



OFFICE FOR HARMONIZATION IN THE INTERNAL
MARKET
(TRADE MARKS AND DESIGNS)
The Boards of Appeal

**DECISION
of the Second Board of Appeal
of 5 March 2010**

In Case R 1509/2008-2

COUTURE TECH LIMITED
Trident Chambers, P.O.Box 146
Road Town, Tortola
British Virgin Islands

Applicant / Appellant

represented by Brand Protect L.L.P., Stonecroft Chambers, Stonecroft, Somerton
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APPEAL relating to Community trade mark application No 5 585 898

THE SECOND BOARD OF APPEAL

composed of T. de las Heras (Chairperson), H. Salmi (Rapporteur) and
G. Humphreys (Member)

Registrar: J. Pinkowski

gives the following

Decision

Summary of the facts

- 1 By an application filed on 22 December 2006, Couture Tech Limited (hereinafter 'the applicant') sought to register the figurative mark in colour



for the following list of goods and services:

- Class 3 – Perfume products, namely perfume, personal and body deodorants, cologne, toilet water, body creams, hand creams, face lotions, after-shave lotions, shower gel, bath gel, bubble bath, bath oils, bath pearls, non-medicated bath salts, toilet soaps, hand, facial and bath soaps, body deodorants, essential oils for personal use, talcum powder, face powder, body powder, bath powder, hair shampoo, hair sprays, hair lotions, skin soaps, cosmetic pencils, foundation make-up, face powders, talcum powder, rouges, lipsticks, mascaras, skin cleansing creams, skin cleansing lotions, sun screen preparations, nail polish remover, face creams, body creams, hand creams, dentifrices, dental gels, non medicated salts for bath and shower, toilet soaps, shampoos; perfumery.
- Class 14 – Jewellery namely amulets, bracelets, brooches, chains, costume jewellery, links (cuff), medallions, necklaces, ornaments in the form of jewellery, paste jewellery, pearls, pins, precious stones, rings, tie clips and pins; horological and chronometric instruments namely chronographs, master clocks, stopwatches, straps for wristwatches, sundials, watches, wrist watches, watch straps; precious metals and their alloys and goods in precious metals or coated therewith, not included in other classes namely ashtrays, of precious metal, for smokers, badges of precious metal, boxes of precious metal, buckles of precious metal, busts of precious metal, candelabra [candlesticks] of precious metal, candle rings of precious metal, jugs of precious metal, key rings [trinkets or fobs], napkin holders of precious metal, powder compacts of precious metal, purses of precious metal, services [tableware] of precious metal, shoe ornaments [of precious metal], belt ornaments [of precious metal], silver and gold ware, other than cutlery, forks and spoons, silver ornaments, silver plate [plates, dishes], statues of precious metal, tea infusers of precious metal.
- Class 18 – Leather and imitations of leather sold in bulk; leather goods, namely, handbags, purses, wallets, brief cases, toiletry cases sold empty, cosmetic cases sold empty; animal skins, animal hides; trunks and travelling bags; umbrellas, parasols and walking sticks; whips, harness and saddlery.
- Class 23 – Yarns and threads, for textile use.
- Class 26 – Badges [buttons] (ornamental novelty), badges for wear, not of precious metal, bands (hair), bands for holding sleeves, broaches [clothing accessories], buckles [clothing

accessories], buckles (shoe), buttons, clasp (belt), ornamental novelty badges [buttons], ornaments (hair), ornaments (hat) [not of precious metal], ornaments (shoe) [not of precious metal].

Class 43 – Services for providing food and drink; temporary accommodation, restaurant, bar and catering services; provision of holiday accommodation; booking/reservation services for restaurants and holiday accommodation.

2 On 21 November 2007, the examiner issued a Notice of grounds for refusal of the CTM applied for pursuant to Article 7(1)(f) and 7(2) of Council Regulation (EC) No 40/94 of 20 December 1993 on the Community trade mark ('CTMR') (OJ EC 1994 No L 11, p. 1; OJ OHIM 1/95, p. 52), which is now codified as Council Regulation (EC) No 207/2009 of 26 February 2009 on the Community trade mark (OJ EC L 78 of 24 March 2009, p. 1). The reasoning was the following:

- The sign applied for consists of the exact representation of the coat of arms of the Soviet Union, including the red star, sickle and hammer, and 15 ribbons containing the motto 'proletariats of the world, unite!' in all the 15 languages of the Soviet Socialist Republics of the Soviet Union. This emblem was the official symbol of the Soviet Communist party that ruled the country according to the Soviet constitution. It is common knowledge that the Soviet Union was a totalitarian state that massively violated human rights, under the leadership of the Soviet Communist party, committed crimes against humanity, including summary executions, torture, sending innocent people to labour camps, involuntary settlement and stripping of citizen's rights. It is commonly accepted that the ethnicity-targeted population transfers in the Soviet Union led to million deaths due to inflicted hardships. For example, 10 percent of the entire adult Baltic population was deported or sent to labour camps, as can be seen from Wikipedia printouts.
- Against this background, it is obvious that a sign which alludes to the Soviet totalitarian regime and its ideology which has tragically affected many countries, nations and individuals, is contrary to public policy and accepted principles of morality. In view of the genocide and other crimes committed by the Soviet regime under the leadership of the Soviet Communist party, it is clear that its official symbol may cause outrage in the minds of people in those Member States which have been directly affected. Particularly from Baltic States, where the majority of ordinary citizens whose values and standards would be offended when seeing the sign applied for in relation to the claimed goods and services, since it would be perceived by them as a glorification of the Soviet totalitarian regime.
- Under the laws of some Member States Soviet symbols have been equalled to Nazi symbols. For instance, Latvia, Estonia and Hungary ban the display of both Nazi and Soviet symbols at public meetings. According to Article 11(5) of the Latvian Law on Meetings, Street processions and Pickets of 16 January 1997, participants in meetings, streets processions and pickets during such events are prohibited from utilizing former USSR and Nazi German flags, coats of arms, hymns and symbols. In Hungary, the Criminal Code, Act IV/1978, Chapter XVI (Crimes against public order), title 2 (Crimes against public peace), Section 269/B expressly prohibits 'use of

symbols of despotism'. Since these provisions reflect the public beliefs as regards those symbols, it is reasonable to consider that the registration of the sign applied for bears a serious risk of causing public disorder.

- The Office is aware of the fact that the applicant has succeeded in registering the same sign as Community trade mark No 3 958 154 for a range of goods in Classes 16, 24 and 25. It is considered that the Office erred in law in accepting this mark. According to case-law, the registrability of a sign as a Community trade mark is to be assessed solely on the basis of the relevant Community legislation, and not on the basis of a previous practice of the Office. It is also clear from case-law that observance of the principle of legality according to which no person may rely, in support of his claim, on unlawful acts committed in favour of another person or himself (see, to that effect, judgments of 27 February 2002 in Case T-106/00, *Streamserve Inc. v OHIM* ('STREAMSERVE') [2002] ECR II-723, paragraph 67), and of 12 June 2007 in Case T-339/05 *MacLean-Fogg Co. v OHIM* ('LOKTHREAD') [2007], ECR II-61, paragraph 57).
- 3 On 12 December 2007 and 8 January 2008, the applicant requested further information, including the query if the statement that the Office erred in law by excepting CTM No 3 958 154 refers to the opinion of the Office or of the examiner.
 - 4 On 11 January 2008, the examiner replied that the objection expresses the Office's official position. The registration of the same sign as a CTM No 3 958 154, however valid, was in breach of Article 7 (1)(f) CTMR.
 - 5 On 18 January 2008, the applicant sent its observations, in which stated the following:
 - Until the registration of CTM No 3 958 154 is held invalid, it remains being valid. It also points out that it has a similar CTM application No 5 641 725. Having spent time and money on these two new applications, the applicant has the legitimate expectation that they will receive the same diligent examination. Since the marks are identical, if there is some problem with the goods and services applied for, the applicant is ready to make alterations according to the Office's suggestions.
 - The Office has failed to assess the present CTM application by the standards and values of ordinary citizens of the Community whose mother tongue is English, since the application is made in English. Such citizens would not be shocked or offended by the application; in fact many of those citizens would not recognize it.
 - The applicant refers to a previous decision of the Grand Board in Case R 495/2005-G 'SCREW YOU' dated 6 July 2006, and recalled that the Office should not refuse to register a trade mark, which is only likely to offend a small minority of exceptionally puritanical citizens, or the small minority at the end of the spectrum who find even gross obscenity acceptable. According to the applicant's representative poll in its office, only

those employees over the age of 30 had any idea that the application was previously associated with the Soviet Union given the fact that it disappeared over 17 years ago. Of those who recognized the application, none attributed it with any adverse connotations. Therefore, it seems that the Office has chosen to access the application according to the prudish and easily shockable minority of consumers. It has been suggested that since the examiner's name 'Lamsters' is a Latvian name, his view may be biased.

- Although the Soviet regime was totalitarian, most of the excesses can be levelled not against the Soviet State itself but against its leader Joseph Stalin. In fact, the mass deportations were denounced by his successor Nikita Khrushchev in February 1956 as being a violation of Leninist principles. It can be said that the forced migrations were the result of Stalin's paranoia rather than being a policy of the Soviet State. Moreover, the imprisonment and deportment was not unique to the Soviet regime. Furthermore, the cited articles from *Wikipedia* are not reliable, since they may be created and amended by anybody at any time.
 - The Community trade mark regime is an autonomous system and if there are national laws that prevent the use of a mark in a particular Member State, that provision may be invoked in that State. Furthermore, the laws aimed at preventing public order are aimed at people using prohibited insignia on public demonstrations; they are not aimed at selling goods that use such insignia. As to the allegation that registration of the sign applied for bears a serious risk of causing public disorder, the applicant points out that the Communist Party of Great Britain uses the hammer and sickle and the five pointed star, they attend marches and there have not been disturbances because of their use of these symbols. Also most cities in Eastern Europe still retain signs and statutes glorifying the former Soviet Union, and no reports of public disorder have been claimed. In any case, the Baltic States and Hungary together represents only 3.5% of the EU population.
- 6 On 4 April 2008, a new examiner issued the second Notice of grounds for refusal, in which he maintained the previous position. The contested sign contains a slavish copy of the official coat of arms of the former Soviet Union. By virtue of Article 7(2) CTMR is it sufficient if the grounds of non-registrability obtain in only part of the Community. The public in some Member States are particularly sensitive when being confronted with symbols which represent the former Soviet Union because of the delicate relationship between those states and the Soviet Union in recent history. The Hungarian and Latvian provisions are indications that certain symbols of the former Soviet Union bring back memories which are perceived as unpleasant. The rationale of those provisions is to prohibit the use of symbols which represent an anti-democratic and totalitarian ideology which are contrary to the principles of liberty, democracy and respect for human rights and fundamental freedoms, to which the Member States are committed. The commercial freedom of expression of the applicant is not unduly curtailed by the refusal to register the sign as a trade mark. The Office should not assist an applicant in making business by awarding a monopoly right to a sign which may be perceived as an offence to the basic values and principles of the European Union. Under those circumstances, the right of the public not to be confronted

with signs which are contrary to public policy prevail over the applicant's right to freely employ words and images in the signs it wishes to register as trade marks.

- 7 On 4 August 2008, the Office received the applicant's observations. The applicant proposed a restriction of the goods and services, adding a sentence: 'none intended to be used in illegal meetings or in pickets, street processions or in a way that is intended to offend public morals' at the end of the specification of the goods and services. If this limitation is not acceptable, it is further argued as follows. None of the Latvian or Hungarian statutes prohibits the use of the sign *per se*. There is no law against displaying such insignia in public or selling such insignia, nor a law or public policy that is intended to prevent citizens from being confront with such insignia. To suggest the opposite would make a mockery of parks in Hungary that openly display Soviet insignia which are used as tourist attractions, for example, Momento Park in Budapest. The Regulation does not prevent registration of marks for companies that sell firearms, which are used to kill people, which is worse than negative public policy. Furthermore, the European Commission has rejected a demand to ban Soviet symbols in the EU in 2005, as follows from a report taken from the BBC website.

- 8 On 27 August 2008, the examiner notified the applicant of his decision (hereinafter 'the contested decision') in which he maintained his position as to the refusal of the CTM application on the basis of the following additional arguments:
 - The proposed limitation of the specification of the CTM has to be rejected, because the scope of protection would be vague and unclear.
 - The Office does not agree that the Hungarian provisions quoted would not prohibit the use of the sickle and hammer and a five-pointed red star *per se*. Section 269/B explicitly prohibits the distribution, use before great publicity and exhibition in public of said symbols. In other words, any use which is not of a purely private nature is prohibited.
 - As far as the alleged rejection of the Communist symbol ban by the European Commission is concerned, the Office points out that the press clipping referred to by the applicant concerns a draft bill which was still being discussed by the European authorities when the press article was published. Moreover, the article explicitly confirms that symbols of the former Soviet Union are perceived very critically, at least in some Member States and it is only a part of Community, which is sufficient for rejecting the registration.
 - As to CTM No 3 958 154, the legality of decisions of the Office is to be assessed purely by reference to the Regulation and not by the Office's earlier decisions.

- 9 On 20 October 2008, the applicant filed a notice of appeal against the contested decision. On 29 December 2008, it filed the statement of grounds.

- 10 The appeal was submitted to the examiner for revision pursuant to Article 61 CTMR (previously Article 60). It was remitted to the Boards of Appeal on 19 January 2009.
- 11 As a preliminary examination, the Board conducted a further search on this matter and the applicant was invited to submit further comments on the new evidence (Guidelines of the Hungarian Patent Office and decisions taken by national Offices in Latvia and the Czech Republic) on 11 November 2009.
- 12 On 14 January 2010, the applicant submitted its comments.

Grounds of appeal

- 13 The applicant requests that the contested decision be annulled and the CTM applied for allowed for registration. It maintains the previous comments and adds the following:
 - The applicant refers to Hungarian criminal proceedings against Attila Vajnai who was arrested because he wore a five-pointed red star on his clothing, which is prohibited by the Hungarian Criminal Code. During the proceedings regarding a preliminary question the Court in case C-328/04 ruled that it has no jurisdiction with regard to national provisions outside the scope of Community law and when the subject-matter of the dispute is not connected in any way with any of the situations contemplated by the treaties.
 - The European Commission has stated that to specifically outlaw former symbols of the Soviet Union is a matter for each Member State, and no Member State has taken such action so far. Also none of the recitals of the CTMR state that the registration of a former symbol of the Soviet Union is contrary to public policy. For the Office to find differently would mean that the Office is prepared to contradict the CTMR, the Court of Justice of the European Union and the Commission, and therefore act beyond its powers and such a decision would be *ultra vires*.
 - In addition, in the *White Paper* concerning European Governance, the European Commission stated in relation to regulatory agencies that they can not be granted decision making power in areas in which they would have to arbitrate between conflicting public interests, exercise political discretion or carry out complex economic assessments. By rejecting the application because of the socio-political criminal statutes of Latvia and Hungary, the Office arbitrated between conflicting public interests and exercised political discretion contrary to the public policy as espoused by the Commission.
 - The contested decision is also contrary to Article 6(1) of Council Regulation 58/2003 laying down the statute for executive agencies. The Office has also acted in a discriminatory manner (see, for example, the judgment of 23 April 1956 in joined cases 7/54 and 9/54 (*Groupement des Industries Sidérurgiques Luxembourgeoises v High Authority of the European Coal and Steel Community*), [1955-1956], ECR 53 page 175).

- The rejected negative limitation can be expressed in a positive way, which complies with the *Postkantoor* requirement (see judgment of 12 February 2004 in Case C-363/99 *Koninklijke KPN Nederland NV v Benelux-Merkenbureau* ('Postkantoor') [2004] ECR I-1619), as 'to be used exclusive in trade and which are moral'.
- In the case of previous CTM registrations of the same sign the objection has been initially raised on the basis of Article 6ter of Paris Convention. However, the Office has found that the sign is not contrary to that provision. The applicant points out that since the Russian Federation has abandoned the symbols of the former Soviet Union, Article 6ter should not have been under any sort of consideration. In addition, whether or not the application is a slavish copy of any sign is not a relevant consideration of whether the sign applied offends Article 7(1)(f) CTMR.
- The coat of arms of the former Soviet Union, abandoned by its successor the Russian Federation as a state symbol, emblem, or a similar device has neither been banished nor prohibited in any Member State in the European Union nor has its use *per se* been declared immoral, illegal or unlawful. Although in Latvia and Hungary certain use of former Soviet emblems constitutes criminally prohibited acts, the intention of the statutes is directed towards the prohibition of the use in a political or a socio-political context where the indicia would imply or suggest an endorsement of the Soviet Union, its political system or ideology. The Latvian Statute does not seek to declare the said indicia *per se* objectionable or objectionable in any other context or activity. The Hungarian law is similar to the Latvian one, the context and scope of the prohibition is political or socio-political. The sale of USSR flags or memorabilia would not fail within the scope of the statute as this involves a private activity.
- Stating that the registration bears a serious risk of causing public disorder is irrational, since the applicant uses the same sign registered as a CTM and there have been no instances of any public order disturbances caused by such use. The use of the sign as a trade mark carries no political or ideological statement. Stating that certain symbols of the former Soviet Union are perceived as being unpleasant is devoid of any real substance, since the exhibition of Soviet art, music or literature could have the same effect.
- The Office cannot show a general antipathy to the former Soviet symbols or similar signs. The Hungarian and Latvian statutes are not evidence of antipathy; when the rest of the former Soviet dominated Member States such as Poland, the Czech Republic, Slovenia, Slovakia, Estonia, Romania and Bulgaria show no antipathy. In any event, even if it could be assumed that the former Soviet Union, its ideology and actions are disliked and have left unpleasant memories in the minds of certain sections of the Eastern-European citizens, this does not amount to any form of proof that the CTM applied for should be disallowed on the grounds of public policy in the face of an earlier registration of the same sign. The mark should be offensive to a substantial section of the public (see Morcom: *The Modern Law on Trade Marks*, 2005, paragraph 146). Public policy should be invoked only in the

clearest cases of outrage to moral decency. Reference is made to a Decision of the Boards of Appeal of 18 July 2006 in Case R 558/2006-2 – REVA The electricity Car.

Comments on the additional evidence

14 The applicant claimed that the evidence emanating from Latvia, Hungary and the Czech Republic cannot be taken into consideration on the basis of the following arguments:

- It refers to the judgment of 13 September 2005 in Case T-140/02 *Sportwetten GmbH Gera v OHIM* ('Intertops') [2005] ECR II-3247, at paragraphs 31 and 32, where it was held that the Community trade mark regime is an autonomous system which applies independently of any national system. Thus, none of the material relating to the national offices can be taken into consideration. In any case, the applicant further commented on the non-applicability of this evidence.

Hungary

- As to the Methodological Guidance for the Hungarian Patent Office, it is not known who issued it or how it is regarded by law of the Hungarian Courts. The objection raised by the Board in its letter dated 11 November 2009, stating that according to the commentary on the Hungarian Criminal Code, 'use in public' means that it is shown on a product as a mark when a product is distributed on a market, this relates only to the use of mark. In any case, the origin, status and validity of this commentary are also unknown. Be as it may, the criminal statute under Hungarian Law does not *per se* preclude a mark on a product from containing these symbols of necessity as the Guidelines states, as the mark is not assessed by itself but in relation to its use. The applicant is not required to show that its sign in use would not constitute a criminal offence in Hungary or that the sign in use would render it non-registrable before the Hungarian Patent Office.

The Czech Republic

- First of all, the decision is based on the law which predates its entry to the European Union. According to this decision, the mark was found objectionable pursuant Section 4(1) of Act 441/2003 Law on Trade Marks, as its use could be taken by a section of the general public as promoting Communist ideology. The applicant claims that it is not known what the terms of the relevant section are or what the Czech law relating to the promotion of Communist ideology *vis à vis* the registrability of trade mark is.

Latvia

- The submitted decisions are based on statutes which predate Latvian entry into the EU and relate to signs and goods which are different from the ones in question. It is apparent from the decision that the findings are based on the use of the signs. Also, the applicant claims the principles of ethics,

humanism and morality applied in Latvian Law are unknown. Significantly the Latvian statutes do not appear to include public policy in the scope of the enquiry which is undertaken.

- The applicant based its comments on the basis of the ‘Intertops’ judgment, where the Court held, that it is the trade mark itself, namely the sign in relation to the goods or services as they appear upon registration of the trade mark, which is to be assessed in order to determine whether it is contrary to public policy or accepted principles of morality. Similarly, in the judgment of 9 April 2003 in Case T-224/01 *Durferrit GmbH v OHIM* (‘Nu-Tride’) [2003] ECR II-1589, at paragraph 76), the Court made clear that an overall reading of the various subparagraphs of Article 7(1) CTMR shows that they refer to the intrinsic qualities of the mark applied for and not to circumstances relating to the conduct of the person applying for the trade mark. Furthermore, in the decision of the Boards of Appeal in Case R 495/2005-G – SCREW YOU, the Board stated that the question whether a trade mark can be registered under Article 7(1)(f) CTMR is separate from the question of whether it can be used. The mere fact that the mark has been registered as a CTM does not mean that its use cannot be prohibited in the Member States.
- The applicant repeatedly argues that there is no prohibition against any former Soviet symbol in any Member State. It admits, that there is a prohibition against the use of some of these symbols in certain Eastern European states, which were formerly under Soviet and Communist control, nevertheless, the prohibited use is in relation to political activity or activity associated with political activity, especially the promotion of Communist or Soviet ideology. The Communist Party may be banned in certain Member States, but it is not in others, and neither is communism nor the Communist Party banned by Community law.
- It refers to the case rendered in the United Kingdom No 0-021-05 (Jesus), where the appointed person reviewed the law relating to an application under Section 3(3)(a) of the Trade Marks Act 1994. The section is identical to Article 7(1)(f) CTMR. The appointed person held, that Section (3)(3)(a) must be interpreted and applied consistently with the provisions of the European Convention on Human Rights (ECHR). The appointed person stated the following at paragraphs 4-6:

‘4. Consistently with Article 10 ECHR it must be recognized that the right to freedom of expression (including commercial expression: *Casado Coca v Spain* (1994) 18 EHRR 1 paragraphs 33 to 37) is exercisable subject only to ‘such formalities, condition, 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 or impartiality of the judiciary’.

5. Consistently, with Article 14 ECHR it must be recognized that the aims and objectives of Article 10 are to be secured ‘ without discrimination on any ground

such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status’.


6. Section 3(3)(a) seeks to prohibit registration in cases where it would be legitimate for the ‘prevention of disorder’ or ‘protection of...morals’ to regard use of the trade mark in question as objectionable in accordance with the criteria identified in Article 10 ECHR. It does so in terms which disclose no intention to prohibit registration in cases where use of the relevant trade mark would not be objectionable under Article 10 on either or both of those bases. The problem of anti-social branding is, in part, addressed under Section (3)(3)(a) by accommodating the concept of ‘ordre public’ within the prevention of disorder under Article 10. That makes it legitimate, for example, to treat the display of ‘any writing, sign or other visible representation which is threatening, abusive or insulting within the ...sight of a person likely to be caused harassment, alarm or distress thereby’ as objectionable: see Section 5(1)(b) of the Public Order Act 1986. However, the right of freedom of expression must always be taken into account, without discrimination under Section (3)(3)(a) any real doubt as to the applicability of the objection must be resolved by upholding the right to freedom of expression, hence acceptability for registration’.

- The right to freedom of expression is a fundamental principle of Community law. Tested against these principles, the statutes of Latvia, Hungary or any other Member States which may have similar legislation prohibiting the political freedom of their citizens to publicly support Communist ideology or to be members of the Communist Party constitute a curtailment of liberty and freedom of expression. The public policy of these States as embodied in their criminal law is presumably for acceptable exceptions for the prevention of disorder, public safety etc. Behind the public policy and political morality of these Member States and former Soviet satellite countries lies the fact that political activity which seeks to advocate the re-introduction or introduction of such a system violates the democratic principles on which the states are now founded and which formerly caused suffering in various forms to their peoples. It is implicit that any Soviet symbols may not be liked by or might evoke unpleasant memories for some citizens of those countries, but even those States do not ban them or prohibit their use other than for purposes at which the statutes are directed. It is not the function of the Board to enlarge the interpretation of what the public policy and accepted morality is in a particular State.
- In relation to classes for which the sign is applied for, no political ideological programme or philosophy is suggested. The sign itself does not vaunt or suggest the Soviet political system or ideology. The Soviet Union and the symbols of the political entity it formed ceased to exist some 20 years ago. These symbols only carry political meaning or ideological connotation if used in a political context or for a political purpose. The use in a commercial context of those symbols is not prohibited.
- There is no evidence that the sign *per se* contravenes an accepted principle of morality. The application might be seen as a spoof or mockery. There may be some that would find it offensive, but this is not enough to contravene Article 7 (1)(f) CTMR. Reference to a decision of the Board dated 29 January 2009 in Case R74/2009-2 - ETA EARTH TO AIR SYSTEMS is made. The Board, at paragraph 12 held that it is doubtful that the general public in Spain would consider the mark as contrary to public policy or to

accepted principles of morality. Also, it is referred to the case ‘Jesus’, where it was held in paragraph 8, regarding the upholding the refusal of the mark ‘TINY PENIS’ as a trade mark, the following: ... ‘it is only in cases where it is plain that an accepted principle of morality is being offended against that registration should be denied. Mere offence to a section of the public, in the sense that that section of the public would consider the mark distasteful, is not enough’. At paragraph 30, it was continued that the dividing line is to be drawn between offence which amounts only to distaste and offence which would justifiably cause outrage or would be the subject of justifiable censure as being likely to significantly undermine current religious, family or social values. The outrage or censure must be amongst an identifiable section of the public and a higher degree of outrage or censure amongst a small section of the Community will no doubt suffice just as lesser outrage or censure amongst a more widespread section of the public will also suffice.

- Although it may even readily be assumed that the contested sign is distasteful to a section of the Latvian, Czech or Hungarian public, the fact remains that the legislatures in these countries did not regard any former Soviet sign, being so contrary to policy or morality as to ban them. Consequently, this new material does not preclude the contested sign from being refused.

Reasons

- 15 The appeal complies with Articles 58, 59 and 60 CTMR (previously Articles 57, 58 and 59) and Rule 48 of Commission Regulation (EC) No 2868/95 of 13 December 1995 implementing the CTMR (‘CTMIR’) (OJ EC 1995 No L 303, p. 1; OJ OHIM 2-3/95, p. 258) as amended. It is therefore admissible. However, it is not well founded, as will be explained below.
- 16 Article 7(1)(f) CTMR prohibits the registration of ‘trade marks which are contrary to public policy or to accepted principles of morality’. By virtue of Article 7(2) CTMR, the grounds of non-registrability set out in Article 7(1) CTMR do not have to exist throughout the EU; it is sufficient if they ‘obtain in only part of the Community’.
- 17 The figurative mark  consists of the exact representation of the coat of arms of the Soviet Union valid from 1956 until the break up of the Soviet Union in 1991. Although technically it is an emblem rather than a coat of arms, since it does not follow heraldic rules, in Russian it is called a *репб* (gerb), the word used for a traditional coat of arms. It was adopted in 1923 and since then it has been used in four slightly different representations. The version in question is the last one, composed of the hammer and sickle and the red star over a globe, and two wreaths of wheat covered by the USSR State motto ‘proletariats of the world, unite!’ in 15 languages of the Soviet Socialist Republics of the Soviet Union. The Red Star symbolizes the Communist Party, the hammer symbolizes industrial workers and the sickle represents agricultural workers.

Preliminary remarks

- 18 Since the applicant's effort to restrict its list of goods and services by adding the sentence 'none intended to be used in illegal meetings or in pickets, street processions or in a way that is intended to offend public morals' at the end of the specification of the goods and services was rejected in the contested decision, the applicant requested for a restriction in a positive way, by adding the specification 'to be used exclusive in trade and which are moral'. However, the Board observes that even this positive specification cannot be accepted. As follows from the OHIM's Guidelines, Part E, Section 3, dated November 2005, the restrictions that limit in terms of a particular use of the mark, price, conditions of use or marketing of the goods, are not acceptable. Thus, the proposed limitation has to be rejected.
- 19 The Board agrees with the applicant that for application of Article 7(1)(f) CTMR it is irrelevant whether the application is or is not a slavish copy of the sign used in the Soviet Union. Also, in the present case the Office did not raise the objection under Article 7(1)(h) CTMR, as was the case in the case of the CTM registration of the same sign.

Absolute grounds existing only in part of the Community

- 20 The Board primarily points out that Article 7(2) CTMR excludes an application from registration if a ground for refusal pertains in only part of the Community, notwithstanding the population percentage. In other words, for the sign to be refused it is sufficient that the sign is found to be contrary to public policy or accepted principles of morality in only one Member State.

Jurisdiction and discretion of the Office

- 21 The applicant refers to the Order of the Court of 6 October 2005 in Case C-328/04 *Fővárosi Bíróság v. Attila Vajnai* ECR [2005] I-8577, at paragraph 13, regarding a preliminary ruling in criminal proceedings against Mr Attila Vajnai, where the Court held that it had no jurisdiction with regard to national provisions outside the scope of Community law. Since the Court confirmed that Article 269/B of the Hungarian Criminal Code has nothing to do with Community law, the applicant claims that the Office cannot invent a link between the laws justifiable only within a Member State and a provision solely related to Community law.
- 22 The Board observes that Mr Vajnai had been arrested for displaying on his clothing in public a five-pointed red star, during a demonstration in Budapest. He was found guilty of having used a totalitarian symbol in violation of Article 269/B (1)(b) of the Hungarian Criminal Code and the Court imposed a one-year suspended sentence and ordered the confiscation of the symbol. The Hungarian national court raised the question of whether the principle of non-discrimination, Article 6 of the Treaty of European Union, Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin or Articles 10, 11 and 12 of the Charter of Fundamental Rights of the European Union, proclaimed on 7 December 2000 in Nice, precludes a national provision, such as Article 269/B of the Hungarian Criminal Code, which imposes sanctions on the use in public of

the five-point red star. The Court held that according to case-law, where national provisions fall within the field of application of Community law the Court must give the national court all the guidance as to interpretation necessary to enable it to assess the compatibility of those provisions with the fundamental rights whose observance the Court ensures. In the discussed case, Mr Vajnai's situation was not connected with any of the situations contemplated by the treaties and the Hungarian provisions applied in the main proceedings were found to be outside the scope of Community law.

- 23 The Board notes that the conclusion of the Court in the case mentioned above is not applicable to the present case. Unlike the quoted case, where the Court had no jurisdiction to answer the question of the national court, the question to be decided in the case at hand is not whether the registration of the mark is against a provision of a national law, but whether it is excluded under the CTMR. In accordance with Article 36(1)(b) CTMR it is the task of the Office to examine whether the CTM application complies with the conditions laid down in the CTMR. Therefore, when doing this the Office in no way acts beyond its powers, as claimed by the applicant.
- 24 It is of course true that none of the recitals of the CTMR state that registration of a former symbol of the Soviet Union is contrary to public policy. However, it is a well-known fact that the law has to be general as it is impossible to explicitly state all the signs which would be contrary to some provisions of the Regulation. Thus, in accordance with Articles 7(1)(f) and (2) and 36(1)(b) CTMR it is the task of the Office to establish whether the sign is contrary to public policy or accepted principles of morality in, for example, Hungary. Although the Office cannot directly apply Article 269/B of the Hungarian Criminal Code, this provision appears to be one of the crucial facts for determining whether Article 7(1)(f) CTMR applies, that is, for finding out if the sign in question is contrary to public policy or to accepted principles of morality in Hungary. The Office does not have many options to find out how the sign would be perceived in Hungary. Without having a national survey on this topic, the only reliable ways of answering the question are general historical knowledge, national provisions, case-law of the national courts, guidelines and decisions of the Hungarian Office.
- 25 The applicant's claim that the contested decision is contrary to Article 6(1) of Council Regulation No 58/2003 of 19 December 2002, laying down the statute for executive agencies to be entrusted with certain tasks in the management of Community programmes, has to be rejected. The OHIM, founded in 1994, is not an executive agency established in accordance with this Regulation, which were set up for a fixed period and located in Brussels or Luxembourg. In addition, even if said Article 6(1) were related to the OHIM, it would not be breached. According to this article the Commission may entrust an executive agency with any tasks required to implement a Community programme, with the exception of tasks requiring discretionary powers in translating political choices into action. The Board notes that since the Office is the only authority overseeing Community trade mark registrations it could not have acted in a political manner, as claimed by the applicant. The fact that the Office has relied in its assessment of the application of Article 7(1)(f) CTMR on national provisions of some Member

States, does not mean that the Office has acted in a political way. The basis of registering Community marks lies in the fact that they must be registrable in the whole Community.

- 26 The *White Paper* regarding European Governance dated 25 July 2001, which the applicant also refers to, states that ‘Agencies cannot be granted decision-making power in areas in which they would have to arbitrate between conflicting public interests, exercise political discretion or carry out complex economic assessments’. The Board points out that the Office does not arbitrate between the public interests of individual Member States nor does it exercise political discretion or carry out complex economic assessments.

Effort to ban Communist symbols in the Community

- 27 The applicant refers to an article from www.news.bbc.co.uk dated 8 February 2005, submitted during the examination proceedings, according to which the European Commission rejected a demand to ban Soviet symbols in the whole European Union in 2005. The applicant adds that the Commission stated that to specifically outlaw former symbols of the Soviet Union is a matter for each Member State and until now, no Member State has taken such action.
- 28 The Board observes that the article, entitled ‘EU rejects Communist symbol ban’, refers to the situation in 2005, when the European Commission rejected calls for a Europe-wide ban of the Communist Party symbols. Mr Franco Frattini (EU Justice Commissioner) said that it would not be appropriate to include the red star and the hammer and sickle in the draft on racism, as had been urged by a group of Members of Parliament from the former Communist block. The situation was thus left to individual Member States. The Board agrees with the applicant on that part. However, the Board does not concur with the applicant’s assertion that no Member State has banned symbols of the former Soviet Union so far. As will be explained later, the legislature of Hungary and Latvia prohibit certain use of those symbols.

Analogy with vulgar signs

- 29 The applicant points out to the analogy with obscene signs where public morality is invoked only in the clearest cases of outrage to moral decency. It refers to the decision of the Boards of Appeal in ‘REVA The electriCity Car’, where the sign ‘REVA’, which is the slang for woman’s genitalia for a part of Finnish consumers, has been registered. The applicant also quotes the decision of the Boards of Appeal dated 6 July 2006 in Case R-495/2005-G – SCREW YOU, stating that the Office should not refuse to register a trade mark, which is only likely to offend a small minority of exceptionally puritanical citizens, or the small minority at the end of the spectrum who find even gross obscenity acceptable. On the basis of those arguments the applicant concludes that the Office has chosen to examine the sign in question according to the prudish minority of consumers.
- 30 The Board concurs with the applicant and with the conclusion confirmed at paragraph 21 of the ‘SCREW YOU’ case, where it was held that the Office must apply the standards of a reasonable person with normal levels of sensitivity and

tolerance. However, it cannot be said that the examiner has chosen only an easily offended group of relevant consumers, as will be explained further in paragraphs 39-43.

- 31 The applicant also refers to two national decisions rendered in the United Kingdom. Firstly, to a decision dated 18 January 2005 of G. Hobbs concerning applications No M 776058 and M 689374 to register the word ‘JESUS’ as a trade mark (case No O-021-05). Secondly, to a decision dated 28 November 2001 of S. Thorley concerning an application No 2232411 to register the expression ‘TINY PENIS’ as a trade mark (case O-583-01). The Board, as a preliminary remark, points out that the applicant contradicts itself when, on the one hand, it refers to national decisions and on the other hand, argues that the material from national offices, invoked by the Board, cannot be considered as relevant.
- 32 As to the ‘TINY PENIS’ case, the applicant refers to the part where it was held that mere offence to a section of the public, in the sense that that section of the public would consider the mark distasteful, is not enough. The Board agrees with this assertion. In line with the findings of the decision, which rejected the mark ‘TINY PENIS’, the Board is of the opinion that the registration of the contested CTM applied for would cause greater offence than mere distaste to a significant section of the public for the reasons which will follow.
- 33 As to the ‘JESUS’ case, the applicant notes that Section 3(3)(a) of the Trade Marks Act 1994, which is identical to Article 7(1)(f) CTMR, must be interpreted and applied consistently with the provisions of the European Convention on Human Rights. The Board concurs with the applicant and observes that this question has been already explored in the ‘SCREW YOU’ case, where the following was stated:
- 17 The right to freedom of expression embodied in Article 10 ECHR includes commercial expression and is subject to limitation only for specific purposes, which include the prevention of disorder and the protection of morals (see *Casado Coca v Spain* (1994) 18 EHRR 1, paragraphs 33-37).
- 18 If the Office construed Article 7(1)(f) too narrowly, by for example refusing to register only those signs which violate the criminal law, the Office would effectively abrogate its responsibility to ensure that the privileges of trade mark registration are not extended to trade marks which are deeply offensive, disgusting and potentially capable of causing outrage, but whose use is not actually prohibited under national law. It would also amount to ignoring the spirit of the provision, which refers to ‘accepted principles of morality’. Article 7(1)(f) clearly imposes a duty on the Office to exercise a degree of moral judgment in assessing the suitability of signs to be granted trade mark protection.
- 19 It can be extremely difficult to ascertain when a sign crosses the boundary from being merely irreverent or distasteful to being seriously abusive and likely to cause deep offence.
- 34 The Office, thus, has the right to refuse the sign because its use violates national law. In the present case, certain use of the sign in question violates Hungarian and Latvian law, as admitted by the applicant. However, this is not the only basis for this decision. In line with paragraph 19 of the ‘SCREW YOU’ case the Board is convinced that the sign applied for is likely to cause deep offence to consumers in certain countries, which suffered under the Soviet supremacy. The reasons for refusing registration of this sign thus are based on general principles including

historical background. Decisions of national offices, found by the Board, serve as proof that not only certain signs are prohibited by national law, but that they are prohibited for a sound reason based on the painful historical memory of those countries, which will continue for generations. Thus, in this regard, it is not relevant that the Soviet Union and its symbols ceased to exist almost 20 years ago. Although national decisions are in no way binding on the Office, the Board has no reason to doubt the decisions issued by national authorities in such a delicate case as public policy and morals, as the national offices have certainly more information about how a mark would be perceived in their territory. This fact in no way contravenes the autonomous system of the Community trade mark regime.

- 35 The decision of the Boards of Appeal dated 29 January 2009 in Case R 74/2009-2 – ETA EARTH TO AIR SYSTEMS, where the Board held that it is doubtful, that the general public in Spain would consider the mark as contrary to Article 7(1)(f) CTMR, is not comparable to the present case. Firstly, unlike the situation in hand, the part ‘ETA’ forms only a part of the sign. Secondly, in the mark in question, the acronym ‘ETA’ did not refer to the name of the terrorist organization, but to the words ‘EARTH TO AIR SYSTEMS’. Furthermore, the mark was to be used on ‘geothermal heating and cooling units for residential and commercial applications and heat exchangers for geothermal heating and cooling systems’, and not, for example, on ‘badges’, for which the contested sign is applied for, which are the types of goods where one often sees deliberately provocative material.

Substantial section of the relevant public

- 36 The Board would like to point out that at the filing date of the application the European Union consisted of 25 Member States with different social, economical, political and historical backgrounds. Thus, it is rather to be expected that different public policies regarding certain signs have been applied within the Community. Consequently, the Board’s task is to find out if registering the sign applied for goes against public policy or accepted principles of morality in part or in the whole Community. Since the sign in question is a symbol used in the former Soviet Union, it is clear that it will have a stronger impact on consumers in the part of the Community which was formerly under its direct regime, than on the other countries. This has been indirectly confirmed by the applicant’s representative, which stated that only people over 30 in its office, based in the United Kingdom, were able to recognize the sign.
- 37 The goods and services listed in the application are ordinary products and services used by the general public. Therefore, when considering questions of offence, the relevant consumers consist of the general public, who cannot as a whole be considered as easily offended.
- 38 The applicant’s assertion that since the application is made in English, the Office should examine the application according to consumers with English as their native language, has to be fully rejected. The Board points out that, in general, the language of the proceedings does not have any influence on the relevant public. In the present case the figurative elements of the sign (particularly the

sickle and hammer and the five-pointed red star) are recognizable throughout the Community, without it even being necessary to read the verbal elements. The sign in question was assessed in relation to countries which had a negative history with the Soviet Union. Both Latvian and Hungarian peoples were forced to learn the Russian language, so the majority of consumers should be able to read the Russian motto 'proletariats of the world, unite!'. In addition, the motto also appears in the Latvian language.

- 39 The applicant claims that in order not to register a sign as a mark, a sign should be offensive to a *substantial section of the public*, quoting a book entitled '*The Modern Law on Trade Marks*' by Christopher Morcom. The Board agrees with this assumption, but notes that a vast majority of the population of, for example, Hungary and Latvia still consists of adults, who were living, working and studying during the years of the Soviet Union dominance. Therefore, they can remember the era either themselves or from narratives of their families. Moreover, even the applicant acknowledged in its letter dated 18 January 2008, that the Soviet regime was totalitarian. In this context signs which appear to glorify a totalitarian regime or offend the victims of this regime should not be registered (see, for example, Decision of the Boards of Appeal of 29 September 2004 in Case R 176/2004-2 BIN LADIN).

Regulated prohibition of use of certain signs

- 40 As a preliminary remark the Board observes that the applicant has constantly repeated throughout the examination and appeal proceedings that neither Hungary nor any other state prohibits certain signs *per se*. What is prohibited is certain use of those signs which has to do with political expression. The applicant notes, that since the question of registration of the mark is different from the question of its use, the contested sign should be registered and then the possibility to question its validity left to national authorities.
- 41 The Board agrees with the applicant, contrary to the examiner's position, that Soviet symbols are not prohibited *per se*, either in Hungary or in Latvia. However, the applicant is wrong in implying that a sign is not registrable only if it is prohibited absolutely, including its private use. The Board notes that such state controlled regulation is not possible as it would go against democratic principles of modern states. Private use of these signs, together with use for educational purposes has to be allowed (see further at paragraph 43). Also, as has already been noted, the present decision is not based on the fact that the sign applied for is regulated by the national law of certain Member States. It is based on public policy or accepted principles of morality, which fall under Article 7(1)(f) CTMR. The applicant's implication that the sign should be primarily registered as a Community trade mark with the possibility of prohibiting its use on the basis of national law, cannot be applied. This procedure would be against the sense of Article 7(2) CTMR, which provides that absolute grounds for refusal shall be applied notwithstanding that the grounds of non-registrability obtained in only part of the Community. Article 110(2) CTMR [previously Article 106(2)], which gives the right to prohibit the use of a registered CTM under the civil,

administrative or criminal law of a Member State, does not apply in the case where the mark can be refused under Article 7(1)(f) CTMR.

- 42 The Board, apart from examining the legislation referred to by the examiner, in order to find objective evidence regarding consumers' feelings concerning signs referring to the Soviet Union or the Communist party, has conducted a search among certain national offices. The material found and sent to the applicant will be described below, together with the replies to the applicant's comments.

Hungary

- 43 The examiner quoted the English translation of Hungarian Criminal Code, Act IV/1978, Chapter XVI (Crimes against public order), Title 2 (Crimes against public peace), Section 269/B, entitled 'Use symbols of despotism', taken from the website www.legislationonline.org, during the examination proceedings. It provides the following:

(1) The person who

(a) distributes

(b) uses before great publicity

(c) exhibits in public

a swastika, the SS sign, an arrow-cross, sickle and hammer, a five-pointed red star or a symbol depicting the above – unless a graver crime is realized – commits a misdemeanour, and shall be punishable with fine.

(2) The person, who commits the act defined in subsection (1) for the purposes of the dissemination of knowledge, education, science, or art, or with the purpose of information about the events of history or the present time, shall not be punishable.

(3) The provisions of subsections (1) and (2) do not extend to the official symbols of states in force.

- 44 The new evidence found by the Board and submitted to the applicant consisted of the Guidelines of the Hungarian Patent Office. According to part 1.3. of the Guidelines (Signs Contrary to Public Policy and Accepted Principles of Morality), signs are regarded as contrary to public policy if they include for example a so-called 'symbol of despotism'. According to the Commentary on the Hungarian Criminal Code, a symbol is a designation of an idea, person or event with an insignia or image which is designed to relate the sign and the designated thoughts, persons or events with each other. *Use in public* in this context means that it is shown on a product as a mark when the product is distributed on the market.

- 45 The applicant, apart from repeating that Hungarian Law does not prohibit the sign *per se*, also challenges the use of the Guidelines with the explanation that it is not known which body has issued it and how they are regarded by Hungarian Courts. This applies also to the Commentary on the Hungarian Criminal Code. Moreover, the Commentary uses the words 'use in public', and thus, again, the mark is not assessed by itself but in relation to particular use. The applicant argues that it is

not required to show that use of the sign in question would constitute a criminal act under Hungarian Law or that it would be unregistrable in Hungary.

- 46 The Board agrees with the applicant that there is no requirement in the CTMR showing that use of a sign applied for as a Community trade mark would be against national law. The applicant also does not have to prove that the sign will not be refused as a trade mark before the Hungarian Patent Office. However, this is not the point.
- 47 The extract from the Guidelines was taken from the website of the Hungarian Patent Office, as can be seen from the domain address http://mszh.hu/vedjegy/vedj_modszertan/i_1_3.html?printable=1. The fact that these Guidelines are listed on the official web pages of the Hungarian Patent Office shows that they are taken into account by the Hungarian Office. Consequently, any other queries of the applicant, including the validity of the Commentary on Hungarian Criminal Code, are irrelevant. In any case, the wording of the Hungarian Criminal Code is clear to the Board and also to the applicant who constantly claims that only certain use of the signs is regulated.
- 48 The Hungarian Criminal Code states that the person who distributes, uses before great publicity or exhibits in public.... sickle and hammer, a five-pointed red starshall be punishable with fine. The person, who commits the act for the purposes of the dissemination of knowledge, education, science, or art, or with the purpose of information about the events of history or the present time, shall not be punishable.
- 49 Thus, any public use including distribution (which also includes selling goods bearing the sign applied for), which is not excluded for educational or other relevant purposes, is prohibited. As has already been explained, the existence of the sign itself or its private use cannot be regulated in democratic countries. The Commentary on the Hungarian Criminal Code as well the Court in Case C-328/04 use a slightly different translation, where the part 'uses before great publicity' is translated as 'uses in public'. However, the content stays the same, meaning that any use which is not purely private and not excluded by subsection 2 of the Criminal Code constitutes a criminal offence.
- 50 The fact that public use of those signs is still prohibited in Hungary, even after almost 20 year after the break up of the Soviet Union, together with fact that a Hungarian Member of Parliament was involved in proposing a ban of Communist symbols in 2005, clearly show that these types of signs would still be viewed by Hungarian consumers as being contrary to public policy and accepted principles of morality.
- 51 Consequently, taking into account all the evidence mentioned above, the Board concurs with the conclusion in the contested decision that the registration of the sign applied for has to be rejected on the basis of Article 7(1)(f) CTMR, because the sign is contrary to public policy and accepted principles of morality in Hungary.

Latvia

52 The examiner quoted Section 11(5) of Latvian Law on Meetings, Street Processions and Pickets from 16 January 1997. This part provides the following:

(1) Participants in meetings, street processions and pickets during such events are prohibited from:

- 5) utilising former USSR, Latvia PSR and nazi Germany flags, coats of arms, hymns and symbols (also in a stylized form);

53 Also, the previous Section 10, subparagraph 2, states that openly advocating the ideology of communism is prohibited:

(2) During the referred to events, it is prohibited to inveigh against the independence of the Republic of Latvia, to express proposals regarding the overthrow of Latvia's State structure by means of violence, to invite the non-fulfilment of laws, to advocate violence, ethnic or racial hatred, openly the ideology of nazism, fascism or communism, to perform war propaganda, as well as to eulogise or invite the commitment of criminal offences and other violations of law. [10 April 2003]

54 The fact that certain use of former Soviet signs constitutes a prohibited act is not disputed by the applicant. Nevertheless, the applicant argues that the Latvian statute is directed towards the prohibition of the use of these signs in a political context and that these signs *per se* are not objectionable in any other activity.

55 The Board observes that the above mentioned Latvian law does not seem to be as strict as the Hungarian one, when it prohibits use of the former USSR or Communist symbols only in meetings, streets processions and pickets. Nevertheless, the fact that certain public use is legally prohibited is a strong indication of how those signs are perceived by Latvian consumers. Furthermore, the Latvian Patent Office has itself expressed the opinion that any public use of these signs, including their use in commercial activities as a trade mark, is unacceptable as it would be contrary to the requirements of ethics, humanism and morality and, consequently, also to public order (see further). This is a natural consequence of the historical memories of the Communist regime. This assumption is not disputed by the applicant, who notes that 'Behind the public policy and political morality of these Member States and former Soviet satellite countries lies the fact that political activity which seeks to advocate the re-introduction or introduction of such a system violates the democratic principles on which the states are now founded and which formerly caused suffering in various forms to their peoples'.

56 The applicant has been notified of three decisions of the Latvian Patent Office relating to refusals of trade marks including the five-pointed red star and/or the sickle and hammer, on the same legal basis of public policy or morality.

57 The decision dated in 27 April 2006, regarding the refusal of a figurative sign



in colour, for goods in Class 33, refers to Section 6(1)(6) of the Latvian Act on Trademarks and Indications of Geographical Origin of 16 June 1999.

According to this provision, those signs which are contrary to public order or to socially accepted principles of morality may not be registered as trade marks. In the decision the following is explicitly stated:

‘Any public use of the sign ‘CCCP’, including its use in commercial activities as a trademark, is unacceptable as it would be contrary to the requirements of ethics, humanism and morality and, consequently, also to public order. Namely, name, coat-of-arms and national flag are the main attributes of a country. The sign ‘CCCP’ symbolises a country which committed crimes against humanity, including terror and genocide, occupation of independent states, etc. The USSR (CCCP) occupied Latvia for a period of 50 years. Many residents of Latvia are victims of the activities of the USSR (CCCP) – for instance, deportation of thousands of people, violation of human rights, assimilation of Latvians, etc. Therefore, it is clear that in the consciousness of the Latvian consumers the sign ‘CCCP’ is associated with occupation, terror and genocide. On the basis of the aforementioned points, it is reasonable to claim that the sign ‘CCCP’ is a symbol of the totalitarian regime’.

58 Another decision issued by the Board of Appeal of the Latvian Patent Office on 1 March 2000 regards the refusal of international application No WO 692450 of the word mark ‘STALINSKAYA’, applied for goods and services in Classes 33, 35 and 39. The Board dismissed the appeal against the decision of 26 May 1999 regarding refusal of the mark in question, based on Section 2(1)(8) of the 1993 Latvian Act on Trademarks. This provision stipulates that those marks which are contrary to the requirements of ethics, humanism and morality shall not be registered in Latvia. The decision stated that in Latvia there is a ban on the Communist Party, whose activities were for many years also associated with the name of its former Secretary-General J. Stalin. Thus, it can be concluded that the majority of Latvian society would consider the registration of the trade mark ‘STALINSKAYA’ as being contrary to the principles of humanism and morality currently established in Latvia. The decision also mentions the Latvian Association of Victims of Political Repression which represents a considerable number of Latvia’s residents.

59 The last decision of 4 January 2008 relates to the refusal of an application of the



following sign in colour, for goods in Class 32. This mark was refused on the basis of Section 6(1)(6) of the Latvian Act on Trademarks and Indications of Geographical Origin of 16 June 1999.

60 The applicant’s comments can be divided into several following areas:

- a) The decisions are based on statutes which predate Latvian entry to the EU.
- b) The decisions relate to different signs applied for different goods.
- c) Principles of ethics, humanism and morality applied in Latvian law are unknown to the applicant.
- d) Public policy is not included in the Latvian statutes.
- e) The decisions are based on use of the signs, not on the signs *per se*.

Add a)

- As to the fact that Latvia entered the EU on 1 May 2004, while the decisions are based on legislation from 1993 and 1999, this is not relevant, as the relevant provisions stayed the same. Section 2(1)(8) of the 1993 Latvian Act on Trademarks relates to marks which are contrary to ethics, humanism or morality. This 1993 Act was repealed by the Act on Trademarks and Indications of Geographical Origin of 16 June 1999, currently in force, which contains the same provision about the non-registrability of signs which are contrary to public policy or to socially accepted principles of morality (Section 6(1)(6)).

Add b)

- The Board is aware of the fact that the signs contained in the decisions of the Latvian Patent Office are different from the sign applied for. However, they still contain former Soviet symbols, whose use is regulated and, in fact, one of them includes the simplified coat of arms of the Soviet Union. The fact that those signs were applied for different goods than the contested sign is not crucial, as the objections of the Office did not relate to the goods, but to the signs. Therefore, these decisions are considered by the Board as highly relevant since they were issued in similar cases.

Add c)

- The applicant's argument that principles of ethics, humanism and morality applied in Latvian Law are unknown to it has to be rejected. First of all, general principles of those categories, attributed to all democratic societies do not require further specification. Moreover, they were expressed in the above mentioned decisions as those preventing the registration of the sign which is related to crimes against humanity, including terror and genocide, occupation of independent states etc. Latvia was occupied for a period of 50 years. Furthermore, the applicant is aware of those principles as it recognises that the Soviet regime violated the democratic principles on which the states are now founded and which formerly caused suffering in various forms to their peoples.

Add d)

- The applicant's assertion that the Latvian statutes do not include public policy is incorrect as this ground of refusal is contained in Section 6(1)(6) of the 1999 Act. Also, public policy (translated as public order) is mentioned in the decision of 27 April 2006, which stated that 'Any public use of the sign 'CCCP', including its use in commercial activities as a trade mark, is unacceptable as it would be contrary to the requirements of ethics, humanism and morality and, consequently, also to public order'.

Add e)

- The applicant argues that all the decisions are based on use of the signs (Any public use of the sign ... including its use in commercial activities as a trade mark,

is unacceptable). The Board observes that the signs applied for *per se*, without any reference to the goods or the circumstances of its use were assessed as referring to a totalitarian regime, and its public use was considered contrary to the national trade mark and criminal law.

- 61 Consequently, the Board concludes that all of the above mentioned evidence fully supports the finding of the contested decision that the registration of the sign applied for has to be rejected on the basis of Article 7(1)(f) CTMR, because it is against public policy and accepted principles of morality in Latvia.

The Czech Republic

- 62 The newly found material regarding the Czech Republic, submitted to the applicant, consisted of a decision of the Czech Industrial Property Office dated 3 August 2006 with its English translation and an extract from the national trade mark database. The decision refused the application for the figurative trade mark



No O-429748 of the following sign , applied for goods in Class 25. The refusal was based on Section 4(f) of Act 441/2003 Coll., *Trade Marks*, which prohibits registration of marks which are contrary to public policy or to accepted principles of morality (good manners). The decision stated that the sign in relation to the goods applied for could be taken by a section of the general public as promoting Communist ideology.

- 63 The applicant firstly argues that this evidence cannot be taken into consideration because it is based on the law which predates the entry of the Czech Republic to the European Union. The Board notes that the purpose of issuing Act 441/2003 Coll. of 3 December 2003, *Act on Trade Marks*, was to harmonize the national law with the Community law on trade marks. This Act was prepared before the EU accession and came into force partly on 1 April 2004 and partly on 1 May 2004, the date of entry of the Czech Republic to the EU. As it is currently in force, the claim of the applicant has to be rejected.
- 64 Secondly, the applicant claims that the quotation of the relevant Section 4(f) of this Act is unknown. The Board observes that the decision itself, indeed, does not contain the quotation of Section 4(f) of the Act. Nevertheless, it can be retrieved from the official website of the Industrial Property Office of the Czech Republic. According to the translation of this particular Act, which can be found on the following website (<http://www.upv.cz/en/legislation/national/codes.html>), Section (4)(f) states that a sign, which is contrary to public policy or to accepted principles of morality shall not be registered. Thus, this provision corresponds to Article 7(1)(f) CTMR.
- 65 Therefore, the applicant's suggestions that national provisions can be outdated or not harmonized with the EU law have to be rejected. In light of this, the applicant's query relating to the law on the promotion of Communist ideology in the Czech Republic is irrelevant. The decision of the national authority relating to

signs promoting Communist ideology, issued a few months before the filing of the contested application, indicates the critical view of consumers in this matter.

Legitimate expectations

- 66 The applicant argues that by registering Community trade mark No 3 955 154 of



the same sign for goods in Classes 16, 24 and 25, it was entitled to legitimately expect the registration of the sign in question also in these proceedings. In the opinion of the applicant, by rejecting the trade mark in question the Office has acted in a discriminatory manner. The applicant refers to the judgment in joined Cases 7/54 and 9/54 cited above, where the Court held that the concept of discrimination is specified in Article 60 of the *Treaty of European Steel and Coal Community*, which indicates that practices involving, within the Common Market, the application of dissimilar conditions to comparable transactions, are discriminatory.

- 67 The Board supports the view of the examiner that the registration of Community trade mark No 3 958 154 was a mistake, which might have been caused by the fact that the examiner was not a citizen from a relevant country, and therefore, was not aware of the circumstances in the above mentioned Member States. In any case, the principle of legitimate expectations does not bind the Office to issue decisions following an incorrect one. Although consistency in decision-making is highly desirable, the legality of decisions of the Office must be assessed purely on the basis of the Regulation and not on the basis of previous decisions taken by the Office or by the Boards (see in this sense judgment of 27 February 2002 in Case T-106/00 *Streamserve v OHIM* ('Streamserve') [2002] ECR II-723, at paragraph 66, confirmed by order of 5 February 2004 in Case C-150/02 P *Streamserve Inc. v OHIM* ('Streamserve') [2004] ECR I-1461). Thus, not only has the Office not acted discriminatorily, as claimed by the applicant, but, on the contrary, it has proceeded in this sensitive matter carefully, by considering how the sign will be perceived in certain Member States. The Board also points out that Community trade mark application No 5 641 725 filed by the applicant on



5 January 2007 for a similar type of sign , applied for goods in Class 16, 24 and 25, was rejected on 27 August 2008 on the basis of Article 7(1)(f) CTMR as well. No appeal has been filed in that case.

Final remarks

- 68 The applicant also argues that many cities in Eastern Europe still retain signs and statutes glorifying the former Soviet Union, and that there are no reports of public disorders because of this. The Board is of the opinion that the examiner's statement that the registration of the sign in question bears a serious risk of causing public disorder might be slightly exaggerated. In any case, actual public disturbance is not relevant because the sign can still offend people without them protesting publicly.

- 69 The Board is also of the opinion that the assessment of the sign applied for is in line with the judgments in ‘Nu-Tride’ and ‘Intertops’, quoted by the applicant. In those judgments the Court held that it is only the sign itself, its intrinsic qualities, which have to be assessed, together with the goods or services, and not the circumstances of its use in the market or of conduct of the person applying for the trade mark. The sign in question was assessed as it was applied for and not in relation to the applicant’s potential use of it on the market.
- 70 The Board cannot concur with the applicant’s assertion that historical symbols only carry political meaning or ideological connotation if they are used in a political context or for political purposes. Certain signs, especially symbols (state emblems, flags, coat of arms, heraldic emblems etc.), which represent an idea (religious, political, etc.) have the advantage of being recognized irrespective of the situation in which are presented. For example, the swastika as one of the Nazi symbols will be recognized and will carry ideological connotation always, not only in a political context. By analogy, the sign applied for not only suggests, as the applicant tries to argue, but clearly refers to Soviet ideology. This has nothing to do with its use on the market. The sign *per se* represents a symbol of the Soviet Union and its power lies in the fact that it communicates a political or ideological message, especially when the sign is used on goods such as ‘badges’ applied for in Class 26 and also on the other goods and services applied for.
- 71 In the light of the foregoing and contrary to the applicant’s assertion, the Office does not show a general antipathy to former Soviet symbols or similar signs, but relies on objective evidence from certain countries of the Community, in which the sign would be perceived very critically. The Board is of the opinion that the evidence discussed in this case endorses the statement of the notice of grounds for refusal dated 4 April 2008, where the examiner concluded that:
- The public in some Member States is particularly sensitive when being confronted with symbols which represent the former Soviet Union because of the delicate relationship between those states and the Soviet Union in recent history. The Hungarian and Latvian provisions, cited in the previous notice of ground for refusal, are indications that certain symbols of the former Soviet Union bring back memories which are perceived as unpleasant. The rationale of those provisions is to prohibit the use of symbols which represent an antidemocratic and totalitarian ideology which is contrary to the principles liberty, democracy and respect for human rights and fundamental freedoms, to which the Member States are committed.
- 72 This conclusion, in general, is not challenged by the applicant, who itself acknowledges in its observations of 18 January 2008 that the Soviet regime was totalitarian. The applicant also, in its comments of 14 January 2010, notes that ‘Behind the public policy and political morality of these Member States and former Soviet satellite countries lies the fact that political activity which seeks to advocate the re-introduction or introduction of such a system violates the democratic principles on which the states are now founded and which formerly caused suffering in various forms to their peoples. It is implicit that any Soviet symbols may not be liked or might evoke unpleasant memories by some citizens of those countries....’.
- 73 In this regard it is irrelevant if the rest of the Community were not to have any objections to the application in question, for example, because similar symbols are used legally by left-wing parties of some Member States. As was expressed in

the ‘SCREW YOU’ case, the organs of government and public administration should not positively assist people who wish to further their business aims by means of trade marks that offend against certain basic values of civilised society. The sign applied for is a sign whose registration would be contrary to Article 7(1)(f) CTMR, at least as far as Hungary and Latvia are concerned, as correctly concluded by the examiner.

74 In the light of the foregoing, the appeal is dismissed.

Order

On those grounds,

THE BOARD

hereby:

Dismisses the appeal.

Signed

T. De Las Heras

Signed

H. Salmi

Signed

G. Humphreys

Registrar:

Signed

J. Pinkowski

