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The Registrability of Olfactory Trade Marks Before and After the Implementation of Directive (EU) 2015/2436: Practical or Only Theoretical Change?

Zdolność rejestrowa zapachowych znaków towarowych przed i po wprowadzeniu dyrektywy 2015/2436. Zmiana w praktyce czy jedynie w teorii?

ABSTRACT

Smells are an unusual way of communication, allowing not only for the creation of associations in the minds of the recipients, but also for evoking certain emotions. Therefore, they are used in marketing strategies and they may become trade marks. Unfortunately, until the adoption of Directive (EU) 2015/2436 of the European Parliament and of the Council of 16 December 2015 to approximate the laws of the Member States relating to trade marks, these signs were, in principle, excluded from registration. This was due to their inability to meet the requirement of graphic representation as understood by the criteria established by the case law of the Court of Justice of the European Union. However, under this Directive, this requirement was abolished and replaced by the criterion of so-called representativeness of the sign. The purpose of this article is to present olfactory marks from both a marketing perspective and the admissibility of their registration, as well as to analyze the practice of registering them before and after the adoption of Directive 2015/2436.

Keywords: olfactory trade mark; registrability; graphic representation; Directive 2015/2436

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INTRODUCTION

Nowadays, trade marks are a marketing tool used by entrepreneurs in the era of unrestricted competition. Their main purpose is to maximize profits and build the position of enterprises on the market. Therefore, the number of registered trade marks increases every year. Thanks to technological progress, the catalogue of non-traditional representational forms is also expanding and deviates more and more from the existing standards. This is a real challenge not only for patent offices, including the European Union Intellectual Property Office (EUIPO), but also for courts in assessing whether such markings deserve legal protection.

Among such markings, we can distinguish smell marks which, apart from taste, sound and tactile marks, are classified as invisible unconventional signs.[1] Although olfactory marks have not been formally excluded from registration, in practice the possibility to register them raised many doubts. The reason for this was the necessity to meet the normative requirement of the graphic representation of the sign, the understanding of which was consolidated by the jurisprudence practice developed by the Court of Justice of the European Union (CJEU).

Changes in the representation of the trade mark were introduced by Directive (EU) 2015/2436 of the European Parliament and of the Council of 16 December 2015 to approximate the laws of the Member States relating to trade marks,[2] pursuant to which the requirement of graphic representation has been replaced by the requirement to present the mark in the register in a way that allows competent authorities and recipients to determine the unambiguous and precise subject of protection granted to the owner of the trade mark (Article 3 letter b).

The aim of this article is to present fragrances as a means of marketing communication and as a trade mark. It will also show the current practice of registering fragrance marks as well as the reasons and consequences of the changes that have been made under Directive 2015/2436 in the definition of a trade mark with regard to the condition of graphic representation. On this basis, it will also be possible to evaluate the adopted solutions.

[1] E. Wojcieszko-Głuszko, [in:] *System Prawa Prywatnego*, vol. 14B: *Prawo własności przemysłowej*, ed. R. Skubisz, Warszawa 2017, p. 487.

[2] OJ EU L 336/1, hereinafter: Directive 2015/2436.

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FRAGRANCES IN THE TRADE MARK SYSTEM – THE IMPACT OF MARKETING TRENDS

Currently, the normative definition of a trade mark can be found in Article 4 of the Regulation (EU) 2017/1001 of the European Parliament and of the Council of 14 June 2017 on the European Union trade mar[3] and in Article 3 of the Directive 2015/2436. These provisions contain definitions with the same content. They show that a trade mark may consist of any signs, in particular words, including names, or drawings, letters, numbers, colours, the shape of goods or their packaging or sounds, provided that the sign is distinctive and they can be changed in the registry in an accurate and unequivocal manner (the so-called representational ability). Due to the necessity of implementation of the provisions of the Directive 2015/2436 by the Member States, national regulations regarding the legal definition of a trade mark have been unified.

One of the basis for shaping the division of trade marks is the above-mentioned descriptive-functional definition of a trade mark, based on the premises of the distinctive and presentable abilities together with an open catalogue of representational forms. On this substrate (especially the descriptive element of the definition), and based on the practice of registering trade marks, as well as the achievements of the doctrine and judicature in this matter, the most popular division of signs has been developed. The main criterion for the aforementioned distinction is the way a sign is perceived by the senses. From this point of view, trade marks are divided into conventional (traditional) signs and unconventional (non-traditional) signs, which additionally consist of two subsets.[4]

In the group of conventional signs, word signs and figurative signs are distinguished. The indicated types of markings are the oldest and most basic forms of representation, in which trade marks may be traded. Specifying an interesting product name and companies, creating an eye-catching logotype, catchy slogan or finally a trade mark – these are still key activities in marketing strategies.[5] According to EUIPO statistics based on research carried out in 2017–2019, word and figurative trade marks are still the biggest group of signs submitted for registration.[6]

However, in the face of ever-growing competition and the emergence of more and more companies, their products and services on the market, it has become

[3] OJ EU L 154/1, hereinafter: Regulation 2017/1001.

[4] Cf. M. Ziółkowski, *Rodzaje znaków towarowych ze względu na ich percepcję zmysłami oraz przedstawialność w rejestrze*, „Przegląd Prawa Handlowego" 2015, no. 1, p. 54; N. Mischra, *Registration of Non-Traditional Trademarks*, "Journal of Intellectual Property Rights" 2008, vol. 13, p. 43.

[5] V. Terpstra, *International Marketing*, Chicago 1987, pp. 250–260.

[6] See EUIPO, *Statistics in European Union Trade Marks 1996-01 to 2021-03 Evolution*, https://euipo.europa.eu/tunnel-web/secure/webdav/guest/document_library/contentPdfs/about_euipo/the_office/statistics-of-european-union-trade-marks_en.pdf [access: 14.01.2021].

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indispensable to look for new sources and methods of competition, i.e. new ways of communicating with the consumer. Traditional methods and patterns of conduct are no longer sufficient in the face of the changing reality. So the search for new tools that could be used in marketing began. It has been repeatedly argued that the subconscious mind plays a huge role in making decisions about the purchase of goods. For this reason, research on the human brain turned out to be justified and purposeful. This authority is called the central analysis centre and interpretation of stimuli reaching us.[7] As an outstanding American neurophysiologist Paul Bach-y-Rita used to say: "We do not see with our eyes, we see with our brains".[8] All this has become the basis for the creation of new branches and marketing departments. This is how so-called neuromarketing started.[9] Entrepreneurs and scientists also pointed to the need to take into account all five senses in the consumer's cognitive process, which was the basis for the concept of the so-called sensory marketing.[10] Due to this, the second group of trade marks, i.e. non-traditional signs started to gain importance. These signs are also oriented towards senses other than sight and hearing, which can become a tool that implements the solutions proposed in sensory marketing. Non-traditional signs are divided into two subsets – visible and invisible signs.

The group of unconventional visible signs includes signs such as, e.g., three-dimensional signs, position signs, colour (colours), multimedia signs, or holographic signs. The possibility to register them does not currently raise doubts in practice. The recording of unconventional invisible signs which do not involve the sense of sight in the cognitive process is much more disputable.[11] The literature indicates

[7] M. Lindstrom, *Buyology: How Everything We Believe About Why We Buy is Wrong*, London 2009, p. 2 ff.; S. Kumar, *Protecting Smell Marks: Breaking Conventionality*, "Journals of Intellectual Property Rights" 2016, vol. 21(3), pp. 524–526.

[8] Reported after K. Wrona, *Neuromarketing i jego rola w budowaniu marki, wprowadzaniu innowacji produktowych oraz w przekazach reklamowych*, „Marketing Instytucji Naukowych i Badawczych" 2014, vol. 11(1), p. 5.

[9] Neuromarketing is a separate department of marketing and neuroeconomics, based on a number of sciences (economics, neurobiology, sociology, psychology and medicine), whose task is to use technological means to determine the subconscious reaction of the consumer to products and their names in order to plan effective marketing strategies. See C. Morin, *Neuromarketing: The New Science of Consumer Behavior*, "Society" 2011, vol. 48, pp. 131–132. See also: M. Lindstrom, *op. cit.*, p. 3.

[10] See B. Hultén, *Sensory marketing: The multi-sensory brand-experience concept*, "European Business Review" 2011, vol. 23(3), pp. 256–273.

[11] However, this does not mean that there are no theoretical and practical doubts as to the registration capacity of certain visible signs as trade marks, in particular colours. See judgement of the Court of 6 May 2003 in case C-104/01, *Libertel Groep BV v. Benelux-Merkenbureau*, ECLI:EU:C:2003:244. See also D. Wetoszka, *Możliwość rejestracji koloru jako znaku towarowego na przykładzie spraw Tiffany's, Louboutin oraz Milka*, [in:] *Prawo własności intelektualnej*, ed. D. Wetoszka, Warszawa 2020; R. Pepin, *L'affaire des chaussures Louboutin : est-il possible d'enregistrer une couleur comme marque de commerce?*, "Les Cahiers de propriété intellectuelle" 2013, vol. 25(2).

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that this group includes the following signs: sound, taste, tactile and – which are particular subjects of considerations in this article – olfactory signs.[12] For many years the main problem, on the way to their admission to registration, was the necessity to meet the normative requirements indicated in the definition of a trade mark, mainly the premises of the graphic representation of the mark.

PRACTICE OF REGISTRATION OF OLFACTORY MARKS IN THE EUROPEAN UNION

1. Prerequisites for obtaining legal protection for a trade mark – graphic representability

While considering the subject of trade mark registration in the European Union, it is necessary to recall the basic conditions that determine the possibility of an effective trade mark application. They can also be called positive conditions, i.e. those that must occur for a given trade mark to obtain legal protection. Until the adoption of Regulation (EU) 2015/2424 of the European Parliament and of the Council of 16 December 2015[13] relating to EU trade marks and Directive 2015/2436, these conditions were: the distinctiveness and graphic representation of the sign. The distinguishing ability is a premise that determines not only the possibility of granting legal protection for a sign, but also determines its very existence. A trade mark arises at the moment of its production at the recipient of the association between the designation and the goods and, consequently, the company, from which it comes. Therefore, this requirement remained unchanged. It should also be noted that the distinctive character of the olfactory signs was not in principle questioned. The main changes in the definition of a trade mark concerned the latter from the premises, i.e. graphic representation.

The requirement of graphic representability of the sign is its ability to be presented in a graphical form, which was to enable unambiguous and clear determination of the subject of the protection granted. This requirement has already been provided for by the EU legislator in Article 4 of the Council Regulation (EC) no. 40/94 of 20 December 1993 on the Community trade mark[14] and in Article 2 of the First Council Directive 89/104/EEC of 21 December 1988 to approximate the laws

[12] E. Wojcieszko-Głuszko, *op. cit*., p. 487.

[13] Regulation (EU) 2015/2424 of the European Parliament and of the Council of 16 December 2015 amending Council Regulation (EC) no. 207/2009 on the Community trade mark and Commission Regulation (EC) no. 2868/95 implementing Council Regulation (EC) no. 40/94 on the Community trade mark, and repealing Commission Regulation (EC) no. 2869/95 on the fees payable to the Office for Harmonization in the Internal Market (OJ EU L 341/21), hereinafter: Regulation 2015/2424.

[14] OJ L 011/1, 14.01.1994.

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of the Member States relating to trade marks.[15] However, EU regulations in this area did not contain a legal definition of this concept, which resulted in the burden of specifying it being shifted by the practice of national patent offices, the practice of EUIPO (until 2016 – the Office for Harmonization in the Internal Market, OHIM) and the judicature and doctrine.

The necessity to meet this requirement was a fundamental challenge for entrepreneurs and their representatives interested in registering unconventional fragrance marks. Doubts were growing, and the question arose: Can it be (and possibly how) to present the fragrance graphically?

2. Olfactory trade marks and their registrability in the light of the requirement of graphic representation

Fragrance marks are perceived through the sense of smell. The human olfactory sense is extremely sensitive[16] It is indicated that a person is able to identify over 10,000 fragrances.[17] The human body reacts to scent stimuli even without the participation of consciousness.[18] Fragrances surround us at every step, and information about them is collected and coded in the brain, which allows the formation of – extremely permanent – the so-called olfactory memory.[19] For this reason, fragrances often become characteristic of a given product or place. Hence, the sense of smell is sometimes called the associative sense.[20] By being memorable, a smell can create ideas and associations related not only to itself, but also to the circumstances surrounding the experience. However, it must be remembered that the perception of smell is not the same in every case. It may differ, e.g., depending on gender or age.[21]

All the indicated features relating to the smell and fragrance support the use of this sense in the company's marketing strategy. Smell can be a carrier of a specific message, often of a persuasive nature, which is to favour the decision to visit a given store or premises, and finally to buy a given product or use a service. It is not only

[15] OJ L 40/1, 11.02.1989.

[16] A. Smith, *Ciało*, transl. H. Wasylkiewicz, Warszawa 1983, p. 440, reported after: E. Czerniakowska, *Czy psychologia powinna mieć węch w nosie?*, „Chowanna" 2012 (special volume), p. 90.

[17] E. Potargowicz, *Węch – niedoceniany zmysł człowieka*, „Postępy Higieny i Medycyny Doświadczalnej" 2008, no. 62, p. 88.

[18] M. Grzybowska-Brzezińska, A. Rudzewicz, *Wpływ marketingu sensorycznego na decyzje konsumentów (znaczenie zmysłów)*, „Handel Wewnętrzny" 2013, vol. 6(347), p. 69.

[19] S. Kuczamer-Kłopotowska, *Sensoryczne oddziaływanie na klienta jako forma wspierania procesu komunikacji marketingowej*, „Zarządzanie i Finanse. Journal of Management and Finance" 2014, vol. 12(2), p. 123.

[20] *Ibidem*.

[21] *Ibidem*.

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informative, but also uses it to reach the audience with an emotional message.[22] For example, the smell of freshly baked bread may remind us of a family home, Christmas gathering, etc. And when we smell such a smell in a shop or in a bakery, pleasant memories related to it will be recalled. It also happens that fragrances are intentionally used to evoke specific feelings in consumers, e.g. thirst or hunger, and thus increase the company's profits.[23] For this reason, traders began to show interest in using fragrances as a means of identifying and individualizing goods. For example, when you enter stores such as Kazar, Massimo Dutti or Mohito, you can detect a specific scent. Most of the consumers who visited the indicated stores could, with their eyes closed and guided by the smell in the air, give an answer without hesitation which store they are in. The skillful use of a fragrance is becoming an increasingly popular means in a marketing strategy used to attract customers to a given product or service. Aroma-marketing is developing as a branch of sensory marketing and a specific art of using fragrance in a marketing campaign, which is to support modern marketing strategies.[24] Entrepreneurs start looking for ways to obtain legal protection for their innovative solutions. The interest in registering scent trade marks has grown stronger especially in the 1990s of the 20th century. In 1990, the TradeMark Appeals Board of the United States Patent and Trademark Office (TTAB) expressly ruled on the admissibility of fragrance as a trade mark in the market. The case concerned a mark described as "a high impact, fresh, floral fragrance reminiscent of Plumeria Blossoms", filed for thread and yarn by Celia Clarke, operating under the name of Clarke's OSEWEZ.

European entrepreneurs, encouraged by this position of TTAB, began to apply for protection of their own fragrance marks in the EU Member States and – under the EU procedure – throughout the European Union.[25] For example, in 1996 the scent of roses (no. UK-00002001416) reported for tires was registered in the United Kingdom, as well as a mark described as a strong bitter beer scent (no. UK00002000234) reported for darts. In the same year, the company Vennootschap onder Senta Aromatic Marketing reported to OHIM (EUIPO) the smell of freshly cut grass for tennis balls.[26] Initially, the application was rejected due to the lack of its graphic representation. However, in that case, the OHIM Board of Appeal found that the graphic representation of the fragrance in the form of a short description in English: "the smell of fresh

[22] E. Potargowicz, *op. cit*., p. 90.

[23] W. Stasiak, *Czar aromamarketingu*, „Marketing w Praktyce" 2005, no. 3, pp. 6–9.

[24] B. Tarczydło, *Scents and Elements of Aroma Marketing in Building of an Appropriate Brand Image*, [in:] *Knowledge – Economy – Society. Managing Organizations Concepts and Their Applications*, eds. A. Jaki, B. Mikuła, Cracow 2014, p. 98.

[25] See F.M. Hammersley, *The Smell of Success: Trade Dress Protection for Scent Marks*, "Intellectual Property Law Review" 1998, vol. 2(105).

[26] Decision of the Second Board of Appeal of 11 February 1999 in case R 156/1998-2, www.copat.de/download/R0156_1998-2.pdf [access: 21.01.2020].

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cut grass" was sufficient for registration of such a mark. The Office found that the description of this fragrance is recognizable and distinguishable on the basis of the recipient's experience.[27] It was definitely a liberal OHIM approach to registration of fragrance marks. However, this decision was incidental, as the view on this matter was about to change dramatically. Advocate General R.-J. Colomer described it as "the pearl in the desert that will never repeat itself".[28]

All hopes related to the registration of fragrances in the state of the art were thwarted when the CJEU issued a judgement of 12 December 2002 in the case of *Ralf Sieckmann v. Deutsches Patent- und Markenamt*.[29] This ruling is the crowning court ruling on the registration of fragrance marks and at the same time in terms of the graphical representation of signs, which are very often mentioned in the literature. First of all, this judgement has become the benchmark for assessing whether the sign meets the requirement of graphical representability. It was also an important step towards starting a discussion on the very legitimacy of the existence of the requirement of graphic representability. The present case concerned an action brought by Ralf Sieckmann against the refusal to register an aromatic trade mark by the German patent office. The complainant presented the trade mark in the form of the following chemical formula:

$$C_6 H_5 – CH = CHCOOCH_3$$

along with samples of this fragrance. The fragrance has also been described in words as "balsamically fruity with a slight hint of cinnamon". As a result, this ruling touched upon the wider problem of meeting the requirement of graphic representability by unconventional signs, as it was this category of signs that caused in practice and in theory, most doubts.

In line with the CJEU ruling, it was assumed in the case at hand that a sign meets the requirement of graphic representation if such representation has such features as: clarity, precision, completeness, easy accessibility, comprehensibility, durability and objectivity of the graphic presentation. These criteria have become accepted as the commonly used basis for assessing the condition of the trade mark's graphic representability. In the doctrine, these are called the seven requirements of Sieckmann.[30] In the circumstances of formulating such requirements, registration of the fragrance mark was in most cases excluded. According to the CJEU, neither

[27] A. Kumar, *op. cit.*, p. 133.

[28] Opinion of Advocate General R.-J. Colomer delivered on 6 November 2001 in case C-273/00, *Ralf Sieckmann v. Deutsches Patent- und Markenamt*, EU:C:2001:594, p. 32.

[29] Judgement of the Court of Justice of 12 December 2002 in case C-273/00, *Ralf Sieckmann v. Deutsches Patent und Markenamt*, ECLI:EU:C:2002:748.

[30] E. Wojcieszko-Głuszko, *op. cit*., p. 478.

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the verbal description, nor the sample of the fragrance or the chemical formula (or even a combination thereof) with regard to the fragrance label fulfilled seven Sieckmann requirements. In the Court's opinion, the chemical formula is neither precise nor sufficiently understandable.[31] The verbal description, despite its intelligibility, does not have the characteristics of objectivity, clarity and precision. The fragrance samples have been completely denied meaning as they are in no way graphically represented.[32] They also do not have the features of durability and stability, due to the changes that the smell undergoes with time.[33] This judgement formulated a new way of understanding graphic representation. This was certainly a different position to that presented by EUIPO (OHIM) on the fragrance mark of freshly cut grass.[34] These seven strict Sieckmann criteria determined the practice of examining unconventional trade mark applications for the following years. As a result, the principle of the so-called unrestricted choice of trade mark has been limited.[35]

FROM THE REQUIREMENT OF GRAPHIC REPRESENTABILITY TO THE REPRESENTATION ABILITY

The requirement of graphic representability understood through the prism of the seven Sieckmann criteria, despite the fact that it did not *de facto* exclude *a priori* registration of fragrance marks as trade marks, basically prevented their registration.[36] It seems that the only obstacle in this case was the lack of appropriate technical measures. Both in the EU countries, as in other countries, the question of the sense of the existence of the premise of graphic representability and its possible change started.[37] A discussion was initiated among the representatives of the

[31] M.M.S. Karki, *Nontraditional Areas of Intellectual Property Protection: Colour, Sound, Taste, Smell, Shape, Slogan and Trade Dress*, "Journal of Intellectual Property Rights" 2005, vol. 10(6), p. 504; P.L.C. Torremans, *Trademark Law: Is Europe Moving Towards an Unduly Wide Approach for Anyone to Follow the Example?*, "Journal of Intellectual Property Rights" 2005, vol. 10(2), p. 130.

[32] E. Wojcieszko-Głuszko, *op. cit*., p. 478.

[33] M. Ziółkowski, *Wymóg graficznej przedstawialności jako przesłanka zdolności ochronnej znaku towarowego w prawie unijnym – aktualne koncepcje oraz planowane zmiany*, „Białostockie Studia Prawnicze" 2015, no. 19, p. 260.

[34] See A. Kumar, *op. cit.*, p. 133; K. Sztobryn, *Niekonwencjonalne znaki towarowe. Część 1 – zapach i smak*, „Europejski Przegląd Sądowy" 2017, no. 10, pp. 21–23.

[35] See A. Hołda-Wydrzyńska, *Graficzne przedstawienie znaku towarowego*, „Problemy Prawa Prywatnego Międzynarodowego" 2011, vol. 9, p. 118.

[36] E.M. Reimer, *A semiotic analysis: Developing a new standard for scent marks*, "Vanderbilt Journal of Entertainment and Technology Law" 2011–2012, vol. 14, p. 711; S. Karapapa, *Registering scents as community trademarks*, "The Trademark Reporter" 2010, vol. 100(6), p. 15.

[37] T. Cook, *European Union Trademark Law, and Its Proposed Revison*, "Journal of Intellectual Property Rights" 2013, vol. 18, p. 284.

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doctrine on replacing this premise with another, more appropriate formulation. The aim of such an operation was given by E. Wojcieszko-Głuszko to "liberalize the registration practice with regard to non-traditional marks, with the simultaneous indication that such an activity should not detract from the importance of seven Sieckmann criteria for the possibility of implementing the principle of legal certainty".[38] There was also a postulate in the doctrine to replace the requirement of graphic representability with the term "sensual perceptibility".[39] Such a formulation, opening this premise to the possibility of perception by various human senses, would enable the registration of signs perceived through the smell, but also by other senses, e.g. touch or taste. Another argument in favour of redefining or even removing the requirement of graphical representability was its absence in some legal orders. Such an example is the USA, where registration of fragrance marks is allowed.[40] Another example is Australia where, despite the requirement for graphical representability, odours can be registered.[41] Moreover, we will not find such a requirement either in the provisions of the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS).[42] Article 15 para. 1 sentence 4 TRIPS only provides for the possibility of making registration dependent on the visual perception of the sign. Thus, graphic representability was not a common standard, but only an optional (depending on the will of the legislator within a specific system) condition of protection. Its main objective was to ensure the certainty of trading by preventing legal protection of trade marks, the determination of which is not sufficiently precise.

The discussions regarding the requirement of graphic representability were stopped by the adoption of Regulation 2015/2424 and Directive 2015/2436. The adoption of this Directive, aimed at unifying the provisions on trade marks, resulted

[38] E. Wojcieszko-Głuszko, *op. cit*., p. 478.

[39] J.M. Doliński, *Smak oraz jego receptura jako przedmiot praw własności intelektualnej*, „Zeszyty Naukowe Uniwersytetu Jagiellońskiego. Prace z Prawa Własności Intelektualnej" 2012, vol. 2, p. 64; J. Mordwiłko-Osajda, *Znak towarowy. Bezwzględne przeszkody rejestracji*, Warszawa 2009, pp. 99–100.

[40] According to the Lanham (Trademark) Act (15 U.S.C.), 1946, the term "trademark" includes any word, name, symbol, or device, or any combination thereof (1) used by a person, or (2) which a person has a bona fide intention to use in commerce and applies to register on the principal register established by this chapter, to identify and distinguish his or her goods, including a unique product, from those manufactured or sold by others and to indicate the source of the goods, even if that source is unknown. Based on this definition, it is possible to formulate two requirements that a mark must meet. These are: commercial use of the sign and its distinctiveness.

[41] G. Noto La Diega, *Non-conventional marks: The EU reform of trade marks, Brexit, and the Internet of Things*, "Diritto Mercato Tecnologia" 2018, www.dimt.it/index.php/en/policy/104-news/16608-non-conventional-marks-the-eu-reform-of-trade-marks-brexit-and-the-internet-of-things [access: 20.01.2020].

[42] Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) of 22 December 1994 (OJ EU L 336/214).

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in the commencement of legislative processes in the EU countries, which were to lead to the full implementation of its provisions. In order to modernize the trade mark law, it was decided to abandon the requirement of graphic representability for qualifying a sign as a trade mark. As stated, its removal is necessary to allow for more flexibility while at the same time providing more legal certainty with regard to the way in which trade marks are represented. The phrase "graphic representability" in the face of more precise means of identifying a trade mark has become an anachronistic concept.[43] The main aim of the amendment was to clarify the scope of trade mark protection.[44] According to Article 3 of the Directive 2015/2436, a trade mark may consist of any signs, in particular words, including names, or drawings, letters, numbers, colours, the shape of goods or their packaging or sounds, provided that two conditions are met. First, the sign must be distinctive. Secondly, it must also make it possible to present it in the register in a way that allows the competent authorities and recipients to identify unequivocally and precisely the subject of protection granted to the trade mark proprietor. This premise has been abbreviated as the so-called representational ability. Consequently, it is pointed out that the newly created system of registering trade marks has been based on the principle of protecting signs in the form in which they have been filed for registration.[45]

Basing only on the condition of the representation ability of the sign and relating it to the problem of the registrability of olfactory marks, it should be pointed as follows: the clear and precise determination of the subject of trade mark protection means that there can be no doubt as to the of mark for which the protection right is to be granted and what is to become the subject of the specific monopoly of the entrepreneur concerned. Furthermore, the fulfilment of the above-mentioned representation criteria must be assessed not only from the perspective of the office responsible for the registration, but also from the perspective of users of the sign. However, the reflection of this determination of the subject of trade mark protection, i.e. understanding what in fact is to become a protected trade mark, should be its appropriate depiction in the relevant register. Therefore, in the light of he thus specified condition of the representativeness of the sign, it may be noted that in relation to fragrance marks – without any additional criteria – it allows two opposing interpretations to be applied. On the one hand, it seems that the means of representation included in R. Sieckmann's application, i.e. a sample of the fragrance, its verbal description and chemical formula, could satisfy the requirement in question. The combination of these forms should not give rise to doubts as to

[43] J. Kępiński, [in:] *System Prawa Handlowego*, vol. 3: *Prawo własności przemysłowej*, eds. E. Nowińska, K. Szczepanowska-Kozłowska, Warszawa 2015, p. 133.

[44] M. Ziółkowski, *Wymóg graficznej przedstawialności…*, p. 262.

[45] J. Konikowska-Kuczyńska, *Admissibility of Unconventional Trade Marks Registration within the European Court of Justice Statements*, „Studia Iuridica Lublinensia" 2020, vol. 29(4), p. 119.

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what protection is to be granted. In view of such a presentation of the mark, not only the office assessing the application, but also the users of the mark would have no difficulty in indicating what is to be protected. After all, despite the lack of durability of the fragrance and the possibility that it may be perceived differently by the public, which depends on a number of subjective factors – it is not impossible that there are fragrances that are so characteristic that even if their intensity is weakened somewhat by the passage of time, the ability of identyfying them would be entirely excluded. On the contrary, opponents of a liberal approach to the registration of fragrance marks may argue the very fact of the fragrance's impermanence and and the lack of precision in its perception does not allow the object of protection to be unequivocally established and, consequently, to be presented in such a way in the trade mark register. Those circumstances, in turn, support the second possible interpretation, according to which fragrances cannot be registered as trade marks.

In the context of the creation in the legal system of the European Union of mechanisms allowing the registration of olfactory trade marks that would take into account the needs of the market and postulates of the doctrine, it is important to decide to maintain the practice of evaluating the representation of a symbol through the prism of the so-called Sieckmann criteria. This decision tipped the scales in favour of adopting the aforementioned second interpretation of the representation ability requirement. In the Directive 2015/2436 (thirteenth recital of the preamble), in Regulation 2015/2424 (ninth recital of the preamble), as well as in Regulation 2017/1001 (tenth recital of the preamble), the features that should be present in the manner of representing the mark are explicitly indicated. These features simultaneously constitute the seven requirements formulated by the CJEU in the Sieckmann case. In this situation, it can be said that the EU legislator, by listing these criteria in the directive and regulation, raised their importance. It is also proof that they are not only auxiliary guidelines when assessing the registration ability of a sign. The purpose of the solutions adopted was not to introduce an arbitrary possibility of registering each sign and an unlimited extension of the catalogue of admissible forms of representation. Only the freedom to register trade marks was to be increased by the possibility of using technological measures ensuring appropriate guarantees enabling the determination of the subject of protection by the proper authority. On the basis of the criterion of graphic representability, registration of scent marks was not possible (although it was not formally excluded), precisely because they did not meet one of the Sieckmann requirements.[46] In the current legal state, only the way of applying these criteria has changed. From the requirements for assessing the graphical representability of the sign, they have become the requirements relating to the representation of the sign in general. This condition is still technical and formal. The current lack of technical possibilities to

[46] A. Hołda-Wydrzyńska, *op. cit*., p. 126.

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present fragrances in an unambiguous and unequivocal manner is the main, actual obstacle to their registration.

An effective notification of an odour must contain the designation in an accurate and unambiguous manner, so that neither the competent authority nor any trader has any doubts as to what constitutes the subject of protection. Therefore, since neither the EUIPO nor the CJEU recognizes that the requirement of graphic representability is met by a verbal description, chemical formula, a smell sample, or even by a combination of these forms, it will not recognize them also in the case of representational capacity. It should be assumed that there will be no change in this matter, as it would contradict the current line of decision.[47] Officially, the EUIPO takes the position that the registration of fragrance marks is currently not allowed due to the lack of appropriate technical means allowing for their precise determination.[48]

However, the question is how the EUIPO and national patent offices will evaluate the development of technology in the representation of markings for application procedures. In the next few years, we will probably find out whether the use of new methods, such as chromatography,[49] mass spectrometer testing,[50] electronic nose testing,[51] or the use of the so-called smelling screen[52] will allow the protection of scent markings. In particular, it is indicated that the trade mark registration system should be improved and developed continuously to suit and serve the "Internet Age".[53]

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[47] Cf. G. Noto La Diega, *op. cit*.

[48] EUIPO, *Trademark guidelines, Smell/olfactory and taste marks*, https://guidelines.euipo.europa.eu/1004922/905837/trade-mark-guidelines/9-11-2-smell-olfactory-and-taste-marks [access: 20.01.2020].

[49] Chromatography is, most generally, a method of separating mixtures or of studying their composition. See C.F. Poole, S.K. Poole, *Chromatography Today*, Amsterdam 1991.

[50] Mass spectrometry is a method that is based on measuring the mass-to-charge ratio of a given ion. It makes it possible to determine whether and which chemical compounds are present in the samples under observation. See M. Czerwicka, J. Kumirska, P. Stepanowski, *Spektrometria mas – uniwersalna technika analityczna*, „Laboratorium. Przegląd Ogólnopolski" 2012, no. 5–6.

[51] The electronic nose is a device invented in 1982 by C.K. Persuad and H.G. Dodd. It is used to imitate the olfactory system of mammals. Despite numerous successes, e.g. in classifying bacteria or verifying the shelf-life of food, the results in the field of taste and smell differentiation are still not that satisfactory (see F. Röck, N. Barsan, U. Weimar, J. Lozano, *Electronic Nose: Current Status and Future Trends*, "Chemical Reviews" 2008, vol. 108(2), pp. 706–721). Nevertheless, it should be noted that work on perfecting the electronic nose is still ongoing, which is used, e.g., to classify wine. See J.P. Santos, M.C. Horillo, *Classification of white wine aromas with an electronic nose*, "Talanta" 2005, vol. 67(3).

[52] It is a system that generates the scent distribution on a two-dimensional display screen. See H. Matsukura, T. Yoneda, H. Ishida, *Smelling screen: Development and evaluation of an olfactory display system for presenting a virtual odor source*, "IEEE Transactions on Visualization Computer Graphics" 2013, vol. 19(4).

[53] J. Kępiński, M. Kępiński, *Jakie zmiany czekają prawo znaków towarowych w świetle dyrektywy 2015/2436?*, [in:] *Experientia docet. Księga jubileuszowa ofiarowana Pani Profesor Elżbiecie Traple*, eds. P. Kostański, P. Podrecki, T. Targosz, Warszawa 2017, p. 525.

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It can be noted, for example, that the electronic nose is already being used to assess changes in he odour of cosmetics, or changes in the odour intensity of industrial products. What is crucial, the researchers point out that "the results of measurements obtained from the e-nose are independent of the predisposition, mood, fatigue or motivation of the person carrying out the test".[54]

However, a strict enforcement of the seven Sieckmann criteria will give rise to an allegation of odour impermanence or incomprehensibility of the record – even against analysis records obtained with the aforementioned odour identification tools. That is why each application should also be accompanied by a verbal description comprehensible to the average consumer. Furthermore, it should not be forgotten that the consumer usually does not generally encounter the fragrance under laboratory conditions, but in everyday life, where different fragrances coexist, e.g. in a shopping mall. So it seems that in such a situation there can be no question of absolute fragrance durability, which seems to be the greatest challenge for new technologies. Hence, only by changing the approach to the requirements developed in the Sieckmann case will be actually make it possible to positively assess applications for olfactory trade marks.

However, any such considerations are – for the very moment – only theoretical, as neither the decision-making practice of the EUIPO nor the case law, in particular the practice relating to the assessing registrability of olfactory marks submitted by new technological means, has yet developed under the new regulations. It can also be observed that the use of tools such as, e.g., the electronic nose ia associated with relatively high costs, and in the absence of certainty of success in registering a smell as a trade mark – entrepreneurs will be reluctant to apply for olfactory signs. Nevertheless, there is currently no other option but to wait until the EUIPO has to deal with an application for an olfactory mark presented with the use of modern technologies.

CONCLUSION

In the current state of the art, it seems that the main problem in registering scent marks was not in the requirement of graphic representability itself, but in meeting the seven Sieckmann criteria by graphical representation. The right procedure made by the EU legislator was to remove the "graphic" element from this premise, because in the light of developing technologies it did not fit in with the contemporary realities, nor with the standards for registering invisible marks set by other legal systems. Maintaining the said Sieckmann criteria while assessing the

[54] P. Turek, J. Chmielewski, *Nos elektroniczny jako nowoczesne narzędzie w ocenie jakości wyrobów*, „Zeszyty Naukowe Akademii Ekonomicznej w Krakowie 2006, no. 718, p. 154.

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new requirement of unambiguous and precise representation currently means that the registration of olfactory signs (as well as taste marks) will remain only allowed in theory. As can be seen, it has not happened and there are still no prospects that there will be a change in the treatment of Sieckmann's requirements from decisive evaluation criteria to only auxiliary criteria.

However, it can be assumed that the next, most likely step will be to allow registration of this category of designations, as in some countries their registration is already possible in practice. Undoubtedly, it can be noticed that the new EU regulations in the field of trade marks set a certain direction in which the practice of registration will take in both EU trade marks and trade marks registered in the patent offices of the Member States. The mere departure from the requirement of graphic representability indicates the intention to expand the catalogue of signs that may actually be legally protected. In view of the dynamic development of various forms of marketing (neuromarketing, sensory marketing), ignoring the need to change trade mark law would be inadequate to the changing reality. Due to the fact that fragrances and other invisible signs can perform a distinctive function and undoubtedly have the ability to indicate origin, their registration is only hindered by the requirement to precisely "capture" what is to be protected, and what goes beyond this sphere.

With the change in the field of marketing techniques, the practice of registering trade marks should also change. Changes in the definition of a trade mark have some far-reaching consequences. As repeatedly emphasized by the representatives of the doctrine, the registration of scent markings and – in general – unconventional marks has been somewhat dependent on technological progress, which in the future may result in a satisfactory method of determining the subject of protection. Looking at this issue optimistically, EU regulations are largely long-term and perspective. The changes were introduced with a great deal of caution, as evidenced by the removal of the requirement of graphical representability while replacing it in EU legal acts *expressis verbis* the Sieckmann criteria which "keep in check" the admissibility of registering the majority of invisible trade marks. Although it may seem paradoxical, according to the intention of the EU legislator, the adopted solution is in fact intended to ensure legal flexibility while maintaining its certainty at the same time.

Apart from the discussed difficulties regarding the appropriate determination of the designation, entrepreneurs will still be interested in obtaining protection for their marketing solutions. This will be conducive to research on the invention of such a way of representing trade marks that would not raise any doubts. Therefore, it can be concluded that the enacted changes to the trade mark law deserve a positive assessment. This is a compromise solution, which, however, leaves a certain "hunger" for the supporters of unlimited registration of invisible signs. On the other hand, however, no radical solution was taken to remove the need to adequately present the designation in the register, which should please skeptics. The adopted

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changes, perceived as deliberate openness to innovation, consistently respect the current decision-making line of the EUIPO and the ruling of the CJEU. Perhaps in the future, there will be measures which in practice will allow the registration of invisible marks. However, currently, it is possible to register them only in theory.

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ABSTRAKT

Zapachy są niezwykłym sposobem komunikacji, który pozwala nie tylko na powstawanie w umysłach odbiorców określonych skojarzeń, lecz także na wywoływanie pewnych emocji. Z tego powodu są one wykorzystywane w strategiach marketingowych, a niekiedy stają się znakami towarowymi. Niestety, do czasu przyjęcia dyrektywy Parlamentu Europejskiego i Rady (UE) 2015/2436 z dnia 16 grudnia 2015 r. mającej na celu zbliżenie ustawodawstw państw członkowskich odnoszących się do znaków towarowych oznaczenia te były w zasadzie wyłączone z rejestracji. Powodem tego był brak możliwości spełnienia wymogu graficznej przedstawialności, rozumianego przez pryzmat

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kryteriów wypracowanych w orzecznictwie Trybunału Sprawiedliwości Unii Europejskiej. Jednakże na mocy wspomnianej dyrektywy wymóg ten został zniesiony i zastąpiony wymogiem tzw. zdolności przedstawieniowej oznaczenia. Celem niniejszego artykułu jest zaprezentowanie znaków zapachowych z perspektywy zarówno marketingowej, jak i dopuszczalności ich rejestracji, a także dokonanie analizy praktyki rejestrowania tych oznaczeń w okresie przed i po przyjęciu dyrektywy 2015/2436.

Słowa kluczowe: zapachowy znak towarowy; zdolność rejestrowa; graficzna przedstawialność; dyrektywa 2015/2436

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