essence, the following grounds for its decision:

- The cancellation applicant has demonstrated that the three essential characteristics of the contested mark, namely the squares separated by a black grid, the cube shape and the colours of each side of the cube, are necessary to obtain a technical result in relation to *three-dimensional puzzles*.
- The black grid represents the physical separation between the individual squares and rows of squares which allows a player to change the position of these squares in order to arrange them, in the desired colour scheme, on the cube's six faces. This is confirmed by the evidence submitted by the EUTM proprietor itself, for instance the Wikipedia entry (Exhibit 1) and the examples of how the Rubik's cube is advertised (Exhibit 5). Since the physical separation is necessary for the rotation and that rotation is necessary for the product to perform its technical function of arranging the smaller cubes coherently on each of the six surfaces of the cube, the grid together with the squares serve a technical function.
- The fact that the cube shape is necessary to obtain a technical result is proven by the patents granted for logic toys in favour of Mr Rubik (Attachment 17). US patent No 4 378 116, granted for a 'spatial logical toy' which can be rotated and which stimulates logical thinking activity, shows the technical result which is obtained rotating the different parts to solve a logical puzzle. The drawings in other patents also show the same 3x3 structure as that of the contested mark which confirms its technical function. The existence of alternative shapes is not relevant in the assessment of whether or not a shape is necessary to obtain a technical result.
- The different colours are also necessary to obtain a technical result, namely to gather all squares of the same colour on the respective side of the cube. Therefore, different colours are needed to distinguish the different sides. The fact that other colours could have been chosen cannot be decisive.
- The contested mark consists of the actual shape of a three-dimensional puzzle which is encompassed by the broad category of *toys, games* and *playthings*. It is therefore possible that the shape is necessary to achieve a technical result, namely to rotate the goods in order to solve a puzzle or game. As regards *electronic games* and *hand-held electronic games*, although 'Rubik's cubes' are generally mechanical, the possibility of an electronic version cannot be excluded, for instance, an electronic element that contains a timer or a score board. These goods therefore may include types of three-dimensional puzzles which can be rotated in the same way as the mechanical version. With regard to *jigsaw puzzles*, it is not beyond the realm of possibility that the shape could be the shape needed to fulfil the technical function of another form of jigsaw, a three-dimensional shape in which cubes of different colours are pressed to fit together in a certain position within the same colour sequence. As such, the contested mark could be the shape necessary to achieve a technical result in relation to all the goods at issue.
- Since the cancellation application is entirely successful on the grounds of Article 52(1)(a) in conjunction with Article 7(1)(e)(ii) of Regulation No 207/2009, there is no need to examine the remaining grounds on which the application is based. As to the alleged acquired distinctiveness of the contested mark pursuant to Article 7(3) EUTMR, it is noted that this article does not apply under Article 7(1)(e) EUTMR as even if a shape of goods that is necessary to obtain a technical result has become distinctive in consequence of the use that has been made of it, it is prohibited from being registered as a trade mark (14/09/2010, C-48/09 P, Lego brick, EU:C:2010:516, § 47).

Submissions and arguments of the parties

- 26 On 16 May 2022, the EUTM proprietor filed an appeal against the contested decision, requesting that the decision be annulled, the application for a declaration of invalidity be rejected and costs be awarded in its favour. The statement of grounds of the appeal was received on 29 July 2022.
- 27 The EUTM proprietor argues in essence the following:
- According to the case-law, the essential characteristics to be taken into account in the assessment under Article 7(1)(e)(ii) of Regulation No 207/2009 are the most important elements. Where the trade mark relates to a shape of goods in which another element plays an important or essential role, which is not inherent to the generic function of the goods, the provision cannot apply.
 - The Cancellation Division correctly considered the six different colours of the cube to be an essential characteristic of the contested mark because they play an important or essential role in the visual impression conveyed.
 - However, the Cancellation Division erred when it equated the colours applied to the surface of the shape with the shape itself. The specific combination of colours, the third essential characteristic of the contested mark, cannot be considered to constitute a ‘shape’ within the meaning of Article 7(1)(e)(ii) of Regulation No 207/2009. The contested mark refers to a ‘hybrid shape’, i.e. a shape that has essential characteristics found to be functional, and an essential characteristic that is not an integral part of the shape but a mere surface decoration.
 - In the Louboutin judgment (12/06/2018, C-163/16, Louboutin and Christian Louboutin, EU:C:2018:423), the Court of Justice decided that the position of a specific colour on a specific part of a product does not constitute the shape of that product. The same principles apply in the case at hand. If an element can be removed without altering the shape, it is difficult to see how it could be an essential element of that shape.
 - In its judgment T-601/17 regarding the black and white representation of the Rubik’s cube, the General Court confirmed that the colours do not form part of the three-dimensional shape.
 - In the Textilis judgment (14/03/2019, C-21/18, Textilis, EU:C:2019:199), the Court of Justice confirmed that two-dimensional decorative motifs affixed to products could not be considered to consist of the shape of these products.
 - The distinction between the colour on the one hand and the shape on the other, has been followed by the District Court of Gelderland in infringement proceedings as demonstrated by the judgment attached (Enclosure AP 1).
 - The contested decision does not take into account that Article 7(1)(e)(ii) of Regulation No 207/2009 cannot apply to characteristics other than the shape and that the colour combination is very specific. The statement that the colours are very basic is irrelevant in the assessment of the technical functionality.
 - It is true that in order for the shape to function as a three-dimensional puzzle, the individual cubes must be distinguishable. However, such distinction may be obtained by any colour combination or by adding words, symbols, patterns etc. to the surface of these cubes.

- In any case, the colours and their position are not purely functional. The specific colour combination is arbitrarily chosen and imaginative.
 - The primary purpose of the colour combination is to give the Rubik’s cube its typical appearance and to distinguish the goods of the EUTM proprietor from those of competitors. Counterfeiters and copycats generally imitate the distinctive colour scheme used by the EUTM proprietor for decades in order to ride on its coat tails. It is the purpose of the registration to protect its legitimate proprietary rights to the distinctive get-up of its products.
 - The protection of the contested mark does not enable the EUTM proprietor to block the market for cube-shaped three-dimensional puzzles that use a similar surface decoration. The case-law which has found the existence of alternative shapes to be irrelevant in the assessment of Article 7(1)(e)(ii) of Regulation No 207/2009 is therefore not pertinent. Alternative colour shades cannot be considered as alternative shapes.
 - The specific colour combination of the Rubik’s cube enjoys copyright protection, as recognized by the Tribunale di Napoli (Enclosure AP 2) and the Gerechtshof Arnhem-Leeuwarden (Enclosure AP 3). While the test under copyright and trade mark law is different, the fact that the get-up of a product enjoys copyright confirms that it is a creative expression which was not purely dictated by the technical function of the product.
 - With respect to *jigsaw puzzles*, Article 7(1)(e)(ii) of Regulation No 207/2009 cannot apply. The contested decision did not define the alleged technical function with regard to *jigsaw puzzles*. There is no indication, let alone evidence, of any technical result to be performed by the shape at issue for anything that could be called a jigsaw puzzle.
- 28 Together with its statement of grounds, the EUTM proprietor submits the following additional evidence:
- Enclosure AP 1: Judgment of the District Court of Gelderland dated 27 March 2019;
 - Enclosure AP 2: Order of the Tribunale di Napoli dated 16 June 2022;
 - Enclosure AP 3: Judgment of the Gerechtshof Arnhem-Leeuwarden dated 13 July 2021 (already submitted as Exhibit 15).
- 29 By communication of 1 August 2022, the Registry of the Boards of Appeal forwarded the statement of grounds of appeal to the cancellation applicant.
- 30 On 30 September 2022, the cancellation applicant filed a reasoned request for an extension of the time limit for filing a reply until 1 December 2022.
- 31 Upon invitation by the Registry, the EUTM proprietor filed observations and asked the Board to reject the request because any delay in the appeal proceedings would also affect the infringements proceedings pending before a German court that had been suspended in view of the present proceedings.
- 32 By communication of 4 October 2022, parties were informed that the request for extension had been granted.
- 33 Together with its response received on 1 February 2023, the cancellation applicant requested continuation of proceedings pursuant to Article 105 EUTMR and paid the requisite fee. It asks in essence that the Board reject the appeal and order the EUTM proprietor to bear the costs of the proceedings.
- 34 On 9 February 2023, continuation of proceedings was granted.

- 35 Its arguments may be summarized as follows:
- There exists no such thing as a ‘hybrid shape’ within the meaning of Article 7(1)(e)(ii) of Regulation No 207/2009.
 - The colours of the contested mark show a technical characteristic as confirmed by Mr Rubik himself in his statement filed as Attachment 22.
 - According to the opinion issued by the Advocate General in the proceedings C-30/15 P, it is the purpose of Article 7(1)(e)(ii) of Regulation No 207/2009 to prevent a monopoly on technical solutions or functional characteristics of a product which a user is likely to seek in products of competitors and ensures that undertakings may not use trade mark law in order to perpetuate, indefinitely, exclusive rights relating to technical solutions. He also noted that the purpose of the system of trade mark protection differs from that of the protection of other intellectual property rights which serve to promote innovation and creativity and that this difference explains why trade mark protection is indefinite, whereas the protection conferred by other intellectual property rights is limited in time.
 - The EUTM proprietor’s claim that the contested mark serves ‘to protect its legitimate proprietary rights to the specific and distinctive get-up of the products’ is contradicted by its widely known enforcement activities directed against all types of rotating cube-shaped games.
 - The claim that national courts have confirmed ‘the specific colour combination’ to enjoy copyright protection is contradicted by the judgments of German courts attached which found the coloured Rubik’s cube to be a teaching aid for students in order to promote the understanding of spatial movements which was not to be eligible for copyright protection.
- 36 In support of the response, the cancellation applicant added the following documents:
- Attachment 25a-b: Judgment of the High Court of Frankfurt dated 22 December 2021 with English translation;
 - Attachment 26a-b: Undated article titled ‘Kein Urheberrecht am Rubik’s Cube’ with English translation;
 - Attachment 27a-b: Judgment issued by the High Court of Frankenthal (Pfalz) dated 29 June 2021 with English translation;
 - Attachment 28a-b: Preliminary opinion issued by the Pfälzisches Oberlandesgericht Zweibrücken with English translation.
- 37 The EUTM proprietor requested to file a rejoinder or to hold oral proceedings in view of the importance and legal complexity of the appeal and the significant public interest.
- 38 On 17 April 2023, the request to supplement the statement of grounds of appeal was rejected on the grounds that a mere disagreement between the parties on the assessment of Article 7(1)(e)(ii) of Regulation No 207/2009 did not require further submissions on the part of the EUTM proprietor.

Reasons

- 39 The appeal is admissible but unfounded. The Cancellation Division correctly held that the contested mark has been registered contrary to Article 7(1)(e)(ii) of Regulation No 207/2009.

Applicable law

- 40 With regard to the substantive law, the relevant provisions are Article 7(1)(e)(ii) and Article 51(1)(a) of Regulation No 40/94 since the application for registration of the contested mark was made on 6 February 2007. In the case of applications for a declaration of invalidity, the date on which the application for registration of such marks was made is determinative for the purposes of identifying the applicable substantive law (23/04/2020, C-736/18 P, *GUGLER (fig.) / GUGLER FRANCE*, EU:C:2020:308, § 3).
- 41 The cancellation application was filed on 25 January 2013 and therefore based on Article 7(1)(e)(ii) in conjunction with Article 52(1)(a) of Regulation No 207/2009, which entered into force on 13 April 2009. Since Article 7(1)(e)(ii) and Article 51(1)(a) of Regulation No 40/94 are identical in wording to Article 7(1)(e)(ii) and Article 52(1)(a) of Regulation No 207/2009, the Board will refer to the latter regulation throughout the decision unless indicated otherwise.
- 42 The Board will start the examination of the cancellation application with Article 7(1)(e)(ii) of Regulation No 207/2009, as did the Cancellation Division.

Article 52(1)(a) in conjunction with Article 7(1)(e)(ii) of Regulation No 207/2009

- 43 Article 7(1)(e)(ii) of Regulation No 207/2009 excludes from registration as a European Union trade mark signs which consist exclusively of the shape of goods which is necessary to obtain a technical result. Pursuant to Article 52(1)(a) of Regulation No 207/2009, a European Union trade mark which has been registered in breach of this provision shall be declared invalid upon application to the Office.
- 44 The public interest underlying Article 7(1)(e)(ii) of Regulation No 207/2009 is to prevent trade mark law granting an undertaking a monopoly on technical solutions or functional characteristics of a product. The rules laid down by the legislature reflect the balancing of two considerations, both of which are likely to help establish a healthy and fair system of competition (10/11/2016, C-30/15 P, *CUBES (3D)*, EU:C:2016:849, §§ 39, 53; 14/09/2010, C-48/09 P, *Lego brick*, EU:C:2010:516, §§ 43-44; 24/10/2019, T-601/17, *CUBES (3D)*, EU:T:2019:765, § 43).
- 45 First, the provision ensures that undertakings may not use trade mark law in order to perpetuate, indefinitely, exclusive rights relating to technical solutions. Second, by restricting the ground for refusal set out in Article 7(1)(e)(ii) of Regulation No 207/2009 to signs which consist ‘exclusively’ of the shape of goods which is ‘necessary’ to obtain a technical result, the legislature duly took into account that any shape of goods is, to a certain extent, functional and that it would therefore be inappropriate to refuse to register a shape of goods as a trade mark solely on the ground that it has functional characteristics. By the terms ‘exclusively’ and ‘necessary’, that provision ensures that solely shapes of goods which only incorporate a technical solution, and whose registration as a trade mark would therefore actually impede the use of that technical solution by other undertakings, are not to be registered (14/09/2010, C-48/09 P, *Lego brick*, EU:C:2010:516, §§ 45-48; 24/10/2019, T-601/17, *CUBES (3D)*, EU:T:2019:765, §§ 44-45).
- 46 The presence of one or more minor arbitrary elements in a three-dimensional sign, all of whose essential characteristics are dictated by the technical solution to which that sign gives effect, does not alter the conclusion that the sign consists exclusively of the shape of goods which is necessary to obtain a technical result within the meaning of Article 7(1)(e)(ii) of Regulation No 207/2009. Conversely, this provision cannot apply where a sign incorporates a major non-functional element, such as a decorative or

imaginative element which plays an important role in the shape (14/09/2010, C-48/09 P, Lego brick, EU:C:2010:516, §§ 51, 52).

- 47 The existence of alternative shapes capable of achieving the same technical result does not in itself preclude an application from being rejected pursuant to Article 7(1)(e)(ii) of Regulation No 207/2009 (14/09/2010, C-48/09 P, Lego brick, EU:C:2010:516, §§ 53-58; 24/10/2019, T-601/17, CUBES (3D), EU:T:2019:765, § 46).
- 48 The application of Article 7(1)(e)(ii) of Regulation No 207/2009 requires that the essential characteristics of the three-dimensional sign at issue be properly identified by the authority deciding on the application for registration of the sign as a trade mark. The expression ‘essential characteristics’ must be understood as referring to the most important elements of the sign (10/11/2016, C-30/15 P, CUBES (3S), EU:C:2016:849, § 40; 14/09/2010, C-48/09 P, Lego brick, EU:C:2010:516, §§ 51, 52, 68-69; 24/10/2019, T-601/17, CUBES (3D), EU:T:2019:765, § 47).
- 49 In order to analyse the functionality of a sign for the purposes of Article 7(1)(e)(ii) of Regulation No 207/2009, the essential characteristics of a shape must be assessed in the light of the technical function of the actual goods concerned but also taken into account the documents relating to previous patents that describe the functional elements of the shape concerned (10/11/2016, C-30/15 P, CUBES (3D), EU:C:2016:849, § 46; 14/09/2010, C-48/09 P, Lego brick, EU:C:2010:516, § 72; 24/10/2019, T-601/17, CUBES (3D), EU:T:2019:765, §§ 51-52).
- 50 In invalidity proceedings, since a registered trade mark is presumed to be valid, it is for the cancellation applicant to present the facts, evidence and arguments which call the validity of that trade mark into question (13/09/2013, T-320/10, Castel, EU:T:2013:424, §§ 27-29).

The essential characteristics of the sign

- 51 It is common ground between the parties that the mark corresponds to the shape of a three-dimensional puzzle invented by Mr Rubik and successfully marketed since the 1980s as Rubik’s cube.
- 52 It is also common ground between the parties that the representation of the mark shows the following essential characteristics:
- a cube shape;
 - a black grid on each side of the cube formed by squares arranged in rows of 3x3;
 - six different colours of the squares on each side of the cube respectively, namely red, green, blue, orange, yellow and white.

The technical function of the Rubik’s cube

- 53 In its decision R 452/2017-1 of 19 June 2017, the Board of Appeal described the intended technical result of the three-dimensional puzzles at issue as ‘*that of a game which consists of completing a cube-shaped three-dimensional colour puzzle by generating six differently coloured faces. This purpose is achieved by axially rotating, vertically and horizontally, rows of smaller cubes of different colours until the nine squares of each face of the cube show the same colour*’ (§ 32 of the decision).
- 54 This description of the intended technical result has been confirmed by the General Court (24/10/2019, T-601/17, CUBES (3D), EU:T:2019:765, §§ 80-83).

- 55 With regard to the essential characteristic of the grid structure, consisting of black lines which intersect, horizontally and vertically, on each of the faces of the cube, dividing each of them into nine small cubes of equal size divided into rows of 3x3, the Board found it to be necessary to obtain the intended technical result. It observed that the black lines represent a physical separation between the different small cubes, allowing a player to rotate each row of small cubes independently of each other in order to gather those small cubes, in the desired colour scheme, on the cube's six faces. Therefore, the black lines and the squares which they separated had to be assessed in combination. The Board considered this physical separation to be necessary to rotate, vertically and horizontally, the different rows of small cubes by means of a mechanism located in the centre of the cube (19/06/2017, R 452/2017-1, §§ 40-42).
- 56 The General Court confirmed the Board's findings, It observed in addition that the technical functionality of the black lines, which could not be assessed separately from the individual small cubes that they outline, was corroborated by the following image of the Rubik's cube reproduced in the decision of the Board (24/10/2019, T-601/17, CUBES (3D), EU:T:2019:765, § 87; 19/06/2017, R 452/2017-1, § 36):



- 57 In the proceedings at hand, both parties submitted the Wikipedia entry for the Rubik's cube (see Attachment 16 and Exhibit 1), which includes the following image:



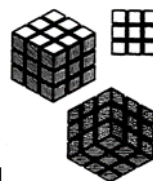
- 58 It is clear from these images, and moreover common ground between the parties, that the contested mark refers to a product which, apart from the colours, is not different from that assessed by the Board in its decision R 452/2017-1. Accordingly, the findings of the Board with regard to the technical functionality of the grid structure must also apply in the case at hand.

- 59 Likewise, with respect to cube shape, the General Court confirmed the findings of the Board that it is necessary to obtain the intended technical result. Since the three-dimensional puzzle is made up of small cubes arranged in rows of 3x3, which must be rotated vertically and horizontally in order to solve the puzzle by giving each face a different colour, the shape of the product as a whole is necessarily that of a cube (24/10/2019, T-601/17, CUBES (3D), EU:T:2019:765, § 89; 19/06/2017, R 452/2017-1, § 43). Given that the cube shape is inseparable from the grid structure, these findings equally apply to the contested mark.
- 60 The only questions that need to be assessed in the present proceedings are therefore (i) whether the colours of the cube's surface are necessary to obtain a technical result and, if this is to be confirmed (ii) whether the findings that all the essential characteristics of the contested mark are necessary to obtain the technical result of a three-dimensional puzzle apply to all the goods registered.

The technical function of the colours

- 61 With respect to the colours of the squares on each side of the cube, the EUTM proprietor explicitly confirms that they constitute an essential characteristic of the contested mark. But it claims that they cannot be considered to be a shape within the meaning of Article 7(1)(e)(ii) of Regulation No 207/2009 and that they are not necessary to obtain a technical result. Both arguments are to be rejected.
- 62 The provision of Article 7(1)(e)(ii) of Regulation No 207/2009 seeks to prevent trade mark law from granting an undertaking a monopoly on technical solutions or functional characteristics of a product. A correct application of that provision requires that the essential characteristics of the three-dimensional shape are properly identified and that they are assessed in the light of the technical function of the actual goods concerned (10/11/2016, C-30/15 P, CUBES (3D), EU:C:2016:849, §§ 39-40, 46).
- 63 It is clear from the evidence and not contested by the EUTM proprietor that the shape of the contested mark corresponds to a product which is marketed in colour as, for instance, confirmed by the image of the Wikipedia entry on which both parties rely (s. para. 57). Accordingly, the colours form an integral part of the shape and cannot be excluded for the sole reason that a colour *per se* does not have a 'shape'. What must be demonstrated under Article 7(1)(e)(ii) of Regulation No 207/2009 is that the essential characteristics, considered in their entirety, are necessary to obtain a technical result. It is not required that each of these characteristics on their own should be able to obtain this result. If the argument of the EUTM proprietor were correct, the addition of a colour, whether essential or merely decorative, to a functional element of a shape mark would suffice to prevent the sign from falling foul of Article 7(1)(e)(ii) of Regulation No 207/2009 for the sole reason that it could not be considered to consist 'exclusively' of a shape. The application of the provision would be effectively limited to trade marks registered in black and white and would no longer ensure the underlying public interest stated above, namely to prevent trade mark law from granting a monopoly on technical solutions or functional characteristics of a product.
- 64 The reference to the Louboutin and the Textilis judgments are of no avail. From the outset, these judgments do not concern shape marks but position marks, i.e. trade marks consisting of the specific way in which a sign is placed or affixed on the goods applied for (cf. Article 3(3)(d) EUTMIR).
- 65 In Louboutin, the Court of Justice held the following (12/06/2018, C-163/16, Louboutin and Christian Louboutin, EU:C:2018:423, §§ 22-24):

- It does not follow from Directive 2008/95, the case-law of the Court, or the usual meaning of that concept, that a colour *per se*, without an outline, may constitute a ‘shape’.
 - Nevertheless, the question arises as to whether the fact that a particular colour is applied to a specific part of the product concerned results in the sign at issue consisting of a shape within the meaning of Article 3(1)(e)(iii) of Directive 2008/95.
 - In that regard, it must be noted that, while it is true that the shape of the product or of a part of the product plays a role in creating an outline for the colour, it cannot, however, be held that a sign consists of that shape in the case where the registration of the mark did not seek to protect that shape but sought solely to protect the application of a colour to a specific part of that product.
- 66 It is clear from these findings that the Court did not address the question of whether or not Article 7(1)(e)(ii) of Regulation No 207/2009 applies to shape marks registered in colour.
- 67 In *Textilis*, the Court of Justice stated the following (14/03/2019, C-21/18, *Textilis*, EU:C:2019:199, §§ 40-42):
- Although it is true that, in the main proceedings, the sign under consideration represents shapes which are formed by the external outline of drawings representing, in a stylised manner, parts of geographical maps, the fact remains that, apart from those shapes, that sign contains decorative elements which are situated both inside and outside those outlines.
 - Furthermore, that sign highlights words, in particular the word *Manhattan*.
 - In any event, it cannot be held that a sign consisting of two-dimensional decorative motifs is indissociable from the shape of the goods where that sign is affixed to goods, such as fabric or paper, the form of which differs from those decorative motifs.
- 68 Again, the Court did not assess a coloured shape but a coloured two-dimensional figurative mark.
- 69 Likewise, the District Court of Gelderland (Enclosure AP 1) merely observed that the provision of the Benelux trade mark law equivalent to Article 7(1)(e)(ii) of Regulation No 207/2009 could not support the counterclaim raised by the defendant because the trade marks invoked by the plaintiff ‘do not seek to protect the shape but only the application of the pattern in question to a specific place of the goods’ (para. 4.19 of the judgment).
- 70 To sum up, none of the judgments relied upon by the EUTM proprietor supports the claim that, in the assessment of Article 7(1)(e)(ii) of Regulation No 207/2009, a distinction should be made between the shape and its colour. In the case at hand, the contested mark is not a colour *per se* and not a two-dimensional motif to be applied to the product at issue (a three-dimensional puzzle) but consists of the coloured shape of this product itself. The findings of these judgments therefore cannot apply to the case at hand.
- 71 As for the technical function of the colours, the Board, in its decision R 452/2017-1

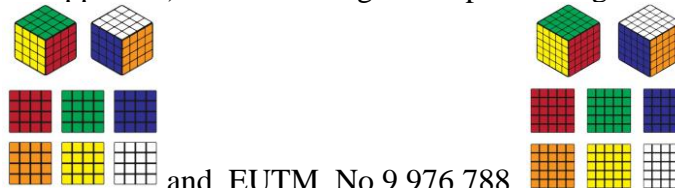


regarding the validity of EUTM No 162 784 , reasoned that the different hatching (vertical lines, diagonal lines, dots, etc.) of the squares on each side of the cube suggest different colours. Consequently, it considered the different colours on the six faces

of the cube to constitute the third essential characteristic of the sign. In view of the intended technical result, namely to rotate, horizontally and vertically, rows of cubes until each of the faces of the puzzle shows nine squares of the same colour, it found the colours to be necessary to obtain this result. The cube would not function as a puzzle, if all of its six faces had the same colour (19/06/2017, R 452/2017-1, §§ 22, 44).

- 72 In this respect, the General Court found the Board to have erred when it considered the colours to constitute an essential characteristic of the mark because its graphic representation did not show any colours. A reasonably discerning observer could not be expected to conclude that the different hatching suggested different colours. The EUTM proprietor had not indicated any colours in the application. In response to a question put by the General Court, the parties had moreover agreed that the differences in colour did not constitute an essential characteristic of the contested mark (24/10/2019, T-601/17, CUBES (3D), EU:T:2019:765, §§ 65-70).
- 73 However, while the Board was criticised for having taken into account the colours although the graphic representation of the contested mark did not make reference to any colour, the General Court confirmed that the Board had been entitled to take the differences in colour on the six faces of the cube into account as a well-known fact in the assessment of the technical functionality of the other two characteristics, namely the grid structure and the cube shape. It did not pronounce itself on the question of whether or not the colours on the six sides of the cube were necessary to obtain a technical result (24/10/2019, T-601/17, CUBES (3D), EU:T:2019:765, § 99).
- 74 Accordingly, the General Court cannot be said to have held that the colours of the product at issue were not necessary to obtain a technical result. On the contrary, in accepting that the grid structure, the cube shape and the different colours are interrelated, the General Court implicitly confirmed the findings that the colours of the Rubik's cube are necessary to obtain a technical result.
- 75 The EUTM proprietor's claim that the specific colour combination of red, green, blue, orange, yellow and white is distinctive, arbitrary and enjoys moreover copyright protection cannot call these findings into question.
- 76 From the outset, the argument that the colour combination bestows distinctiveness on the Rubik's cube successfully marketed by the EUTM proprietor must be rejected. Pursuant to Article 52(2) of Regulation No 207/2009, it is only where a trade mark has been registered in breach of Article 7(1)(b), (c) or (d) that it may not be declared invalid if it has acquired distinctiveness after registration. It follows from this provision that, even if a shape of goods which is necessary to obtain a technical result has become distinctive in consequence of the use which has been made of it, it must be declared invalid (see 14/09/2010, C-48/09 P, Lego brick, EU:C:2010:516, § 72 for the corresponding provision of Article 7(3) of Regulation No 207/2009).
- 77 The claim that the colours are not the only solution to obtain the technical result of distinguishing the different cubes rests on the erroneous assumption that the colours are to be distinguished from the shape and must fail for the reasons set out above (paras. 63-70). According to consistent case-law, the existence of alternative shapes capable of achieving the same technical result does not in itself preclude an application from falling foul of Article 7(1)(e)(ii) of Regulation No 207/2009 (s. para. 47). The fact that the same technical result of the Rubik's cube could be obtained by adding patterns, symbols or letters to the surface of the cubes therefore is irrelevant in the assessment of the functional character of the colours at issue.

- 78 For the same reason, the argument that the specific choice of the specific colours was made arbitrarily cannot succeed either. As explained by Mr Rubik himself in his written statement of 26 February 2015, submitted by the cancellation applicant as Attachment 22, he originally placed different stickers on the surface of the cubes so that the movement of each cube when rotated could be distinguished (para. 16 of the statement). It follows that any colour combination of six colours which are sufficiently distinct from each other would be suitable to obtain the desired technical result. The colours combination of red, green, blue, orange, yellow and white meets this criterion and is therefore necessary to obtain the technical result of the Rubik's cube.
- 79 The copyright protection allegedly enjoyed by this colour combination cannot justify a different result.
- 80 With regard to the order of the Tribunale di Napoli dated 16 June 2022 (Enclosure AP 2), it is true that two of the earlier trade marks invoked by Spin Master Toys UK Limited (the here cancellation applicant) in the infringement proceedings at issue, namely EUTM



No 9 976 135 and EUTM No 9 976 788, both registered as three-dimensional shapes for goods and services in Classes 28, 35 and 41, are comparable to the contested mark.

- 81 However, the Italian court observed that, in the absence of any counterclaim raised by the defendants, the earlier EUTMs invoked enjoyed a presumption of validity. Consequently, the court did not examine the validity of these marks within the meaning of Article 7(1)(e)(ii) EUTMR.
- 82 As to the copyright invoked by Spin Master Toys UK Limited, the Italian court held that, under Italian copyright law, copyright protection was granted to 'works of industrial design which possessed creative character and artistic value per se' and that, because of the requirement of artistic value, copyright protection could only be granted to 'high-end' industrial products, i.e. those recognised as such by the public and by art critics. The burden of proof to demonstrate artistic value was on the plaintiff and, in this respect, Spin Master Toys UK Limited had inferred that 'the product in question exhibits a distinct aptitude to attract full recognition from the community as a timeless and globally appreciated product of industrial design'. This demonstrated that the Rubik's cube had become 'a true icon of industrial design, sought after by consumers regardless of its function as a puzzle'.
- 83 It is clear from these findings that the Italian court did not assess the validity of the earlier EUTMs invoked and that the findings of copyright protection were made in relation to the design of the Rubik's cube and not with regard to these trade marks.
- 84 Likewise, the Gerechtshof Arnhem-Leeuwarden (Enclosure AP 3) assessed a claim for infringement based on copyright for 'the cube designed by Rubik' without any reference to any shape mark registered in favour of the cancellation applicant. Therefore, the finding that the width, colour and thickness of the grid together with the colours red, green, yellow, blue, white and orange give the cube its original character within the meaning of Dutch copyright law cannot have any bearing on the assessment of the validity of the contested mark pursuant to Article 7(1)(e)(ii) of Regulation No 207/2009. Apart from the fact that these findings are not supported by the case-law of the European Union courts, which

considered the grid to be necessary to obtain a functional result, this judgment cannot be interpreted as having recognised any copyright protection of the coloured shape for which the contested mark is protected.

- 85 In the same vein, the reliance on the Brompton judgment (11/06/2020, C-833/18) is without merit because it deals with the relationship between Article 8(1) of the Community Design Regulation ('CDR') and copyright protection pursuant to the Copyright and Information Society Directive 2001/29.
- 86 The Board underlines in this respect that the purposes of design law, which protects the appearance of a product, and of copyright, which protects original works of authorship, are entirely different from that of trade mark law, which guarantees the commercial origin of the goods for which it is used. The reason why trade mark protection does not lapse over a period of time is that the trade mark does not protect the product as such but only the indication of its commercial source. Accordingly, the mere fact, even if proven to be true, that a shape mark or part of its elements may enjoy design or copyright protection for a limited period of time cannot justify the finding that its registration is not in breach of Article 7(1)(e)(ii) of Regulation No 207/2009.
- 87 To conclude, the third essential characteristic, namely the six different colours of the squares on each side of the cube, are necessary to obtain a technical result.

The goods registered

- 88 The contested decision held that *three-dimensional puzzles*, for which all three essential characteristics of the contested mark have been found to be necessary to obtain a technical result are identical to or encompassed by the broader categories of *toys, games, playthings, three dimensional puzzles; electronic games; hand-held electronic games*. With regard to *jigsaw puzzles*, it reasoned that it could not be excluded that the three-dimensional shape consisting of cubes of different colours could serve the technical result of pressing these cubes in order to fit them together in a certain position with the same colour sequence.
- 89 The appeal only challenges this reasoning of the contested decision with regard to *jigsaw puzzles* and the Board agrees that the explanation provided by the Cancellation Division in this respect is not intelligible. However, the finding that the shape protected by the contested mark is necessary to obtain the technical result of *jigsaw puzzles* must be confirmed. According to its literal meaning, a jigsaw puzzle is a tiling puzzle that requires the assembly of often irregularly shaped interlocking and mosaicked pieces, each of which typically has a portion of a picture. When assembled, the puzzle pieces produce a complete picture.
- 90 A Rubrik's Cube may not be the first example of a jigsaw puzzle that will spring to mind, but there is nothing in the representation of the sign that would exclude the possibility of the cube to be dismantled and reassembled in order to make the perfect combination, with the grid structure to be necessary to separate the individual cubes and the colours necessary to indicate the order in which the cubes must be reassembled.
- 91 To conclude, the contested mark does not meet the requirements of Article 7(1)(e)(ii) of Regulation No 207/2009 for all the goods registered.
- 92 The Board did not find it expedient to hold oral proceedings pursuant to Article 96(1) EUTMR. It was not apparent to the Board and not reasoned by the EUTM proprietor what additional discussions or further statements relevant to the decision could have been added in oral proceedings, above and beyond the extensive written submissions of both parties.

93 The appeal is to be dismissed.

Costs

94 Pursuant to Article 85(1) of Regulation No 207/2009 and Article 109(1) EUTMR, the EUTM proprietor as the losing party shall bear the costs of the cancellation and appeal proceedings.

95 Pursuant to Article 85(6) of Regulation No 207/2009 in conjunction with Rule 94(7)(d)(iii) of Regulation No 2868/95, the fees and costs incurred by the cancellation applicant in the cancellation proceedings consist of the representation costs at the amount of EUR 450 and the cancellation fee of EUR 700 paid by the cancellation applicant. In accordance with Article 109(7) EUTMR and Article 18(1)(c)(iii) EUTMIR, the costs of the appeal proceedings to be fixed in favour of the cancellation applicant consist of the representation costs at the amount of EUR 550. The total amount to be fixed is EUR 1 700.

Order

On those grounds,

THE BOARD

hereby:

- 1. Dismisses the appeal;**
- 2. Orders the EUTM proprietor to bear the costs of the cancellation and appeal proceedings which are fixed at the amount of EUR 1 700.**

Signed

M. Bra

Signed

E. Fink

Signed

C. Bartos

Registrar:

Signed

H. Dijkema

