

**DECISION
of the First Board of Appeal
of 1 December 2023**

In case R 438/2023-1

Administration of the State Border Guard Service of Ukraine

Volodymyrska st., 26

01601 Kyiv

Ukraine

Applicant / Appellant

represented by Andrej Bukovnik, Slomskova 17a, 1000 Ljubljana, Slovenia

APPEAL relating to European Union trade mark application No 18 672 791

THE FIRST BOARD OF APPEAL

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

Registrar: H. Dijkema

gives the following

Decision

Summary of the facts

- 1 On 16 March 2022, the predecessor-in-title to the Administration of the State Border Guard Service of Ukraine ('the applicant') sought to register the sign

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for the following list of goods and services:

Class 9: *Navigation, guidance, tracking, targeting and map making devices; Measuring, detecting, monitoring and controlling devices; Magnets, magnetizers and demagnetizers; Optical devices, enhancers and correctors; Recorded content; Safety, security, protection and signalling devices; Software for use as a wallet for downloadable multimedia files containing artwork, text, audio, and video relating to the Russia military aggression against Ukraine authenticated by non-fungible token (NFTs).*

Class 14: *Jewellery; Gemstones, pearls and precious metals, and imitations thereof; Key rings and key chains, and charms therefor; Time instruments; Chronometric instruments; Ceramic discs for use as tokens of value; Coins; Collectible coins; Commemorative coins; Commemorative shields; Commemorative statuary cups made of precious metal; Decorative articles [trinkets or jewellery] for personal use; Fancy keyrings of precious metals; Identification bracelets [jewelry]; Identity plates of precious metal; Monetary coin sets for collecting purposes; Non-monetary coins; Works of art of precious metal.*

Class 16: *Bags and articles for packaging, wrapping and storage of paper, cardboard or plastics; Decoration and art materials and media; Coasters of paper; Coasters of cardboard; Banners of paper; Bibs of paper; Dinner mats of cardboard; Disposable napkins; Paper handtowels; Kitchen rolls [paper]; Table runners of paper; Table napkins of paper; Paper and cardboard; Printed matter, and stationery and educational supplies; Works of art and figurines of paper and cardboard, and architects' models.*

Class 18: *Luggage, bags, wallets and other carriers; Umbrellas and parasols; Adhesive tags of leather for bags; Card holders made of imitation leather; Card holders made of leather; Cases of leather or leatherboard; Labels of leather; Leather and imitations of leather.*

Class 25: *Clothing; Footwear; Headgear; Parts of clothing, footwear and headgear.*

Class 28: *Sporting and physical exercise equipment; Toys, games, and playthings.*

Class 41: *Publishing, reporting, and writing of texts; Education, entertainment and sports.*

- 2 On 14 July 2022, the examiner notified the applicant of provisional grounds for refusal for the application in its entirety, namely Article 7(1)(f) EUTMR. He reasoned that the sign consisted of basic English words which **would be immediately understood** by the average public in the European Union (and Russian words bearing the same meaning, as would be understood by the Russian-speaking population in the European Union, in particular the relevant public in the Baltic states) **as merely meaning 'Russian warship, go fuck yourself'**. In his view, the relevant public would perceive this sign as **contrary to accepted principles of morality because it seeks financial gain from what is universally accepted to be a tragic event, namely the invasion of Ukraine by the Russian Federation**. In particular, the sign

applied for was the last communication made during the February 2022 Russian attack on Snake Island in Ukraine's territorial waters, which cannot be considered an event for promoting the sales of goods and services, since it is originated in the Russian Federation invasion and subsequent war against Ukraine, this war having resulted in the deaths not only of thousands of soldiers but of thousands of civilians too. Consequently, the sign is ineligible for registration under Article 7(1)(f) EUTMR.

- 3 On 7 September 2022, the predecessor-in-title applied to transfer the contested application to the applicant, and the Office confirmed that this had been entered on the register on 13 September 2022. On the same date, the applicant maintained its request for registration notwithstanding the objections raised by the examiner.
- 4 The applicant argued inter alia that:
 - The contested application would not be considered by the reasonable consumer with average sensitivity and tolerance thresholds as blasphemous, discriminatory, insulting, or as promoting drug consumption. The predecessor-in-title to the applicant is the servant of the applicant, Administration of the State Border Guard Service of Ukraine and experienced the tragedy of the war started by Russia against Ukraine from the start first hand – at the time when he exclaimed the words composing the sign applied for to the Russian warship ‘Moskva’ at Snake Island, while defending the territory of Ukraine. **Since its first use, this phrase has become associated with the courage and bravery of the Ukrainian armed forces and has become one of the symbols of Ukraine’s fight for their freedom against Russian occupation**
 - The sign has been picked up by supporters of Ukraine all over the world and it has been widely used to demonstrate support of Ukraine in the ongoing war commenced by Russia. The sign has been displayed during street protests and was featured in numerous articles by major media and news providers all around the world. It has been used by various political and cultural activists in Europe and in the United States. In April 2022, the Ukrainian Post Office issued a stamp that features a drawing of a Ukrainian soldier presenting the middle finger to the Russian cruiser Moskva representing the moment when the phrase was used for the first time. The stamp has become famous all over the world and since then has been presented by the Ukrainian authorities to various political figures as a sign of appreciation of the support of Ukraine during the Russian aggression.
 - The Office erred in reasoning that, because the sign applied for originated in connection with the tragedy of war, it cannot serve to promote the sale of goods and services. With this the Office entirely ignored the basic fact that the words are an expression of bravery, courage, defiance, resistance, independence, fight for freedom, and patriotism, which are all positive feelings, even though they are most often expressed and demonstrated in the state of extreme crisis or war. If the logic of the Office were followed, words like *On ne passe pas!*, *No pasaran!*, ‘Keep calm and carry on’, and similar slogans calling to resistance would be considered immoral to use in commerce because they originate from the tragedy of war. This is obviously not the case as these expressions are associated with positive feelings and are very popular with consumers and the population in general.
 - As for the claim that this phrase should not be monetised, the contested application aims precisely to prevent third-party bad faith profiteering, instead giving the right to control its use in commerce to its rightful owner, and rightly helping the applicant in its fundraising and aid efforts. Consumers are purchasing merchandise with the phrase

‘RUSSIAN WARSHIP, GO FUCK YOURSELF’ not because it is contrary to public policy or to accepted principles of morality. To the contrary, consumers are buying such articles because 1) the phrase is associated with bravery, courage, defiance, resistance, independence, fight for freedom, and patriotism, 2) they want to show support for Ukraine in the war started by Russia and 3) they want to support Ukraine financially.

- Since the invasion of Ukraine, foreign governments and individuals have been supporting Ukraine. The amounts of money donated are dozens of billions of euros. If the EU population has donated billions of euros to Ukraine and its armed forces, it cannot be assumed that the relevant public would consider it contrary to public policy or to accepted principles of morality if the Office granted protection to the application or if the applicant has put the trade mark to use in order to gather support for the war effort and the gathering of humanitarian aid. The applicant is a special purpose law enforcement agency of Ukraine, which means that it cannot be gaining financially from any activity by default. Further, even if any financial gain were obtained, any such funds would be channelled for the defence of Ukraine against the occupation by Russia.
- 5 On 22 December 2022, the examiner took a decision (‘the contested decision’) refusing the trade mark applied for in its entirety, under Article 7(1)(f) in conjunction with Article 7(2) EUTMR.
 - 6 The decision was based in essence upon the reasoning contained in the previous notification (paragraph 2 above). He added that, despite the arguments of the applicant, the sign is still **insulting and uses vulgar language with a sexual connotation** (‘go and fuck yourself’), which is a form of ‘fuck you’. In those circumstances, the applicant’s argument that the Office erred in finding that the sign at issue had a sexual connotation is ineffective and must be rejected. The examiner’s reasoning was accordingly based on his view that the mere use of the word ‘FUCK’ is considered vulgar. He added that many of the goods and services applied for target children and young people under 18, and so the sign is not appropriate for them even if it has become common in certain segments of society. In addition, the goods and services applied for have no relation with the fight for freedom, resistance, bravery, etc. and **the reason for registration is merely for the making of financial gain from the tragedy of the Russian invasion of Ukraine. By using a sign that is insulting and uses shocking and vulgar terms for goods such as watches, jewels, wrapping paper, clothes, etc., the applicant also banalises the Russian invasion of Ukraine by using the tragedy as a merchandising instrument for selling goods and services for making money, it being irrelevant who the applicant is.**

Grounds of appeal

- 7 On 21 February 2023, the applicant filed a notice of appeal against the contested decision, followed by a statement of grounds, requesting that the decision be set aside, and that the application be granted protection in its entirety. In support of the statement of grounds, the applicant submitted the following evidence:

Annex	Short description
1	Screenshots from www.amazon.de , Redbubble, Vetashop, Etsy, etc. showing products offered for sale online with the uncensored phrase RUSSIAN WARSHIP, GO FUCK YOURSELF (e.g. t-shirts, sweatshirts, caps, stickers, patches, mobile phone cases, mugs, posters).
2	A statement dated 7 March 2022 from a professor at the Taras Shevchenko National University of Kyiv and President of the State Exam Committee of the Institute of Journalism, concerning his outrage concerning the wrong way of writing the word 'NAKHUI'.
3	A statement from a manager in the Ukrainian Civil Servants Service dated 21 March 2023 regarding use of the phrase 'RUSSIAN WARSHIP, GO FUCK YOURSELF', stating that this phrase as used by the border guards on Snake Island has become a symbol of the fight against the Russian occupiers, used in numerous poems and songs, and in art and design.
4	Evidence of the phrase having become an expression of bravery, resilience, resistance, independence, and freedom, including its use on Ukrainian stamps (Wikipedia screenshots, articles from navytimes.com, <i>The Guardian</i> , <i>The Washington Post</i> , Speed Reads, <i>The Wrap</i> , Literary Hub, huffpost.com, etc.).
5	More screenshots of products sold online bearing the phrase 'RUSSIAN WARSHIP GO FUCK YOUSELF' on the market, in particular many different t-shirts.
6	A letter dated 19 April 2023 to the EUIPO from the Administration of the State Border Guard Service of Ukraine, stating inter alia that 'Uttered during the first days of invasion, these words have become one of the symbols of bravery and invincibility of the Ukrainian people, which have been admired by the whole world.'

- 8 The arguments raised in the statement of grounds may be summarised as essentially the same as those filed in response to the examiner's initial objection (paragraph 4 above), supported by the submission of the evidence listed above to further support those arguments and to contest the findings in the contested decision.
- 9 On 13 June 2023, the Rapporteur issued a Communication to the applicant, informing it that following a preliminary examination of the case, it appears that the sign also lacks distinctive character pursuant to Article 7(1)(b) EUTMR.
- 10 As the examiner correctly held, the sign applied for

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is composed of basic English words which would be immediately understood by the average public in the European Union (and Russian words bearing the same meaning, as would be understood by the Russian-speaking population in the European Union, which includes in particular the relevant public in the Baltic states) as merely meaning 'Russian warship, go fuck yourself'. The use of 'F**K' will not impede understanding (R 1940/2022-1, FCKNG SERIOUS). According to the applicant, since its first use, this phrase has become associated with the courage and bravery of the Ukrainian armed forces and has become one of the symbols of Ukraine's fight for freedom against Russian occupation. The sign has been picked up by supporters of Ukraine all over the world and it has been widely used to demonstrate support of Ukraine in the ongoing war commenced by Russia. The sign has been displayed during street protests, was featured in numerous articles by major media and news providers all around the world. It has been used by various political and cultural activists in Europe and in the United States.

- 11 A sign that has been very intensely used in a non-trade context – i.e. political, historical, etc. – will necessarily be very closely associated by the public to that context and may only acquire distinctiveness as a mark if consumers have been sufficiently exposed to it in a trade context (see decision of the Grand Board 30/01/2019, R 958/2017-G, BREXIT (fig.) § 50 - 53).

- 12 In its reply, the applicant requested that the Board render a decision first on Article 7(1)(f) EUTMR and only then, on Article 7(1)(b) EUTMR.
- 13 With respect to Article 7(1)(b) EUTMR, the communication makes a few references to the well-established case-law of the CJEU and makes no further assessment of distinctiveness of the application by reference to the goods or services in respect of which registration has been applied for. Further arguments make it clear that the EUTM applied for would have been rejected for any goods or services.
- 14 The war in Ukraine is not a political process for Ukraine or for the relevant public in the EU. This reference by the Board of Appeal is merely a copy-paste mistake from the text of the Grand Board of Appeal's BREXIT decision. The statement/slogan that is the subject of this application is unmistakably, undoubtedly and universally acknowledged to be attributed to a known soldier (a Ukrainian Border Guard serviceman), a known army (the Ukrainian army), and a known country (Ukraine). The statement/slogan is clearly not associated with any other event or historical moment or a 'political process' anywhere else in the world, Europe or any other period in time.
- 15 While the sign applied for has indeed become one of the symbols of Ukraine's fight for freedom against Russian occupation, it is striking how the Board of Appeal has easily established that, as of the application date (16 March 2022), it could no longer be associated with any specific undertaking. The Board of Appeal did not allege that the sign applied for is inherently non-distinctive, but rather that it had lost its distinctiveness. The relevant public was (has been and is still, one and half years into the war) associating the sign applied for with a specific Ukrainian border guard serviceman who uttered it. The relevant public was (has been and is still) associating the sign applied for with the Ukrainian defenders, for whom the applicant is serving as a representative in this case. The relevant public of the European Union (excluding the supporters of the Russian invasion into Ukraine) was, has been and will be associating the goods bearing the sign applied for with the abovementioned Ukrainian border guard serviceman, with the Ukrainian defenders and the Ukrainian people, and will be under the impression that any person producing or marketing the goods bearing the sign applied for must have received an authorisation from the author of the phrase and from the Ukrainian defenders (be it the Ukrainian army or the applicant as its representative) for use of this sign on such goods. At the very least, the relevant public would assume some economic relationship between the author of the phrase and the users of the sign applied for. The relevant public in the European Union was (has been and is) purchasing the goods bearing the sign applied for to show their support to the Ukrainian people while believing that proceeds from a purchase of such goods would go to ease the damage, harm and pain caused to the Ukrainian people as a consequence of the war, which is a regular practice for similar goods marketing (e.g. as the proceeds of goods bearing the CANCER sign are normally expected by the purchasers of such goods to bring relief to those who suffer from cancer or to be contributed to cancer research).
- 16 In relation to above, the Office clearly cannot make a distinction between a 'political' statement and commercial use of the sign. The applicant does not want to prevent or in any way discourage 'political' expression of support through use of the statement/slogan, which is, even in the 'political' context, only associated with a specific war, a specific person, the events on the Ukrainian Snake Island, and Ukraine. There are also sufficient safeguards to prevent the applicant from using EUTM exclusive rights to prevent free speech or freedom of expression outside of commerce. After all, neither the author of the sign applied for, nor the applicant, nor the Ukrainian Government are preventing fair use

of the slogan through copyright mechanisms, even though copyright and authorship in this case are clear and undisputed. However, what the applicant is seeking is to gain rightful trade mark rights and an effective IP mechanism to prevent abuse, misuse, and war profiteering, and to control commercial use of the sign in the EU so that consumers are not misled into believing that they support Ukraine by buying a T-shirt but instead support a dictatorship in Myanmar or Vietnam where the T-shirts came from without any authorisation from the author, the applicant as his representative, or the Ukrainian Government. There is, therefore, a clear distinction between the use of the sign as a 'political' statement and the use in trade (which is otherwise not problematic for the Office as shown by various examples). While other entities are already (predominantly unfairly) using the mark in its advertising function (as was shown by the applicant with examples in the statement of grounds), the applicant is prevented by the Office from using it to ensure and guarantee the origin of the goods.

- 17 The Office has registered other signs that referred to 'political events' or were used as slogans in 'political events'.
- 18 It is relevant and important that the applicant is a Ukrainian governmental institution. This means that it is entitled to control, manage, and dispense with parts of the property belonging to the Ukrainian State in accordance with decisions and guidance of the Government of Ukraine. In view of this, even if the sign were associated in the minds of the relevant public not only with an individual border guard serviceman, the author of the phrase, or the applicant as his representative, but was instead associated with Ukraine as a country or Ukrainians as a nation, then the applicant is entitled to obtain the corresponding rights and manage them as an IP property on behalf of Ukrainians as a sovereign nation. There is no one else that can have moral rights to use the sign applied for and the applicant asks the Board of Appeal to extend this moral and legitimate right also to the exclusive trade mark rights so that the sign which is associated only with the applicant or his employee and Ukraine, is also only used in good faith and with the authorisation of Ukraine, for the benefit of the Ukrainian people.

Reasons

- 19 The appeal complies with Articles 66, 67 and Article 68(1) EUTMR and is admissible, but not well-founded.

Article 7(1)(b) EUTMR

- 20 In accordance with Article 7(1)(b) EUTMR, trade marks which are devoid of any distinctive character are not to be registered. Furthermore, Article 7(2) EUTMR provides that this ground for refusal applies even if it exists in only part of the European Union. The idea underlying Article 7(1)(b) EUTMR coincides with the essential function of the trade mark, which is to guarantee the identity of origin to the consumer in relation to the goods or services covered by the trade mark.
- 21 The absolute ground for refusal provided for in Article 7(1)(b) EUTMR is thus intended to ensure that the consumer is able, without any possibility of confusion, to distinguish the product or service in question from goods or services having a different origin. A trade mark therefore has distinctive character within the meaning of that provision if it is sufficient to identify the product or service in respect of which registration is sought as originating from a particular undertaking and thus to distinguish that product or service from those of other undertakings, so that the consumer who acquired the product designated by that mark or to whom the service designated by that mark has been supplied

- may, in the event of a subsequent purchase or contract, if the experience is positive, repeat that choice or, in the event of a negative experience, make a different choice (29/04/2004, C-473/01 P & C-474/01 P, Tabs, EU:C:2004:260, § 32; 08/05/2008, C-304/06 P, Eurohypo, EU:C:2008:261, § 66; 21/01/2010, C-398/08 P, Vorsprung durch Technik, EU:C:2010:29, § 33; 27/02/2002, T-79/00, Lite, EU:T:2002:42, § 26; 30/06/2004, T-281/02, Mehr für Ihr Geld, EU:T:2004:198, § 24).
- 22 Registration of a trade mark which consists of indications that are also used as advertising slogans, indications of quality or incitements to purchase the goods or services covered by that mark is not excluded as such for that reason. In the case of such trade marks, it must always be examined whether there are elements which, beyond their plain advertising function, would enable the relevant public to memorise the sign easily and instantly as a distinctive trade mark for the goods and services designated (05/12/2002, T-130/01, Real People, Real Solutions, EU:T:2002:301, § 19; 11/12/2012, T-22/12, Qualität hat Zukunft, EU:T:2012:663, § 15).
- 23 A sign consisting of an advertising slogan is devoid of any distinctive character if it is liable to be perceived by the relevant public as a mere promotional formula. However, such a mark must be recognised as having distinctiveness if, apart from its promotional function, it may be perceived immediately as an indication of the commercial origin of the goods or services in question (12/06/2014, C-448/13 P, Innovation for the real world, EU:C:2014:1746, § 36; 05/12/2002, T-130/01, Real People, Real Solutions, EU:T:2002:301, § 20; 30/06/2004, T-281/02, Mehr für Ihr Geld, EU:T:2004:198, § 25; 13/04/2011, T-523/09, Wir machen das Besondere einfach, EU:T:2011:175, § 31).
- 24 Since the relevant consumers are not very attentive if a sign does not immediately indicate to them the origin and/or intended use of the object of their intended purchase, but just gives them purely promotional, abstract information, they will not take the time either to enquire into the sign's various possible functions or mentally to register it as a trade mark (05/12/2002, T-130/01, Real People, Real Solutions, EU:T:2002:301, § 29; 11/12/2012, T-22/12, Qualität hat Zukunft, EU:T:2012:663, § 30). For example, the level of attention of the relevant public is relatively low in the case of promotional formulations, irrespective of whether the public consists of the average consumer or a more attentive public composed of specialists or circumspect consumers (05/12/2002, T-130/01, Real People, Real Solutions, EU:T:2002:301, § 24; 29/01/2015, T-59/14, INVESTING FOR A NEW WORLD, EU:T:2015:56, § 27).
- 25 The distinctive character of a sign must be assessed, first, by reference to the goods or services in respect of which registration is sought and, second, by reference to the perception of the relevant public, which consists of average consumers of those goods or services, who are reasonably well informed and reasonably observant and circumspect (21/01/2010, C-398/08 P, Vorsprung durch Technik, EU:C:2010:29, § 34; 12/09/2019, C-541/18, #darferdas?, EU:C:2019:725, § 20).
- 26 The goods and services in question overwhelmingly consist of everyday goods and services, which all target mainly the public at large, although *navigation, guidance, tracking, targeting and map making devices; measuring, detecting, monitoring and controlling devices; magnets, magnetizers and demagnetizers; optical devices, enhancers and correctors; recorded content; safety, security, protection and signalling devices* in Class 9 may also be targeted at business professionals, as may the *sporting and physical exercise equipment* in Class 28, and the services of *publishing, reporting, and writing of texts; education* in Class 41. For goods such as *bags and articles for packaging, wrapping and storage of paper, cardboard or plastics; bibs of paper; dinner mats of cardboard;*

disposable napkins; paper handtowels; kitchen rolls [paper]; table runners of paper; table napkins of paper; paper and cardboard in Class 16, to the extent that these are normally disposable single-use and inexpensive items which are frequently purchased, the level of attention displayed in this regard is normally low. By contrast, to more infrequent and durable purchases, often far more expensive, and those concerning safety, security and art and collectables, the level of attention displayed is likely to be high (e.g. *navigation, guidance, tracking, targeting and map making devices; measuring, detecting, monitoring and controlling devices; magnets, magnetizers and demagnetizers; optical devices, enhancers and correctors; recorded content; safety, security, protection and signalling devices* in Class 9, *jewellery; gemstones, pearls and precious metals, and imitations thereof; coins; collectible coins; commemorative coins; commemorative shields; commemorative statuary cups made of precious metal; identity plates of precious metal; monetary coin sets for collecting purposes; non-monetary coins; works of art of precious metal* in Class 14, and *works of art and figurines of paper and cardboard, and architects' models* in Class 16). For the remaining goods and services at issue, the level of attention displayed will normally be average.

- 27 That said, even for those consumers of the goods at hand who might display a higher level of attention, this does not mean that the absolute grounds for refusal should be applied to the mark in a more relaxed manner. On the contrary, terms that may not be fully clear to average consumers can be immediately clear to a professional audience (11/10/2011, T-87/10, Pipeline, EU:T:2011:582, § 27, 28; 07/05/2019, T-423/18, vita, EU:T:2019:291, § 13, 14). This equally goes for a non-professional public that displays a heightened level of attention. Similarly, as set out in paragraph 24 above, the relevant consumers are not very attentive if a sign does not immediately indicate to them the origin and/or intended use of the object of their intended purchase, since they will not perceive it or mentally register it as a trade mark.
- 28 The Board is well aware of the fact that the applicant is an independent law enforcement agency, established and organised by the Constitution of Ukraine. However, this has no bearing on the case.
- 29 Furthermore, the Board, as well as the average European public is well aware of the Russian attack on Ukraine and the war in Ukraine.
- 30 The sign applied for, or at least the sentence in Russian, was used by a then unknown Ukraine soldier.
- 31 As the applicant itself confirms, the slogan is one of the symbols of Ukraine's fight for freedom against Russian occupation. It is associated with a soldier, whether known by name or not, the Ukrainian army and the country. As the applicant confirms, it is not associated at all with any economic undertaking. To the contrary, it is only associated with a sad historical moment and the heroic fight of a country against an – under public international law – illegal attack. Unfortunately, war is part of (international) politics. In this sense, the sign has become, from the very first moment, a political slogan. Consequently, the sign must be seen in connection with the historic event, the Russian attack on Ukraine.
- 32 The Board's reliance upon the principle set out in the BREXIT decision is certainly not, as alleged, 'a copy-paste mistake.' A sign that has been very intensely used in a non-trade context – i.e. political, historical, etc. – will necessarily be very closely associated by the public to that context and may only acquire distinctiveness as a trade mark if consumers have been sufficiently exposed to it in a trade context (see decision of the Grand Board

- 30/01/2019, R 958/2017-G, BREXIT (fig.), § 50-53). There was no hint of use of the original phrase now forming the subject of the application issue ever being used in a commercial context, let alone to identify goods and services.
- 33 Consumers will, first of all, see only the plain message of the sign, which is – as explained above – a political one.
- 34 Equally unconvincing is the assertion that consumers buying a t-shirt or goods marked with the sign applied for would thereby believe that they support Ukraine commercially, and if the goods were made in or sold from a ‘dictatorship’ from Myanmar or Vietnam, they would be misled. Both assertions base their premises on their supposed conclusion – that the sign would be perceived as an indication of commercial origin. However, this is far-fetched and must be rejected. The sign at issue will be perceived by the relevant public as promotional, in the sense of promoting bravery in the face of overwhelming odds, but not as promoting any trade or commercial entity.
- 35 While it is true that the assessment of Article 7 EUTMR must be made with respect to the goods and services applied for, a general statement might be sufficient on a case- to- case basis.
- 36 In the case at stake, the political message, expressed in Russian and English, will be understood by the Russian-speaking public in the entire European Union. The sign contains basic English words, easily understood by any Russian speaker with a basic knowledge of English, especially considering that the Russian original forms part of the sign. This message will always be perceived in the same way, when seen in conjunction with any of the goods and services applied for; it will first and foremost, be seen as a political message. Whether the sign might be perceived differently when applied to other goods or services does not need to be answered.
- 37 Simply put, the war in Ukraine and the defence against Russian military aggression is not intrinsically, nor has it been shown to be subsequently, an instance of commerce in which slogans used to encourage the troops or to deter the enemy are somehow seen as indicating the commercial origin of any particular goods or services. The statement forming the sign at hand will be seen as a very brave Ukrainian refusal to submit to seemingly overwhelming Russian military firepower, but there is no basis to allege that it will automatically be seen for this reason as an indication of commercial origin for goods and services sold by the Ukrainian State, or anyone else for that matter. The Board finds that this is clearly not the case and confirms its preliminary view as expressed in the Communication to the applicant, that the sign is bereft of distinctive character for the goods and services at hand, and thus must be refused under Article 7(1)(b) EUTMR.

Earlier registrations

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

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

- 40 In the present case, the Board has carried out a full and specific examination of the application before refusing it on the basis of the absolute grounds for refusal referred to in Article 7(1)(b) and Article 7(2) EUTMR. Since the examination of the application, in light of those provisions, could not, in itself, lead to a different conclusion, the applicant's claims relating to the failure to take into consideration the registration of allegedly comparable marks, or the alleged unfairness of previously registering a sign which is said to be a patriotic Russian phrase, cannot succeed. The applicant may thus not usefully rely on previous decisions of the EUIPO in order to cast doubt on the conclusion that registration of the sign applied for in respect of the refused goods and services is incompatible with the EUTMR.

Article 7(1)(f) EUTMR

- 41 Pursuant to well-established case-law, it is sufficient that one of the absolute grounds for refusal applies in a part of the European Union, in order for the sign at issue not to be registrable as a European Union trade mark (16/03/2006, T-322/03, WEISSE SEITEN, EU:T:2006:87, § 110).
- 42 In this case, since the mark must be refused to registration pursuant to Article 7(1)(b) EUTMR, it is not necessary for the Board to assess whether it should also be refused to registration pursuant to Article 7(1)(f) EUTMR. The applicant's request to render a decision on Article 7(1)(f) EUTMR is redundant, all the more, since the applicant has not filed any (subsidiary) claim under Article 7(3) EUTMR.

Conclusion

- 43 The appeal shall be dismissed.

Order

On those grounds,

THE BOARD

hereby:

Dismisses the appeal.

Signed

M. Bra

Signed

C. Bartos

Signed

E. Fink

Registrar:

Signed

H. Dijkema

