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**INTERIM DECISION
of the First Board of Appeal
vof 16 December 2021**

In Case R 260/2021-1

Matthias Zirnsack
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Germany

Applicant / Appellant

represented by Slopek Rechtsanwälte, Zippelhaus 6, 20457 Hamburg, Germany

APPEAL relating to European Union trade mark application No 18 288 813

THE FIRST BOARD OF APPEAL

composed of G. Humphreys (Chairperson), Ph. von Kapff (Rapporteur) and A. Kralik (Member)

Registrar: H. Dijkema

gives the following

Interim decision

Summary of the facts

- 1 By an application filed on 12 August 2020, Mr Matthias Zirnsack ('the applicant') sought to register the figurative mark



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

Class 6 – Metal clips;

Class 9 – Computer gaming software; mobile apps;

Class 28 – Board games; toys.

- 2 An objection was filed to the application. The applicant maintained its request for registration and declared that the trade mark was to be used for a game:
 - The German word 'COVIDIOTEN' [in English: 'COVIDIOTS'] refers to the protagonists of the game against whom the players compete and against whom they have to win. The winner of the game receives a challenge trophy consisting of a gold clip that is pinned to the score sheet.
 - The trade mark sign consists of the word 'COVIDIOT' and a representation in colour of three game pieces that resemble a jester's cap. This evocation is further intensified by the colours chosen for the trade mark sign.
 - This graphic component makes it clear to the reasonably circumspect observer that what is involved is an ironic allusion to 'COVIDIOTS'.
 - The word 'Idiot' may be rude on its own but, in connection with 'COVID', is not yet viewed as purely offensive or negative. It is increasingly being used and also accepted as a buzzword. No offensive or gross violation of taste is apparent.
 - Art and opinion are allowed to be ironic, even satirical, and are covered by the guaranteed fundamental rights of artistic freedom and freedom of expression.
- 3 By decision of 9 December 2020 ('the contested decision'), the examiner refused the application pursuant to Article 7(1)(f) EUTMR in conjunction with Article 7(2) EUTMR in respect of all the goods applied for. The examiner based his decision on the following grounds in particular:
 - The word combination is understood inter alia in German and English.
 - The purpose of Article 7(1)(f) EUTMR is not to identify and filter out signs whose use in trade absolutely must be prevented, but to prevent the registration of EU trade marks where the granting of a monopoly would contravene applicable law or be perceived by the relevant public as going directly against

the basic moral norms of society. The Office should therefore not actively support individuals who wish to further their business objectives by using trade marks that violate certain basic values of civilised society (06/07/2006, R 495/2005-G, SCREW YOU, § 13).

- The application of Article 7(1)(f) EUTMR is not restricted by the principle of freedom of expression (Article 10, Freedom of expression, European Convention on Human Rights (ECHR)), as refusal of a registration only means that the sign is not granted protection under trade mark law but not that use of the sign, even in business, is prohibited (09/03/2012, T-417/10, ¡Que buena ye! Hijoputa (fig.), EU:T:2012:120, § 26).

Public

- In the present case, the contested goods are aimed both at the general public, which uses them for private purposes, and at the more restricted target group of gaming industry professionals.
- Depending on the type of goods concerned, the level of attention of the relevant public will be that of average consumers, who are reasonably well informed and reasonably observant and circumspect, or it will be high, as specialists usually pay particular attention to acquisitions in the scope of their professional activity and the goods applied for are particularly important for the functioning of an undertaking.

Word element of the trade mark ‘Covidiot’

- The word ‘Covidiot’ is a combination of the terms ‘COVID’ and ‘Idiot’.
- The word is understood by both the German-speaking and English-speaking public and is now part of standard vocabulary.

Figurative element

- The jester’s cap primarily emphasises the message that what is involved here is an idiot.
- 4 The examiner demonstrated the meaning of the term ‘Covidiot’ with the following evidence in particular (retrieved on 31 August 2020):

- ‘How to tell a covidiot from a maskhole: learning the language of the pandemic’

<https://www.bbc.co.uk/programmes/articles/4G0DhbmMBPN3nTIGkDLXGgC/how-to-tell-a-covidiot-from-a-maskhole-learning-the-language-of-the-pandemic>

an online article analysing the evolution of language during the pandemic. One of the chapters refers to new words that have arisen from plays on words.

New words for new times

One of the best things about the British is our sense of humour and our ability to make light of the most dire of situations. We take a look at some of our favourite plays on words during Covid-19 ...



Blursday: when all the days blur into one another and you're not sure if it's Sunday or Thursday; **Quarantinini:** what started off as a concoction of vitamin D, orange juice and vodka for an immune-building drink, is now just any cocktail you drink during lockdown; **Loxit:** the exiting from lockdown and its rules; **Lockstalgia** (Times): we may look back fondly upon the time of lockdown and save up stories to tell our grandchildren; **Covidiot:** someone behaving irresponsibly or flouting government instructions in the face of the virus; **Rona:** American rapper Cardi B coined this phrase in a video that quickly went viral online; **Morona:** a person behaving like an imbecile directly because of the outbreak; **Coronalusional:** suffering from disordered thinking as a result of, or during, the COVID-19 crisis; **Doomscrolling:** scrolling through social media and seeing a continuous stream of doom and gloom; **Zumped:** 'dumped' by a partner via video link [Zoom] or online; **Ronavation:** renovation or refurbishment during lockdown; an Instagram hashtag; **Quaran-stream:** binge-watching several TV series and/or movies while in lockdown; **Spendemic:** the increase in online shopping while confined during the coronavirus; **Maskhole:** someone refusing to wear a mask despite notices being in place; **Quaran-stream** is the binge-watching of several TV series and/or movies while in lockdown ...

- 'People who do not behave correctly in the context of the coronavirus'

at <https://www.netzwelt.de/abkuezung/177332-covidiot-bedeutung-verwendung.html>

This is what 'Covidiot' means: People who do not behave correctly in the context of the coronavirus. The coronavirus keeps the world in suspense and, as the virus spreads, both governments and people are reacting differently when dealing with the virus. Those people in particular who behave irresponsibly and, for example, continue to celebrate in large groups are described as 'covidiot'. In March 2020, the expression 'covidiot' was coined as a result of the behaviour of some people who ignore the public warnings and behave irresponsibly. The term 'covidiot' also refers to those people who bought items such as toilet paper in bulk, meaning that the supermarkets were no longer able to obtain sufficient supplies, resulting in weeks of empty shelves and some people no longer getting toilet paper. People who do not cut off their social contacts and who continue to meet and even celebrate in large groups can also be described as 'covidiot', as they put others' lives at risk by their actions and, despite all the media coverage, continue to behave as 'idiots'.

This is how 'Covidiot' is used: If you have a person who displays such behaviour, does not think of others and starts panic buying, or does not keep at the stipulated distance in public places, you can call them a 'covidiot'. You must of course be conscious of the fact that this expression, like 'idiot', is not particularly flattering. Therefore, you should be circumspect when using the expression and make sure that no-one gets triggered by it.

Examples of use of 'Covidiot':

Person A: 'I've just treated myself to five packs of toilet paper; you never know when there will be any again.' Person B: 'You're such a covidiot! Now there is none left for anyone else!'

Person A: 'I don't care what the state says, I'm flying to Italy now!' Person B: 'You covidiot, just stay at home, quarantine and chill!'

Covidiot: A term from the Urban Dictionary

- https://praxistipps.chip.de/covidiot-das-bedeutet-der-begriff_118602
 ‘The coronavirus causes fear and concern throughout the world. It is recommended to stay at home and avoid crowds in order to slow down the outbreak. In many countries, there is even a curfew. However, there are still people who do not comply and, despite the warnings, **are not aware of the seriousness of the situation** and do not appreciate it. These people put the health of others at risk and thus show **disrespect** for their fellow human beings. Many people also show their disrespect by shopping excessively. They are afraid that there will soon be no food left, so they **panic buy**. They buy much more than they need and **hoard it**, for example toilet paper and food, which means that there is insufficient for other people. The *Urban Dictionary* has coined a term for these people: ‘**covidiot**’. It is made up of ‘COVID-19’ and ‘idiot’. The term therefore describes those people who, in this crisis situation, think only of themselves and not of the wellbeing of other people.’
- ‘Risk to reputation – on the risk of being branded a covidiot’, Rainer Schlötterer, 26 May 2020 on RiskNet, The Risk Management Network, at <https://www.risknet.de/themen/risknews/vom-risiko-zum-covidiot-abgestempelt-zu-werden/>.



[abgestempelt-zu-werden/](https://www.risknet.de/themen/risknews/vom-risiko-zum-covidiot-abgestempelt-zu-werden/).

‘Covidiot was originally used to describe people who do not comply with the measures imposed by governments, such as keeping a distance or hoarding toilet paper. However, the meaning has since expanded. It is now also used to discredit people and even scientists who do not believe that all the measures that most governments have implemented, such as social lockdowns or mask mandates, are expedient, proportionate or even necessary. The term is now used to discredit such other opinions and people who hold these views, and to portray them as ‘sick’ and ‘idiotic’. This rules out any discussion, scientific and interdisciplinary discourse and possibly a compromise solution, and no debate takes place.’

Breach of accepted principles of morality

- Taken in its entirety, the trade mark applied for therefore constitutes a breach of the accepted principles of morality pursuant to Article 7(1)(f) EUTMR and Article 7(2) EUTMR.
- The trade mark must be assessed by reference to the norms and values of ordinary citizens who fall between both extremes (the small minority of exceptionally puritanical citizens and the small minority at the other end of the spectrum, who find even gross obscenity acceptable) (06/07/2006, R 495/2005-G, SCREW YOU, § 21).
- The meaning of the trade mark applied for is clearly and unambiguously conveyed to reasonable consumers with an average sensitivity and tolerance threshold. The term is an insult that is likely to offend the sense of decency of those who think fairly and justly, as it discredits, inter alia, other people who do not think that all the measures that most governments have implemented,

such as social lockdowns or mask mandates, are expedient, proportionate or even necessary.

- In addition, the goods in Classes 6, 9 and 28 labelled with the trade mark may be used to label other people with the term ‘Covidiot’ in a derogatory manner, for example by attaching metal clips bearing the term to their clothing or their home (Class 6), or by using the games in Classes 9 and 28 to teach children or young people, for example, in a playful way, the criteria to defame other people as covidiot.
 - There can therefore be no liberalisation of the public view in this case. Nor is any purely ironic allusion to ‘COVIDIOTS’ apparent. Artistic freedom and freedom of expression are not restricted, as refusing registration of the sign, while not granting it any protection under trade mark law, does not prohibit its use, even in the course of business.
 - The figurative elements are not capable of weakening, let alone refuting, the impression the trade mark makes, as the jester’s cap primarily emphasises the message that what is involved here is an idiot.
 - With regard to prior registration No 3 888 344 ‘SCREW YOU’, the Office points out that, according to established case-law, the decisions to be made concerning the registration of a sign as a European Union trade mark are adopted in the exercise of circumscribed powers and are not a matter of discretion. The trade mark was not identical, and Office practice may have changed since that registration.
- 5 The applicant filed a notice of appeal on 8 February 2021 and requested that the contested decision be annulled. The grounds of appeal were received by the Office on 9 April 2021.

Grounds of appeal

- 6 The applicant’s arguments in the grounds of appeal may be summarised as follows:
- The applicant expressly does not share the examiner’s assessment. The concept of accepted principles of morality refers to the fundamental values and standards of a society at a given moment in time. Values and norms are variable and subject to constant change, both in terms of time and place. The decision must therefore be based on the relevant time and place. According to that view, an assessment must be made of what is still morally acceptable in society (27/02/2020, C-240/18 P, Fack Ju Göhte, EU:C:2020:118, § 39). It is not enough for a sign or term to seem tasteless or inappropriate; rather, it must be contrary to the fundamental moral values and standards of a society (emphasis in original) (27/02/2020, C-240/18 P, Fack Ju Göhte, EU:C:2020:118, § 41f).
 - The term ‘Covidiot’ is already contrary to the fundamental moral values in Germany and elsewhere in the EU, where English is spoken.
 - Nor does ‘Covidiot’ refer to all those who comment critically on individual measures to combat the COVID-19 pandemic. According to the online encyclopaedia Wikipedia, in German linguistic usage, the term refers to people who consciously, and seeking publicity, deny the existence of the COVID-19

disease or the SARS-CoV-2 virus, or believe in and/or spread misinformation or conspiracy theories about the COVID-19 pandemic.

- The applicant refers to the following Wikipedia entry (retrieved on 25 October 2021, here without the evidence cited therein).

Covidiot



[Polemic](#) from opponents of measures to combat the pandemic: Comparison with the [Sportpalast speech](#) given by [Joseph Goebbels](#) in 1943 (Berlin, March 2020)

The German term *Covidiot* ([English](#) [covidiot](#)^[1] or also [covidioy](#)), [French](#) *covidiot*, [Italian](#) *covidiota* is a [neologism](#) that emerged in 2020 in the wake of the [COVID-19 pandemic](#). The [portmanteau word](#) is formed by combining the name of the disease [COVID-19](#) with the [insult](#) [idiot](#). It has been included in the English-language [Urban Dictionary](#) since March 2020 and is used in both [social media](#) and the press.

The term forms the counterpart to the term ‘[sheeple](#)’ for those who follow the health advice and state restrictions.

Meaning

The term describes in a derogatory ([pejorative](#)) manner those who consciously, and seeking publicity, deny the existence of the COVID-19 disease or the [SARS-CoV-2](#) virus, or believe in or spread [misinformation](#) or [conspiracy theories](#) about the COVID-19 pandemic. The term acquires a derogatory meaning by being used to refer to people who, in the face of a social crisis, [selfishly](#) place their personal wellbeing above that of others, for example by deliberately disregarding protective regulations, such as the wearing of [cloth face masks](#) or [surgical masks](#), and [other rules](#).

It refers to people who move in possibly overlapping [filter bubbles](#), and are therefore subject to an [echo chamber effect](#), which may lead to a narrowing of their world view and [confirmation bias](#) or other [cognitive biases](#).^{[8][9]} Similar views are heard and read again and again, for example that the novel coronavirus does not even exist or that covering the nose and mouth is an unnecessary and even dangerous measure. Staying inside the filter bubble leads to continuous confirmation of demonstrably false claims or ‘half-truths’, going as far as holding the view that untruths are deliberately spread via the established mass media, the [Robert Koch Institute](#), orthodox medicine, etc. (the ‘[lying press](#)’), and that the truth can only be found on certain ‘uncensored’ channels outside the establishment, such as [YouTube](#) or [Telegram](#).

Reception

Since the beginning of the [pandemic](#) in Germany, use of the [insult](#) can be proved, for example in March 2020. It is also used, for example, on [Twitter](#), as a [hashtag](#): #Covidiots.

The criticism was made on Bayerischer Rundfunk [Bavarian Radio] that the term summarised a complex issue in a ‘nonsensical’ and ‘condescending’ way. [Pia Lamberty](#) is also of the opinion that it is not helpful to ‘label’ conspiracy theorists as covidiot. As belief in conspiracies was ‘not measured in a binary way’, but there was a scale between ‘strong conspiracy theorist or not a conspiracy theorist at all’, the ideologies of those referred to as such had to be considered.

Legal aspects

The SPD Chairperson, [Saskia Esken](#), used #Covidioten as a hashtag to refer to the participants in a demonstration in Berlin at the beginning of August 2020, during which the demonstrators violated the German [Protection against Infection Act](#) ([legislative text](#)). Subsequent charges of

defamation were dropped by the Berlin Public Prosecutor's Office without any investigations being initiated. The Public Prosecutor's Office took the view that the 'pointed term' Covidiot was, 'as an expression of opinion in the political dispute in the coronavirus pandemic, not punishable by law and was covered by freedom of expression, which was protected by the constitution (Article 5(1) of the Basic Law (Germany's Constitution)).' However, it pointed out that Esken had aimed it at those participants who 'had breached the sanitary and social distancing rules laid down on the basis of the Protection against Infection Act and the ordinances issued in this respect'.

- In English, the term means

'someone who behaves in a stupid way that risks spreading the infectious disease COVID-19' or 'someone who ignores the warnings regarding public health or safety. A person who hoards goods, denying them from their neighbours'.

- As correctly stated by the examiner, the term has now become part of standard language and is part of the political debate. 'Covidiot' therefore does not mean people who voice criticism, but people who deny the virus as such and/or reject any measure, and show no solidarity with their fellow human beings.
- It is significant that referring to the participants in a demonstration against the Federal Government's coronavirus restrictions as 'covidiot' does not constitute an insult, but rather, in the opinion of the Berlin Public Prosecutor's Office, is, as an expression of opinion in the political dispute in the coronavirus pandemic, not punishable by law and regarded as covered by freedom of expression.
- The term 'Covidiot' is also the subject of scientific research and is, literally, 'on everyone's lips'.
- In the United Kingdom, the term has been included in the *Cambridge Dictionary*.

covidiot

noun [C] • informal (also **Covidiot**)
UK /kəʊˈvɪd.i.ət/ US /kouˈvɪd.i.ət/



someone who behaves in a stupid way that risks spreading the infectious disease Covid-19:

- *Covidiot*s were still holding parties as the region recorded its highest ever death toll this week.

– More examples

- *A covidiot doesn't take COVID-19 and the risks of the virus seriously, despite what government and health officials say.*
- *It's easy for the press to rail against "covidiot*s" and ignore the government's failures.
- *A covidiot might declare it's their constitutional right to ignore social distancing guidelines and local regulations.*
- *People think it's alright to bend the rules for themselves, but everyone else is a Covidiot.*

- FAZ 11/05/2020, <https://www.faz.net/aktuell/feuilleton/medien/corona-was-die-proteste-gegen-den-virenschutz-verraten-16763103.html>



PROTEST GEGEN CORONA-MASSNAHMEN

Covidioten sind unter uns

EIN KOMMENTAR VON MICHAEL HANFELD - AKTUALISIERT AM 11.05.2020 - 08:18



Sie sind wieder da - die selbsternannten Retter von Freiheit und Demokratie. Sie gehen auf die Straße und gerieren sich als Widerständler gegen eine vermeintliche Corona-Diktatur. In Wahrheit sind die Protestler etwas ganz anderes.

- The term is also used for reporting in the German newspaper *Die Zeit*.
- A term that is used by high-ranking politicians, and even in conservative daily newspapers or liberal weeklies, does not exceed the average tolerance threshold of a reasonable person. It may seem inappropriate to some people and even to a reasonable average observer, and might therefore not be used for that reason. However, this is not enough to see it as a fundamental violation of the moral rules that exceeds the tolerance threshold.
- Nor is there anything to indicate why morals in another EU Member State should be significantly different in this respect from those in Germany, which has been used as an example here.
- Account must be taken of prior registrations such as:
 - You're An Idiot (EUTM No 1 489 107),
 - The Idiot Among Us (EUTM No 1 537 631),
 - American Idiot (EUTM No 4 148 052),
 - Air Hole Face Masks You Idiot (EUTM No 11 667 045) or
 - God's Favorite Idiot (EUTM No 18 346 297).
- In comparison with these terms, no objection can be made to the expression 'Covidiot'.
- Furthermore, use of the term is protected by freedom of expression, Article 10 of the ECHR and Article 11 of the Charter of Fundamental Rights of the European Union. In assessing whether the registration of a trade mark is contrary to accepted principles of morality, freedom of expression must also be taken into account, Article 11 of the Charter of Fundamental Rights, Article 10 ECHR (27/02/2020, C-240/18 P, Fack Ju Göhte, EU:C:2020:118, § 56). Freedom of expression is a fundamental pillar of democratic society; it is simply a constitutive element thereof. Freedom of expression is does not consist merely of its final expression in conventional media, such as

newspapers, periodicals and radio, not even when supplemented by what is known as social media, but also takes other forms. For example, the European Court of Human Rights (ECHR) found it admissible for the initials of an allegedly corrupt Austrian minister to be used for the board game ‘KHG – Korrupte haben Geld [‘The corrupt have money’] (ECHR, 23 April 2019, *Grasser v Austria*, No 37898/17). In order to assess whether a satirical argument is admissible, it is irrelevant whether a subject has a commercial purpose (ECHR, 23/04/2019, No 37 898/17, *Grasser v Austria*, § 15).

- The game for which the trade mark in question is to be registered specifically in Class 28 deals with the current debate on combating the COVID-19 pandemic. It is a contribution to a heated debate – a contribution that, through exaggeration (also taken up in a downright humorous way by the figurative elements of the trade mark), softens the term. No specific individuals are attacked. Those who are critical of individual measures to combat the COVID-19 pandemic will not feel targeted – and nor should they. It must remain possible to take a satirical look at the COVID-19 pandemic, as well as at the debate within society, including and particularly in a playful, humorous way.
 - In the social debate, the term ‘sheeple’ is the opposite of ‘covidiot’. ‘Sheeple’ is the term used, in particular by the ranks of critics of the fight against the pandemic, to describe those who support stringent measures to combat it. The trade mark ‘Schlafschaf’ [German for ‘sheeple’] is registered as European Union trade mark No 17 998 077. If there is a pair of terms, such as COVIDIOT on the one hand and SCHLAFSCHAF [sheeple] on the other, it would be odd and inherently contradictory for one to be contrary to accepted principles of morality, and the other not.
 - The refusal of the trade mark applied for, ‘COVIDIOT’, must therefore be annulled, and the application allowed to proceed to registration.
- 7 By communication of 1 October 2021, the rapporteur heard the applicant on the basis also of Article 7(1)(b) EUTMR.
- ‘Covidiot’ is a kind of trendy term for a specific temporary phenomenon such as Brexit (30/01/2019, R 958/2017-G, BREXiT, § 50) or World Cup 2006 Germany (30/06/2008, R 1470/2005-1, WORLD CUP 2006 GERMANY § 51). The relevant consumers will be familiar with the meaning of the word ‘covidiot’ – namely an event relating to a historical and political process – and will therefore perceive the trade mark, when applied to games, merely as referring to the event concerned. This perception would overshadow any possibility of the trade mark being perceived as an indication of specific industrial or commercial origin for the goods.
 - The jester’s cap merely accentuates the semantic meaning conveyed by the word element ‘COVIDIOT’.
- 8 The applicant responded to the objection by letter of 22 October 2021.
- The word element ‘Covidiot’ is already distinctive on its own (see grounds of appeal of 9 April 2021).
 - The trade mark as a whole is particularly distinctive. It is not apparent why the figurative elements should necessarily be descriptive of the goods applied for. The stylisation of the trade mark, in particular the yellow, which, by virtue of

its area, makes up a disproportionate share of the word/figurative mark, and the blue, yellow and red figures in the upper central part, leave ample scope for interpretation.

- When looking at the trade mark, it is clear that the yellow background forms a large part of the overall representation in terms of surface area. In addition, yellow is a signal colour that is particularly noticed by the public. Furthermore, another striking stylisation in the form of blue, yellow and red figures is clearly visible in the upper central part of the sign.
- The argument that these stylisations have a semantic content, conveyed by the word ‘Covidiot’ is, at best, contrived. Solely the assumption that the stylisation resembles a jester’s cap already shows that it is not entirely clear what exactly the stylisations are supposed to represent. This makes them capable of interpretation, which rather, and without further ado, speaks for the distinctive character and therefore the registrability of the application. Even if it were to be assumed that the stylisation is a jester’s cap, it is not clear to what extent jesters’ caps could be descriptive of the goods applied for (games).

Reasons

- 9 The appeal is admissible and well founded pursuant to Articles 66 and 67, and Article 68(1) EUTMR.
- 10 Pursuant to Article 37 EUTMDR, the present case is referred to the Grand Board for examination.
- 11 The Board notes that the degree of legal complexity of the case and its importance justify its examination by the Grand Board.

The meaning of the trade mark



- 12 The trade mark applied for, , is composed of the word ‘COVIDIOT’ on a rectangular yellow label with three playing pieces that tilt in different directions and are arranged like a jester’s cap.
- 13 The term ‘COVIDIOT’ is an obvious play on the words ‘COVID’ and ‘IDIOT’, in which ‘COVID’ may refer to the virus ‘COVID-19’ and ‘IDIOT’ is a colloquial derogatory term for a person.
- 14 COVID-19 is a highly contagious disease of the respiratory tract, in particular the lungs, caused by the coronavirus SARS-CoV-2 (see *Brockhaus Enzyklopädie* n.p.). Print.). The ‘19’ in the name of the disease stands for the year in which the disease was first documented in a person. ‘COVID’ is an abbreviation of the English words ‘**corona virus disease**’. This translates into German as ‘Coronavirus- Erkrankung’. Typical symptoms of the disease are fever, a dry cough and a tickly throat. In addition, the senses of taste and smell may be affected. The disease may progress in very different ways. In most cases, its course is moderate, and some people even showed no symptoms at all throughout the disease. However, around 20% of

infected people are severely affected by COVID-19. In these people, pneumonia develops first, leading to serious breathing difficulties and the need for artificial ventilation. Despite intensive medical intervention, the disease can lead to complete lung failure and ultimately also death.

- 15 The virus has spread to varying degrees throughout the world. Countries and states have been trying to tackle the virus with various strategies and measures since the beginning of 2020. Efforts have been made in many countries to mitigate the wave of the disease by severely restricting or prohibiting contact within the population. For example, daycare centres, nursery schools and schools were almost completely closed in many countries in spring 2020 and the following winter. The most widespread protective measures include the mandatory use of protective masks, for example on public transport or in shops, keeping one's distance, sanitary measures and regular ventilation. The measures adopted aim to limit the increase in the number of infected people so that sufficient medical care can be given to all persons seriously ill with COVID-19. An unchecked exponential increase in infected people would overload hospitals' intensive care units. The sanitary measures are leading to major economic losses for many businesses, and to profits for others.
- 16 There has been intensive research into vaccines against the SARS-CoV-2 virus throughout the world since the beginning of the pandemic. Vaccines produced by various manufacturers have been temporarily authorised for use since November 2020. During 2021, Member States carried out vaccinations with the four authorised vaccines. However, the level of acceptance among the population varies widely in different parts of the European Union, as well as in other regions of the world.
- 17 For various reasons, a certain percentage of people oppose the various protective measures. Their reasons include, in particular, emotional, esoteric, religious or philosophical and political ideologies and dogma.
- 18 In view of the frequent use of the word 'COVIDIOT' in the media and on social networking websites around the world, as shown by examples in the facts of the case, this term is understood as a general reference to people who behave idiotically in the context of the COVID-19 pandemic. These include coronavirus deniers and people who refuse the vaccination without any medical reason, as well as people who behave in other socially harmful ways, such as needlessly hoarding. The term describes, in a derogatory way, people who consciously, and seeking publicity, deny the existence of the COVID-19 disease and/or the SARS-CoV-2-virus, or believe in and/or spread misinformation or conspiracy theories about the COVID-19 pandemic.
- 19 For many who choose the term, it characterises in a concise but polemicising way, those persons in particular who not only endanger themselves, but also put others at risk by acting against the findings and recommendations of science.

Article 7(1)(f) EUTMR

- 20 In the Board's view, the trade mark applied for could be refused as contrary to accepted principles of morality pursuant to Article 7(1)(f) EUTMR, because the trade mark contains the word 'Covidiot', which refers to a person or group of people in a derogatory manner in connection with 'COVID'. There is also the possibility that it is contrary to accepted principles of morality if the name of the virus can be trivialised as the name for a game. Finally, in the Board's opinion, an

examination can be made as to whether the trade mark is contrary to accepted principles of morality because the applicant wishes, through freeriding, to make an undue profit from the pandemic.

- 21 Furthermore, the term could constitute a breach of public policy should it become, for example, a term that, by trivialising the actual message, incites a breach of the public pandemic measures.

Article 7(1)(b) EUTMR

- 22 The principles of decision 30/01/2019, R 958/2017-G, BREXiT, could be applicable to ‘Covidiot’ because the trade mark applied for is a kind of trendy term for a specific temporary phenomenon, such as Brexit (30/01/2019, R 958/2017-G, BREXiT, § 50) or World Cup 2006 Germany (30/06/2008, R 1470/2005-1, WORLD CUP 2006 GERMANY, § 51) and is not seen as an indication of origin for the goods applied for. The trade mark could therefore be devoid of distinctive character.

Article 7(1)(c) EUTMR

- 23 It must also be examined whether the applicant’s mere submission of how it intends to use its trade mark is sufficient to refuse the trade mark as a descriptive indication. The applicant argues that one of the characteristics of the game is to deal ironically with the behaviour of vaccine opponents through use of the term ‘Covidiot’. Accordingly, the trade mark could be refused as a descriptive indication pursuant to Article 7(1)(c) EUTMR, as it may designate the product directly and by reference to one of its essential characteristics (14/03/2011, C-369/10 P, Memory, EU:C:2011:148, § 39). Furthermore, the name of a game, such as ‘chess game’ or ‘backgammon game’, might have to be refused as a designation of the product. The fact that the applicant is the inventor of the game to which it gave this name does not in itself make the trade mark registrable (07/11/2014, T-567/12, Kaatsu, EU:T:2014:937, § 39).

The right to freedom of expression and other fundamental rights

- 24 The applicant argues that its trade mark must be registered because opinions are likely to be ironic, even satirical, and are covered by artistic freedom and freedom of expression, which are guaranteed by fundamental rights.
- 25 In principle, the Office must apply the EUTM regulations in such a way that fundamental rights and freedoms are fully respected.
- 26 This also applies to the freedom of expression enshrined in Article 11 of the Charter of Fundamental Rights of the European Union. The article reads as follows:

Article 11 – Freedom of expression and information

(1) Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers.

(2) The freedom and pluralism of the media shall be respected.

- 27 Article 10 of the European Convention on Human Rights (ECHR), which reads as follows, can also be affected:

Article 10 – Freedom of expression

(1) Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall prevent States from requiring the licensing of broadcasting, television or cinema enterprises.

(2) The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

- 28 The applicant also refers to artistic freedom. The corresponding fundamental right is as follows:

Article 13 – Artistic and scientific freedom

Art and research are free. Academic freedom is respected

- 29 Recital 21 of Regulation (EU) 2015/2424 states:

‘(21) ... Furthermore, this Regulation should be applied in a way that ensures full respect for fundamental rights and freedoms, and in particular the freedom of expression.’

- 30 Recital 21 of Regulation (EU) 2017/1001 reproduces identically the wording of Recital 21 of Regulation (EU) 2015/2424.

- 31 However, in its judgment on the trade mark ‘Fack Ju Göhte’, a humorous variation on ‘Fuck you Goethe’ for a successful German film comedy (24/01/2018, T-69/17, Fack Ju Göhte, EU:T:2018:27), the General Court had held that:

27 Thirdly, the applicant states that, in connection with the film ‘Fack Ju Göhte’, the sign applied for is a humorous reference to the students’ occasional frustration with school and for this reason uses a word combination that picks up on the language of youth.

28 In this respect, it must firstly be pointed out that the examination of a breach of public policy or accepted principles of morality must be based on the trade mark itself, that is to say on the sign in connection with the goods and services in respect of which the trade mark is to be registered (13/09/2005, T-140/02, Intertops, EU:T:2005:312, § 27).

29 Furthermore, as pointed out by the EUIPO in its written pleadings, there is, in the field of art, culture and literature, a constant concern to preserve freedom of expression which does not exist in the field of trade marks.

- 32 The judgment was annulled by the Court of Justice ([27/02/2020, C-240/18 P, Fack Ju Göhte, EU:C:2020:118](#)), with these comments being criticised in the reasons given for the decision:

56 Lastly, it should also be added that, contrary to the General Court’s finding in paragraph 29 of the judgment under appeal, that ‘there is, in the field of art, culture and literature, a constant concern to preserve freedom of expression which does not exist in the field of trade marks’, freedom of expression, enshrined in Article 11 of the Charter of Fundamental Rights of the European Union, must, as the EUIPO acknowledged at the hearing and as the Advocate General states in points 47 to 57 of his Opinion, be taken into account when applying Article 7(1)(f) of Regulation No 207/2009. Such a finding is corroborated, moreover, by recital 21 of Regulation 2015/2424, which amended Regulation 207/2009, and recital 21 of Regulation 2017/1001, both of which expressly emphasise the need to apply those regulations in such a way as to ensure full respect for fundamental rights and freedoms, in particular the freedom of expression.

- 33 The passage from the Advocate General’s opinion ‘OPINION OF ADVOCATE GENERAL BOBEK’ (02/07/2019, C-240/18 P, Fack Ju Göhte, EU:C:2019:553), to which the Court refers, reads as follows:

1. Trade mark protection and freedom of expression

45. By the fourth plea of the first ground of appeal, the appellant alleges that the balancing of interests carried out by the General Court was incorrect. As further specified at the hearing, that criticism is in principle directed at paragraph 29 of the judgment under appeal, in which the General Court observed that, in the field of trade marks, freedom of expression does not apply. At the hearing, the appellant disagreed with that statement because, in its view, the guarantees attached to freedom of expression do apply in the field of trade marks.

46. In its written response, the EUIPO stated that there has been no error in the assessment of the balancing of interests and that that exercise has already been reflected in Article 7(1)(f) of Regulation No 207/2009 by the legislature. However, when this was explicitly queried at the hearing, the EUIPO agreed that the statement made by the General Court in paragraph 29 of the judgment under appeal is incorrect.

47. Freedom of expression does indeed play a role in trade mark law.

48. First, respect for fundamental rights constitutes a condition of the lawfulness of any EU measure. The scope of application of the Charter of Fundamental Rights of the European Union ('the Charter') and the fundamental rights guaranteed therein extends to any activity or omission of the EU institutions and bodies (19¹). The same must naturally hold true in the field of trade marks for activities and omissions of EU bodies, such as the EUIPO.

49. Second, the commercial nature of a potential activity is no reason to limit or even exclude fundamental rights protection (20²). It might be recalled that the European Court of Human Rights ('ECHR') has stated that freedom of expression, guaranteed in Article 10 ECHR, applies independently of the type of message, including when a commercial advertisement is concerned (21³). It has applied freedom of expression specifically to evaluating restrictions imposed by national legislation on trade marks or other forms of advertisement (22⁴).

50. Third, the applicability of freedom of expression in the field of trade marks was explicitly confirmed in the preamble to Regulation (EU) 2015/2424 modifying Regulation No 207/2009 and is recognised today in Regulation 2017/1001 (23⁵).

51. Fourth, and on a rather subsidiary note, such an understanding of the law is also consistent with the previous case-law of the General Court (24⁶) and with the EUIPO's own decision-making practice (25⁷).

¹ In contrast to being addressed to the Member States only 'when implementing Union law' (the *functional* definition of the scope of application), Article 51(1) of the Charter makes the provisions of the Charter applicable to the institutions and bodies of the Union in any of their activities (the *institutional* definition of the scope of application).

² See also, by analogy, Opinion of Advocate General Fennelly in *Germany v Parliament and Council* (C-376/98, EU:C:2000:324, points 154 and 155).

³ ECHR, 25 August 2015, *Dor v Romania* (CE:ECHR:2015:0825DEC005515312, § 43 and the case-law cited therein).

⁴ ECHR, 24 February 1994, *Casado Coca v Spain* (CE:ECHR:1994:0224JUD001545089, § 35 and the case-law cited therein). See also the judgments of the ECHR of 25 August 2015, *Dor v Romania* (CE:ECHR:2015:0825DEC005515312, § 43 and the case-law cited therein), and of 30 January 2018, *Sekmadienis Ltd. v Lithuania* (CE:ECHR:2018:0130JUD006931714, §§ 75 to 84).

Recital 21 of Regulation 2015/2424 of the European Parliament and of the Council of 16 December 2015 amending Council Regulation No 207/2009 on the Community trade mark and Commission Regulation (EC) No 2868/95 implementing Council Regulation (EC) No 40/94 on the Community trade mark, and repealing Commission Regulation (EC) No 2869/95 on the fees payable to the Office for Harmonization in the Internal Market (Trade Marks and Designs) (OJ 2015 L 341, p. 21). The latter entered into force on 23 March 2016, that is, after the application in the present case was filed by the appellant on 21 April 2015. See also recital 21 of Regulation 2017/1001.

⁶ For example, judgment of 20 September 2011, *Couture Tech v OHIM (Representation of the Soviet coat of arms)* (T-232/10, EU:T:2011:498, paragraphs 68 to 71).

⁷ For example, decisions of the Boards of Appeal of 6 July 2006, R 495/2005- G, SCREW YOU, paragraph 15; of 28 May 2015, R 2889/2014- 4, DIE WANDERHURE, paragraph 12; of 2 September 2015, R 519/2015- 4, JEWISH MONKEYS, paragraph 16; of 14 December 2015, R 1627/2015- 4, PICA, paragraph 16; and of 28 June 2017, R 2244/2016- 2, BREXIT, paragraphs 26 to 34.

52. Thus, freedom of expression clearly applies in the field of trade mark law. That statement, however, throws up more questions than it answers. Fascinating as the issue and the discussion of it in the abstract may be (26⁸), the question remains as to what exactly that confirmation brings to the solution of the present case.

53. On the one hand, the proposition of the EUIPO that fundamental rights and the balancing of them have already been taken into account by the legislature when drafting Article 7(1)(f) of Regulation No 207/2009 is difficult to defend. There is no indication whatsoever of how exactly such a balance ought to be achieved in individual cases. To suggest that this issue has already been adequately addressed by merely inserting the concepts of public policy and accepted principles of morality into Article 7(1)(f) is, in view of the multifaceted rights and interests at stake, simply untenable (27⁹).

54. On the other hand, when questioned on this point at the hearing, the appellant also had some difficulty in explaining precisely how taking on board freedom of expression should have altered the test under Article 7(1)(f). The suggestions made by the appellant effectively boiled down to the proposition that if the EUIPO and the General Court had taken its freedom of expression into account in the process of registration, they would have allowed the contested trade mark to be registered, since the EUIPO was too strict and should have been more in favour of the freedom of expression contained in or realised by the trade mark in question.

55. That argument is closely linked to, or even overlaps with, the criticism that the appellant expressed in principle as regards ascertaining the sensitivity to public morality identified by the EUIPO, which seems, to the appellant, to be disconnected from the view taken on the expression ‘Fack Ju Göhte’ by the relevant public and by the German authorities. Freedom of expression is therefore hardly an independent yardstick in the assessment, but should, in the view of the appellant, have led the EUIPO to a different (more liberal) vision of public morality. That in turn leads the argument to the crux of the first ground of appeal, already highlighted above: what exactly do the concepts of public policy and accepted principles of morality refer to, and how shall they be ascertained?

56. In sum, although it is not a primary goal of trade mark law, freedom of expression clearly remains present therein. Seen in this light, the statement in question of the General Court in paragraph 29 of its reasoning is perhaps intended to convey a slightly different idea: not that there is no role whatsoever for freedom of expression in trade mark law, but rather that, in contrast to the fields of arts, culture, and literature, the weight to be given to freedom of expression in the area of trade mark law may be somewhat different, perhaps slightly lighter, in the overall balancing of the rights and interests present.

57. If understood according to the first (literal) meaning, the statement in paragraph 29 of the judgment under appeal is clearly incorrect. If interpreted as amounting to the second meaning just outlined, such a statement is, in my view, defensible: although freedom of expression, as well as other fundamental rights potentially at stake, must be taken into account in the overall balancing exercise, the protection of freedom of expression is not the primary goal of trade mark protection.⁷

⁸ On the link between intellectual property rights and human rights protection, see for instance recently, Geiger, C., and Izyumenko, E., ‘Intellectual property before the European Court of Human Rights’, in Geiger, C., Nard, C. A., and Seuba, X., *Intellectual Property and the Judiciary*, Edward Elgar Publishing, Cheltenham, 2018, pp. 9 to 90, especially pp. 50 to 62; Ramsey, L. P., ‘A Free Speech Right to Trademark Protection?’, *The Trademark Reporter*, Vol. 106, No 5, 2016, p. 797.

⁹ In the present case, freedom of expression has been invoked by the appellant. But naturally, freedom of expression, as well as other rights and interests that form part of the equation, is not limited to the holders (or possible holders) of the rights conferred by trade mark protection. Indeed, freedom of expression can be also invoked by those wishing to make unauthorised use of a trade mark, for reasons that they consider socially important. See, for example, Geiger, C., and Izyumenko, E. (eds.), ‘Intellectual property before the European Court of Human Rights’, in Geiger, C., Nard, C. A., and Seuba, X., *Intellectual Property and the Judiciary*, Edward Elgar Publishing, Cheltenham, 2018, pp. 9 to 90, especially pp. 50 to 54, and Senftleben, M., ‘Free signs and free use: How to offer room for freedom of expression within the trademark system’, in Geiger, C., *Research Handbook on Human Rights and Intellectual Property*, Edward Elgar Publishing, Cheltenham, 2015, pp. 354 to 376. See also Opinion of Advocate General Póitares Maduro in Joined Cases *Google France and Google* (C- 236/08 to C- 238/08, EU:C:2009:569, point 102).

- 34 Although this clarifies that the Office must apply the Charter of Fundamental Rights to all grounds for refusal when assessing trade marks,
- 35 this decision may present an opportunity to develop more detailed principles in this respect.
- 36 It is therefore already unclear to what extent merely applying for the term ‘Covidiot’ as a European Union trade mark, without further reference to a specific person or group of people, constitutes in itself an expression of opinion that opens up the scope of protection of Article 11.
- 37 A further question is whether refusal of the trade mark on the basis of the grounds for refusal set out in Article 7 EUTMR, if the conditions thereof are met, constitutes an unlawful infringement of these fundamental rights or whether freedom of expression meets with its limits here.
- 38 It should also be borne in mind that the General Court ruled as follows in previous judgments, such as in that on the coat of arms of the former USSR (20/09/2011, T-232/10, Coat of arms of the Soviet Union, EU:T:2011:498):

68 On the other hand, according to Article 6(3) TEU, fundamental rights, as guaranteed by the ECHR and as they result from the constitutional traditions common to the Member States, are to constitute general principles of EU law. Consequently, respect for those fundamental rights is a condition of the lawfulness of European Union measures, such as the contested decision, and the Courts of the European Union must ensure that respect.

69 In that regard, according to Article 10(1) of the ECHR, everyone has the right to freedom of expression, which includes, inter alia, the freedom to impart information and ideas without interference by public authorities.

70 According to Article 10(2) of the ECHR, the exercise of freedom of expression may be subject to certain restrictions prescribed by law which are necessary in a democratic society, inter alia in the interests of national security, territorial integrity or public safety, and for the prevention of disorder or crime, or for the protection of morals.

71 The applicant puts forward no arguments to show that the refusal to register the trade mark applied for constitutes an interference with the exercise of the freedom guaranteed by Article 10(1) of the ECHR which does not satisfy the requirements of Article 10(2). Therefore, in any event, there is no basis for the applicant to rely on the ECHR in this case.

- 39 The General Court made a similar ruling on the trade mark ‘Ficken’ in connection with alcoholic beverages (14/11/2013, T-52/13, Ficken, EU:T:2013:596):

‘39 Secondly, the applicant argues that the Board of Appeal should have taken account of the right to freedom of expression within the meaning of Article 10 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950, when weighing the interests that were worthy of protection within the scope of Article 7(1)(f) of Regulation (EC) No 207/2009.

40 In this regard, it is sufficient to point out that refusing to register the trade mark applied for does not deprive the applicant of the opportunity to market its goods under the sign FICKEN, and therefore also does not adversely affect the right to freedom of expression that it claims (cf., to this effect, judgment 09/03/2012, T-417/10, ¡Que bueno ye! Hijoputa (fig.), EU:T:2012:120, § 26).’

- 40 These formulations differ from the findings of the judgment of 24/01/2018, T-69/17, Fack Ju Göhte, EU:T:2018:27, § 29. It must therefore be examined whether this case-law continues to apply after the judgment of the Court of Justice.
- 41 It must also be examined to what extent the public interest in continuing to make free use of the term COVIDIOT as an expression of an opinion may be detrimental to any right to freedom of expression on the part of the individual applicant through registration of the term.

Order

On those grounds,

THE GRAND BOARD

hereby:

Refers the case to the Grand Board for examination.

Signed

G. Humphreys

Signed

Ph. von Kapff

Signed

A. Kralik

Registrar:

Signed

H. Dijkema

