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The Registrability of Sports Names as Word and Figurative Marks in the European Union

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Abstract

This thesis assesses the registrability of sports names as word and figurative trade marks in the European Union, largely with a focus on articles 7(1)(b) and 7(1)(c) of Regulation (EU) 2017/1001 of the European Parliament and of the Council of 14 June 2017 on the European Union trade mark, OJL 154. The thesis provides the reader with basic and general information on European Union trade marks, after which legislation and decisions of the European Union Intellectual Property Office and the Boards of Appeal relevant to sports name word and figurative marks in particular will be discussed. Based on the aforementioned legislation and decisions, the thesis aims at providing the reader with a reasoned view on how the registrability of sports name word and figurative marks in the European Union is assessed and the rationales behind these considerations. Further, while the thesis does not aim at providing a comprehensive quantitative analysis, the likelihood of successful registrations in various Nice classes as goes for the aforementioned types of marks will also be assessed to a minor degree.

List of Commonly Used Abbreviations and Terminology

Boards	Boards of Appeal
CTMR	Council Regulation (EC) No 207/2009 of 26 February 2009 on the Community trade mark, OJ L 78
CTMIR	Commission Regulation (EC) No 2868/95 of 13 December 1995 implementing Council Regulation (EC) No 40/94 on the Community trade mark, OJ L 303
EU	European Union
EUIPO/the Office	The European Union Intellectual Property Office
EUTM	European Union trade mark
EUTMR	Regulation (EU) 2017/1001 of the European Parliament and of the Council of 14 June 2017 on the European Union trade mark, OJ L 154
First Board	First Board of Appeal
Mark/Sign	Trade mark
Sports name trade mark	Word and figurative trade marks exclusively consisting of a sports name and the potential additional figurative elements
Second Board	Second Board of Appeal

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1 Introduction

1.1 Problem Background

Word and figurative trade marks¹ exclusively consisting of a sports name and the potential additional figurative elements (sports name trade marks) could be argued to have been researched to a reasonably low degree. One reason for this could be that sports names as trade marks seem, on the face of it, like a non-issue for a person educated in European Union (EU) trade mark law. After all, if the products² and/or services that a sports name trade mark has been applied for relate to that same sport, or perhaps sports at large, it should be denied protection based on descriptiveness and subsequent lack of distinctive character, and depending on the sport, potentially due to being a common name.³ On the other hand, if the sports name trade mark is applied for products and/or services not related to sports, the aforementioned problem does not exist, and other barriers for registration being conspicuously absent, the mark (trade mark) should be granted protection.

However, European Union Intellectual Property Office (EUIPO/the Office) decisions on the matter indicate that this is not the case. Rather, several sports name trade marks have been approved⁴ for products and/or services related to both sports at large, and to the very sport the mark consists of. Additionally, the EUIPO has rejected sports name trade mark applications for marks that were applied for products and/or services that could not reasonably be linked to sports in any way, further basing their objections on descriptiveness and lack of distinctive character.

In light of the aforementioned, it serves purpose to delve into the topic and investigate and analyse the rationale behind this arbitrary and contradictory behaviour of the EUIPO, assessing the legal landscape surrounding these trade marks in this context.

¹ The spelling “trade mark”, instead of “trademark”, will be applied in the thesis due to the prevalence of the former in EU legislation.

² The terms “products” and “goods” are used interchangeably in the thesis.

³ Articles 7(1)(b) and (c) and 58(1)(b) of Regulation (EU) 2017/1001 of the European Parliament and of the Council of 14 June 2017 on the European Union trade mark, OJ L 154. [online]. Available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32017R1001> [Accessed 16 Nov. 2018].

⁴ The terms “approved” and “registered” are used interchangeably in the thesis.

1.2 Objective

The objective of this thesis is twofold. First the thesis aims at providing, in a concise and organised manner, information on both approved, rejected and partially rejected sports name trade marks, including legislation and EUIPO decisions, preceded by more general information on trade marks.

Second, the thesis will assess the aforementioned legislation and decisions and provide an analysis on the legal landscape in the European Union as goes for sports name trade marks, also pinpointing the issues in the *status quo*.

1.3 Research Questions

- 1) On what grounds have word trade mark applications exclusively consisting of sports names been unsuccessful in the EU? What such marks have been successful?
- 2) On what grounds have figurative trade mark applications exclusively consisting of sports names been unsuccessful in the EU? What such marks have been successful?
- 3) What are the specific matters the EUIPO considers when assessing the registrability of word and figurative trade marks exclusively consisting of sports names? What considerations are its decisions based on?
- 4) Has the EUIPO been arbitrary and/or contradictory in its assessments on the registrability of word and figurative trade marks exclusively consisting of sports names?

1.4 Delimitations

The thesis is limited to word and figurative sports name trade marks, namely due to their prevalence compared to other types of trade marks. Furthermore, the discussion will be limited to EU jurisprudence, excluding both non-EU as well as purely domestic Member State trade marks. As the topic of the thesis focuses on the registrability of sports names, the potential of sports name trade marks having become common names⁵ will not be addressed in detail, in addition to which oppositions of sports name word and figurative marks have not been included in the analysis. The thesis has investigated 99 different sports names and whether these have

⁵ Article 58(1)(b) of Regulation (EU) 2017/1001, OJ L 154.

been applied for as EU trade marks, of which the 20 most relevant ones have been chosen.⁶ In this vein, as for relevancy, and in order to get as comprehensive a picture on the matter as possible, the thesis will discuss trade marks registered for as wide a variety of Nice classes as possible. Additionally, the thesis aims at including trade marks consisting of both widely known and less widely known sports in the assessment, in order to clarify whether and to what degree the conspicuousness of the sport makes a difference, and signs (trade marks) rejected for different reasons with different lines of argumentation. Finally, the decisions addressed are limited to where the proceedings have been documented in English, or have later been translated to English, with some isolated exceptions.⁷

1.5 Methodology and Material

In order to answer the research questions and fulfil the objectives of the thesis, two methodologies are used.

The legal dogmatic method will be applied in the descriptive parts of the thesis, where the current legal landscape surrounding the registrability of trade marks consisting of sports names is elaborated on. In other words, an internal perspective will be employed,⁸ meaning that current EU positive law including statutory law, case law, principles, concepts, doctrines and literature will be assessed.⁹

In the analytical parts of the thesis, legal doctrine will be applied with a combination of hermeneutic¹⁰, argumentative¹¹ and empirical¹² disciplines. Material similar to that used in the descriptive part of the thesis will be assessed also in the analytical part of the thesis.

⁶ Including all current Olympic sports and more. For a full list of the sports name trade marks searched for, see Appendix 1 – Sports Names Searched for as Trade Marks in the EUIPO Database; Olympic, (2018). SPORTS. [online]. Available at: <https://www.olympic.org/sports> [Accessed 22 Nov. 2018].

⁷ Namely, where the author has with sufficient certainty been able to understand the content of the decisions.

⁸ Vranken, Jan. (2012). Exciting Times for Legal Scholarship. *Boomjuridisch tijdschriften: Recht en Methode in onderzoek en onderwijs*, [online] Volume 2(2), pp. 42–62. Available at: https://www.bjutijdschriften.nl/tijdschrift/lawandmethod/2012/2/ReM_2212-2508_2012_002_002_004.pdf [Accessed 17 Nov. 2018], p. 43.

⁹ *Ibid.*

¹⁰ Van Hoecke, Mark. (2011). Legal Doctrine: Which Method(s) for What Kind of Discipline? In: M. Van Hoecke, ed., *Methodologies of legal Research – Which Kind of Method for What Kind of discipline?*. Oxford and Portland, Oregon: Hart Publishing Ltd., p. 4.

¹¹ *Ibid.*, p. 4.

¹² *Ibid.*, pp. 5–7.

1.6 Outline

Section 1 introduces the problem of interest, the research questions that will be answered in the thesis, the delimitations applicable and the methodology and materials used.

Section 2 elaborates on trade marks at large, on a very basic level and with a view on the discussed topic. What trade marks are, what different types of trade marks exist, how trade marks benefit their owners, what requirements must be fulfilled for registering trade marks and absolute and relative grounds for refusal are addressed.

Section 3 assesses the applicable and most relevant EU legislation to sports name trade marks. Topics such as descriptiveness and lack of distinctiveness, including the certain ambiguity of these in the context of sports name trade marks, are delved in to.

Section 4 provides a multifaceted overview of sports name trade mark applications in the EU, discussing EUIPO and Boards of Appeal (Boards) decisions on the matter. The section addresses figurative and word mark applications separately, also listing approved and rejected such independently, partially rejected marks being discussed in both subsections.

Section 5, based on the decisions discussed in Section 4, provides an in-depth analysis of the registrability of sports name trade marks in the EU. The matters addressed include the characteristics of the sport, the role of the products and/or services applied including the specific Nice classes, the time of the application of the trade mark and the invention of the sport, the conspicuousness of the sport and the significance of added figurative elements.

Section 6 features final conclusions as to the registrability of sports name trade marks, summarising the points made in the thesis.

2 Trade Marks in a Nutshell

2.1 What are Trade Marks? – A Short Introduction

In order to discuss and assess trade marks in the context of sports names, it serves purpose to first briefly discuss what trade marks, in general, are.

Trade marks are described by the EUIPO as “...signs used in trade to identify products.”¹³ The EUIPO further explains that trade marks are the symbols customers use to choose the products or services of one company instead of another, that they serve as distinguishing tools, distinguishing companies from their competitors.¹⁴ Effectively then, trade marks can be considered as signs of different kinds that are used to identify the products or services a company provides, namely by differentiating these from competitors by providing the consumer with insight on what company the aforementioned originate from. Alternatively, trade marks can also be considered to serve as guarantees of quality, by indicating that a good or a service associated with a trade mark is of a certain quality.¹⁵ However, this could be argued to also be questionable, considering the fact that the use of EUTMs can be licensed to other companies.¹⁶ In a broader sense, trade marks have also been argued to serve as engines of innovation.¹⁷

2.2 Word Marks, Figurative Marks and other Types of Trade Marks

Several different types of trade marks can be applied for in EU jurisprudence, namely word marks, figurative marks, (with or without word elements), shape marks (with or without word elements), position marks, pattern marks, single or combination colour marks, sound marks,

¹³ EUIPO – EUROPEAN UNION INTELLECTUAL PROPERTY OFFICE A, (2018). Trade mark definition – A little bit of theory, [online]. Available at: <https://euipo.europa.eu/ohimportal/en/trade-mark-definition> [Accessed 16 Nov. 2018].

¹⁴ *Ibid.*

¹⁵ Bently, Lionel and Sherman, Brad. (2014). *Intellectual Property Law*. 4th Edition. Oxford: Oxford University Press, p. 815.

¹⁶ Article 25 of Regulation (EU) 2017/1001, OJ L 154.

¹⁷ Bently, L. – Sherman, B. (2014), p. 815; European Commission, (2013). Proposal for a Directive of the European Parliament and of the Council to Approximate the Laws of Member States relating to Trade Marks (Recast) (2013) COM(2013) 162 final, explanatory memorandum. European Commission, [online]. Available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52013PC0162&from=en> [Accessed 16 Nov. 2018], 1, [1.1].

motion marks, multimedia marks, hologram marks and smell marks.¹⁸ However, since only the former two are the focus of this thesis, the remaining ones will not be analysed in any further detail.

Word marks are trade marks that exclusively consist of letters, words, numerals, other standard typographic characters or a combination of any of these.¹⁹ Figurative marks, on the other hand, are trade marks “where non-standard characters, stylisation or layout, or a graphic feature or a colour are used, including marks that consist exclusively of figurative elements”²⁰

Perhaps the easiest way to distinguish between the two is to think of the former as trade marks consisting of purely words and/or numbers, without visual elements, while the latter does always include some sort of a visual element in addition to the possible, but not necessary, words and numbers.

2.3 How do Trade Marks Benefit Their Owners?

The benefits of registered trade marks are manifold: they protect brand value, build assets, define rights, prevent counterfeiting as well as fraud, and defend against rival marks.²¹ Trade marks assure that the owner of the right, and no one else, will enjoy the reputation-related rewards associated with desirable products and/or services.²² Trade marks are powerful communication tools, which ease customers’ search of products and/or services, allow their proprietors to utilize the internet and social media more effectively, and can make recruitment easier.²³

2.4 What can be Registered as a Trade Mark?

2.4.1 General Requirements

¹⁸ This is how the EUIPO differentiates between different types of trade marks. See EUIPO – EUROPEAN UNION INTELLECTUAL PROPERTY OFFICE A, (2018).

¹⁹ EUIPO – EUROPEAN UNION INTELLECTUAL PROPERTY OFFICE A, (2018).

²⁰ *Ibid.*

²¹ EUIPO – EUROPEAN UNION INTELLECTUAL PROPERTY OFFICE B, (2018). Trade marks in the European Union – Where to register, [online]. Available at: <https://euipo.europa.eu/ohimportal/en/trade-marks-in-the-european-union>.

²² Bently, L. – Sherman, B. (2014), p. 815.

²³ Rubinstein, Abigail (2014). 7 Reasons Why Trademarks Are Important to Your Business. *Entrepreneur EUROPE*, [online]. Available at: <https://www.entrepreneur.com/article/235887> [Accessed 16 Nov. 2018].

In terms of EU trade marks, which are the focus of this thesis, Regulation (EU) 2017/1001 of the European Parliament and of the Council of 14 June 2017 on the European Union trade mark (EUTMR) is of relevance. The aforementioned clarify the specific subject matter that can be registered as a trade mark, specifying the requirements that need to be fulfilled. Article 4 of the EUTMR states that:

“An EU trade mark may consist of any signs, in particular words, including personal names, or designs, letters, numerals, colours, the shape of goods or of the packaging of goods, or sounds, provided that such signs are capable of:

(a)
distinguishing the goods or services of one undertaking from those of other undertakings;
and

(b)
being represented on the Register of European Union trade marks (‘the Register’), in a manner which enables the competent authorities and the public to determine the clear and precise subject matter of the protection afforded to its proprietor.”²⁴

In other words, while the sign itself can consist of a variety of things, the importance lies in that it can be distinguished from competitors’ signs and that the scope, i.e. the products and/or services the trade mark protects, are clearly defined.

2.4.2 Grounds for Refusal

On top of the basic requirements for trade mark registration, there are grounds based on which the EUIPO denies trade mark applications, potentially *ex officio*, called absolute grounds of refusal.²⁵ The fulfilment of one of these alternative grounds suffices for a refusal of a trade mark application.²⁶ Absolute grounds of refusal relate to the signs themselves, rather than any third

²⁴ Article 4 of Regulation (EU) 2017/1001, OJ L 154.

²⁵ Bently, L. – Sherman, B. (2014), p. 928.

²⁶ Decision EX 17-1 of the Executive Director of the European Union Intellectual Property Office A. (2017). GUIDELINES FOR EXAMINATION OF EUROPEAN UNION TRADE MARKS, EUROPEAN UNION INTELLECTUAL PROPERTY OFFICE (EUIPO), PART B, EXAMINATION, SECTION 4, ABSOLUTE GROUNDS FOR REFUSAL, CHAPTER 1, GENERAL PRINCIPLES. European Union Intellectual Property

parties, such as the relative grounds addressed below, resulting in these serving the public at large, also meaning that any person can apply for the invalidity of an already registered trade mark that should have been refused based on an absolute ground for refusal.²⁷ The grounds, listed in article 7 EUTMR include signs that do not fulfil the requirements of article 4 EUTMR,²⁸ signs lacking distinctive character,²⁹ descriptive signs,³⁰ generic signs,³¹ signs exclusively consisting of the shape or other characteristics resulting from the nature of goods themselves, which are necessary to obtain a technical result or which give substantial value to the goods,³² signs that are against public policy or do not adhere to the accepted principles of morality,³³ deceiving signs,³⁴ signs not authorised by competent authorities and which are in violation of Article 6ter of the Paris Convention for the Protection of Industrial Property,³⁵ signs including badges, emblems and escutcheons not covered by the aforementioned convention that are of particular public interest and for which consent of the competent authority for registration has not been obtained,³⁶ signs that are excluded from registration based on domestic or EU law, or international agreements the EU is a party of, providing for protection of designations of origin and geographical indications,³⁷ signs that are excluded from registration based on EU law or international agreements the EU is a party of, providing for protection of traditional terms for wine³⁸ or traditional specialities guaranteed,³⁹ and finally, signs that reproduce the essential elements of, or entirely consists of, an earlier plant variety denomination which is registered in accordance to domestic or EU law, or international agreements the EU is a party of, providing for protection of plant variety rights, and which are in respect of plant varieties of the same or closely related species.⁴⁰

Office, [online]. Available at: https://euipo.europa.eu/tunnel-web/secure/webdav/guest/document_library/contentPdfs/law_and_practice/decisions_president/EX-17-1_en.pdf [Accessed 26 Nov. 2018], p. 3.

²⁷ Bently, L. – Sherman, B. (2014), p. 928.

²⁸ Article 7(1)(a) of Regulation (EU) 2017/1001, OJ L 154.

²⁹ Article 7(1)(b) of Regulation (EU) 2017/1001, OJ L 154.

³⁰ Article 7(1)(c) of Regulation (EU) 2017/1001, OJ L 154.

³¹ Article 7(1)(d) of Regulation (EU) 2017/1001, OJ L 154.

³² Article 7(1)(e) of Regulation (EU) 2017/1001, OJ L 154.

³³ Article 7(1)(f) of Regulation (EU) 2017/1001, OJ L 154.

³⁴ Article 7(1)(g) of Regulation (EU) 2017/1001, OJ L 154.

³⁵ Article 7(1)(h) of Regulation (EU) 2017/1001, OJ L 154.

³⁶ Article 7(1)(j) of Regulation (EU) 2017/1001, OJ L 154.

³⁷ Article 7(1)(i) of Regulation (EU) 2017/1001, OJ L 154.

³⁸ Article 7(1)(k) of Regulation (EU) 2017/1001, OJ L 154.

³⁹ Article 7(1)(l) of Regulation (EU) 2017/1001, OJ L 154.

⁴⁰ Article 7(1)(m) of Regulation (EU) 2017/1001, OJ L 154.

In addition to absolute grounds for refusal, also so-called relative grounds for refusal exist, which differ from the former in the sense that these result in the refusal of an application only in the event of an opposition from a proprietor of an earlier trade mark,⁴¹ namely those registered as EU trade marks,⁴² in an EU member state, under the Benelux Office of Intellectual Property,⁴³ or under international agreements which a member state of the EU⁴⁴ or the EU as a whole⁴⁵ is a party of. These relative grounds can be found in article 8 of the EUTMR. However, as this thesis focuses on the registrability of the signs as such, excluding oppositions, these grounds will not be discussed in more detail.

2.5 Nice Classes Explained

The Nice classification, established in 1957 by the Nice Agreement Concerning the International Classification of Goods and Services for the Purposes of the Registration of Marks, is a system used for the registration of trade marks.⁴⁶ The system is applied for the registration of several domestic trade marks, but also for a variety of international trade marks, including European Union trade marks (EUTM).⁴⁷ The system consists of 45 different classes with several subclasses, of which the first 35 are for products, and the remaining 10 are for services.⁴⁸

2.6 Conclusive Remarks

This section has discussed trade marks, namely the very basics of the aforesaid. These were explained to be symbols of different kinds, that distinguished the products and/or services of one undertaking from the products and/or services of another and arguably served as guarantees of quality. Further, the trade marks at the focus of this thesis were elaborated on, namely word

⁴¹ Article 8(1) of Regulation (EU) 2017/1001, OJ L 154.

⁴² Article 8(2)(a)(i) of Regulation (EU) 2017/1001, OJ L 154.

⁴³ Article 8(2)(a)(ii) of Regulation (EU) 2017/1001, OJ L 154.

⁴⁴ Article 8(2)(a)(iii) of Regulation (EU) 2017/1001, OJ L 154.

⁴⁵ Article 8(2)(a)(iv) of Regulation (EU) 2017/1001, OJ L 154.

⁴⁶ WIPO A, (2018). Nice Classification, [online]. Available at: <http://www.wipo.int/classifications/nice/en/> [Accessed 16 Nov. 2018].

⁴⁷ WIPO B, (2018). About the Nice Classification, [online]. Available at: <http://www.wipo.int/classifications/nice/en/preface.html> [Accessed 16 Nov. 2018].

⁴⁸ WIPO C, (2018). INTERNATIONAL CLASSIFICATION OF GOODS AND SERVICES, FOR THE PURPOSES OF THE REGISTRATION OF MARKS (NICE CLASSIFICATION), EIGHTH EDITION, PART II, WITH LIST OF GOODS AND SERVICES IN CLASS ORDER, [online]. Available at: http://www.wipo.int/export/sites/www/classifications/nice/en/pdf/8_list_class_order.pdf [Accessed 16 Nov. 2018], pp. 3–5.

marks and figurative marks, the former consisting of words and/or numbers, the latter consisting of some sort of visual element, while not excluding the possibility of words and numbers included in the mark as well.

As for the requirements for trade marks in EU jurisprudence, it was discussed that a vast variety of signs that make the associated products and/or services distinguishable from the products and/or services of other undertakings are sufficient, as a starting point, as long as these are represented on the Register of European Union trade marks.⁴⁹ However, the absolute and relative grounds of refusal that were addressed later, could prevent registration.

⁴⁹ Article 4 of Regulation (EU) 2017/1001, OJ L 154.

3 Legislation Relevant to Sports Name Trade Marks

3.1 Articles 7(1)(b) and 7(1)(c) of the EUTMR – Descriptiveness and Lack of Distinctive Character

Legislation exclusively applicable to sports name trade marks does not exist in the EU jurisprudence. Rather, these marks must adhere to the very same, more general, rules as other trade marks. In light of this, the primary obstacle in registering sports name trade marks in the EU would seem to be the potential for descriptiveness and the resulting lack of distinctive character. As was briefly touched upon in Section 2.4.2, descriptiveness and a lack of distinctiveness, both on their own, are absolute grounds for refusal in the EU jurisprudence.⁵⁰ The grounds are codified in articles 7(1)(b) and 7(1)(c) of the EUTMR:⁵¹

“1. The following shall not be registered:

(b) trade marks which are devoid of any distinctive character;

(c) trade marks which consist exclusively of signs or indications which may serve, in trade, to designate the kind, quality, quantity, intended purpose, value, geographical origin or the time of production of the goods or of rendering of the service, or other characteristics of the goods or service”.

3.2 Literal Interpretation of the Relevant Legislation Does Not Lead to Appropriate Results

Effectively, article 7(1)(c) of the EUTMR, on the face of it, would seem to mean that stand-alone sports names, such as “football”, cannot be registered for products or services related to the sport, as these would certainly designate the kind, quality or intended purpose of the products or services. However, there are two considerations which are of special interest as goes for the aforementioned subsection on descriptiveness, namely the word “exclusively” and the fact that trade marks are oftentimes registered for very specific products and/or services. This would seem to indicate that the absolute ground related to descriptiveness does not prevent the

⁵⁰ Article 7(1)(c) of Regulation (EU) 2017/1001, OJ L 154.

⁵¹ Note that the decisions discussed in Section 4 will largely focus on the predecessor of the EUTMR, namely Council Regulation (EC) No 207/2009 of 26 February 2009 on the Community trade mark, OJ L 78. [online]. Available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32009R0207> [Accessed 20 Nov. 2018]. However, articles 7(1)(b) and (c) and 7(2) which are discussed, are identical in both Regulations.

registration of marks that consist of sports names registered for products or services that have nothing to do with the sport in question, or sports at large. Nonetheless, these marks would without question still need to be distinctive to a sufficient degree, i.e., these cannot consist of common names alone, which at the very least some sports names could be argued to consist of as such. This would seem to indicate that a sports name alone, at least reasonably popular such, could not be registered as a trade mark in the EU, regardless of the products or services it is applied for.

However, the matter is not this clear-cut. First, an important consideration lies in the arbitrariness of the sign when compared to the product/services the sign is registered for. Where is the line drawn? What can be considered arbitrary to a sufficient degree? Second, with a view on EUIPO practice, the current legislation would not seem to necessarily exclude registration of trade marks consisting of sports names that are less widely known, or sports name trade marks in general, several such having been registered, meaning that those had not been considered descriptive, lacking distinctive character, or common names by the EUIPO. Finally, sports name trade marks with figurative elements add an additional aspect to the analysis of descriptiveness and lack of subsequent distinctive character, considering the added distinctiveness the figurative elements bring to the equation. However, once again, one is faced with the question of where the line should be drawn.

These questions are of interest to the topic of this thesis and cannot be answered by a literal interpretation of the relevant legislation, but instead by analysing EUIPO decisions on the matter. Section 4 will provide information on a vast amount of such decisions that shed light on the aforementioned questions, also providing the base for the more in-depth analysis of the matter in section 5.

3.3 Conclusive Remarks

This section provided the argument that the primary absolute grounds of refusal leading to the rejection of sports name trade marks are those found in articles 7(1)(b) and 7(1)(c) of the EUTMR, i.e. the marks being descriptive and lacking distinctive character. However, considering the several ambiguities of the aforementioned subsections, the questions these raise and the EUIPO decisions on the matter, it was held that literal interpretation of the subsections is not a viable method of reaching appropriate results. Rather, for such results, an analysis on the aforementioned decisions is required.

4 EUIPO Decisions on Sports Name Trade Mark Applications

4.1 Approved Word Trade Marks

4.1.1 Word Mark 005049192, CROSSFIT (02/05/2006)⁵²

Word mark 005049192, “CROSSFIT” was applied for,⁵³ and with the necessary changes made after a Notice of requirement to amend classification,⁵⁴ registered for goods in Nice class 9⁵⁵ and services in Nice classes 38⁵⁶ and 41⁵⁷, largely online journals, (audio)visual material, computer software, chat rooms and different fitness related services. Interestingly, although the sign was applied for several sports related products and services, the mark was approved.⁵⁸ However, one must take into consideration the fact that the mark was applied for back in 2006, when CrossFit was not known by the public to the extent it is known today.

⁵² Filing date as per EUIPO’s database, information accessible at <https://euipo.europa.eu/eSearch/>. This footnote will not be repeated for the remaining trade marks discussed, but holds true for each of them.

⁵³ Application for a Community trade mark (005049192 – “CROSSFIT”), [online]. Available at: <https://euipo.europa.eu/copla/trademark/data/005049192/download/1-79052339/incoming> [Accessed 17 Nov. 2018].

⁵⁴ Notice of requirement to amend classification issued under Article 28 of the Regulation and Rule 9 of the Implementing Regulation (005049192 – “CROSSFIT”), [online]. Available at: <https://euipo.europa.eu/copla/trademark/data/005049192/download/1-3295532/outgoing> [Accessed 23 Nov. 2018], pp. 1–2.

⁵⁵ “Online journals in the field of fitness and nutrition; audio and visual sound recordings, namely prerecorded cassettes, compact discs, videos, DVDs, and CD-ROMs in the field of health, fitness or nutrition; semi-conductor devices containing recorded sound and/or video and/or images; music, sounds, images, text, signals, software, information, data and code provided by telecommunications networks, by online delivery and by way of the Internet; photographic and cinematographic films prepared for exhibition; computer software; non-printed publications; electronic, magnetic and optical credit, identity and/or membership cards; sunglasses and cases and bags adapted therefor”. Certificate of Registration (005049192 – “CROSSFIT”), [online]. Available at: <https://euipo.europa.eu/copla/trademark/data/005049192/download/1-3944278/outgoing> [Accessed 21 Nov. 2018], pp. 2 – 3.

⁵⁶ “Chat room and electronic bulletin board services; electronic dissemination and distribution of data and information in the field of fitness and nutrition; information, advisory and consultancy services relating to the aforesaid, including the provision of such services online from the internet or extranets”. Certificate of Registration (005049192 – “CROSSFIT”), p. 3.

⁵⁷ “Fitness training; rendering online interactive fitness services which allow users to create and/or use fitness and body building programs; providing information in the field of fitness and bodybuilding; consultation services with fitness trainers; educational, instructional and training services; arranging and conducting educational and training conferences and seminars; production of educational sound and video recordings; lease, hire and rental of instructional and teaching materials; provision of education on-line from a computer database or via the Internet or extranets; conducting courses, seminars and workshops; design, setting, administering and marking examinations; testing of people; provision of online journals featuring information relating to fitness and nutrition; provision of blogs featuring information on fitness and special events; information, advisory and consultancy services relating to the aforesaid, including the provision of such services online from the internet or extranets”. Certificate of Registration (005049192 – “CROSSFIT”), p. 3.

⁵⁸ Certificate of Registration (005049192 – “CROSSFIT”), [online]. Available at: <https://euipo.europa.eu/copla/trademark/data/005049192/download/1-3944278/outgoing> [Accessed 21 Nov. 2018].

4.1.2 Word Mark 012850673, CROSSFIT (06/05/2014)

Word mark 012850673, “CROSSFIT”, was applied and registered for goods in Nice class 16⁵⁹ and services in Nice class 28⁶⁰, largely printed matter and educational materials in the fields of fitness, nutrition, sports and exercise and equipment for exercising.⁶¹ Similar to the sign discussed above, this mark was also registered for products related to the sport in question.⁶² Further, different from the previously discussed sign, this sign was registered in 2014, when the sport was arguably significantly more widely known than it was in 2006.

4.1.3 Word Mark 009783614, GYMKHANA⁶³ (03/03/2011)

Word mark 009783614, “GYMKHANA” was applied for products in Nice class 9⁶⁴ and services in Nice class 41⁶⁵, mainly amusement apparatus, games, recorded and pre-recorded material, different kinds of electronic apparatus, sports training services, events and activities, productions of audio-visual material, blogs on sporting and more. The mark was accepted for

⁵⁹ “Paper goods and printed matter, namely, a series of books, written articles, handouts and worksheets in the fields of fitness, nutrition, sports and exercise; printed instructional, educational, and teaching materials in the fields of fitness, nutrition, sports and exercise; magazines in the fields of fitness, nutrition, sports and exercise; general feature magazines; exercise books; posters, bumper stickers”. Application for a Community trade mark (012850673 – “CROSSFIT”), [online]. Available at: <https://euipo.europa.eu/copla/trademark/data/012850673/download/1-128558695/incoming> [Accessed 17 Nov. 2018], p. 2.

⁶⁰ “Exercising equipment, namely, weight lifting bars, dumbbells, medicine balls, nets for sports, exercise bars; fitness machines and equipment, namely, rowing machines; exercise weights; gymnastic apparatus”. Application for a Community trade mark (012850673 – “CROSSFIT”), p. 2.

⁶¹ Certificate of Registration (012850673 – “CROSSFIT”), [online]. Available at: <https://euipo.europa.eu/copla/trademark/data/012850673/download/1-9846501/outgoing> [Accessed 21 Nov. 2018].

⁶² *Ibid.*, pp. 1–2.

⁶³ Gymkhana is the name of two separate sports, namely competitive games on horseback and a type of timed motorsport where a series of events are participated in to test driving skills. See Merriam Webster, (2018). gymkhana, [online]. Available at: <https://www.merriam-webster.com/dictionary/gymkhana> [Accessed 16 Nov. 2018].

⁶⁴ “Amusement apparatus and games adapted for use with television receivers or with video or computer monitors; Recorded and pre-recorded materials, namely, CDs, CD-ROMs, and DVDs; apparatus for recording, transmission or reproduction of sound or images; magnetic data carriers, downloadable files of sounds and/or images, in particular music; Electronic docking stations; MP3 Players; earphones and headphones; audio speakers; eyewear; mobile phones; cases for mobile phones; protective helmets; computer bags; eyeglass cases; electronic memories”. Application for a Community trade mark (009783614 – “GYMKHANA”), [online]. Available at: <https://euipo.europa.eu/copla/trademark/data/009783614/download/1-106884711/incoming> [Accessed 31 Oct. 2018].

⁶⁵ “Sports training services; sporting, recreational and cultural events and activities; production and distribution of cinema, DVD, television, radio and online content; publishing of books and magazines; on-line journals, namely, blogs featuring information regarding sporting, recreational and cultural events and activities”. Application for a Community trade mark (009783614 – “GYMKHANA”).

products in Nice class 9⁶⁶ but rejected for all the applied services in Nice class 41, which will be discussed in more detail in section 4.3.2.

4.1.4 Word Mark 003792686, LES MILLS (26/04/2004)

Word mark 003792686, “LES MILLS” was applied for products in Nice classes 9⁶⁷, 16⁶⁸, 25⁶⁹, 28⁷⁰ and services in Nice class 41⁷¹, mainly (audio)visual material, printed matter, clothing, footwear, headgear and services related to sporting, training, health and music. The application was approved despite the several sports related products and services included.⁷²

4.1.5 Word Mark 014194492, LES MILLS (03/06/2015)

⁶⁶ Certificate of Registration (009783614 – “GYMKHANA”), [online]. Available at: <https://euipo.europa.eu/copla/trademark/data/009783614/download/1-8230825/outgoing> [Accessed 21 Nov. 2018].

⁶⁷ “Audio recordings, video recordings and audio-visual recordings, including cassette tapes, compact discs, phonograph records, audio and video tapes, and CD ROM; information, data, recordings and publications in electronic form supplied online from databases, from the Internet (including web-sites), from intranets or from extranets; computer software and computer games; CD's and DVDs; mousepads”. Application for a Community trade mark (003792686 – “LES MILLS”), [online]. Available at: <https://euipo.europa.eu/copla/trademark/data/003792686/download/1-67153289/incoming> [Accessed 17 Nov. 2018], p. 4.

⁶⁸ “Paper, cardboard and goods made from these materials, not included in other classes; printed matter; bookbinding material; photographs; stationery; adhesives for stationery or household purposes; artists' materials; paint brushes; typewriters and office requisites (except furniture); instructional and teaching material (except apparatus); plastic materials for packaging (not included in other classes); printers' type; printing blocks; posters and calendars”. Application for a Community trade mark (003792686 – “LES MILLS”), p. 4.

⁶⁹ “Clothing, footwear, headgear”. Application for a Community trade mark (003792686 – “LES MILLS”), p. 4.

⁷⁰ “Gymnastic and sporting articles not included in other classes; barbells; body building apparatus; body training apparatus; boxing gloves; exercise bicycles and equipment; games and playthings”. Application for a Community trade mark (003792686 – “LES MILLS”), p. 4.

⁷¹ “Recreation and training services; sporting activities; education services; producing and conducting exercise to music classes and programmes; gymnasium services; health club services; sports club services; fitness club services; exercise instruction, advisory and training services; provision of exercise facilities; sports tuition, coaching and instruction; rental of sports or exercise equipment; producing and conducting personal training programs and services; information, advisory and consultancy services relating to any or all of the aforesaid”. Application for a Community trade mark (003792686 – “LES MILLS”), p. 4.

⁷² Certificate of Registration (003792686 – “LES MILLS”), [online]. Available at: <https://euipo.europa.eu/copla/trademark/data/003792686/download/1-2961544/outgoing> [Accessed 21 Nov. 2018].

Word mark 014194492, “LES MILLS” was applied and registered for other than sports-related products in Nice class 5⁷³, mainly dietary and nutritional products.⁷⁴

4.1.6 Word Mark 014713796, LES MILLS (23/10/2015)

Word mark 014713796, “LES MILLS” was applied and registered for products in Nice class 18,⁷⁵ largely bags, some of these being sports-related.⁷⁶

4.1.7 Word Mark 000321471, RUGBY (18/06/1996)

Word mark 000321471, “RUGBY” was registered for products in Nice classes 18⁷⁷, 20⁷⁸ and 25⁷⁹, mainly bags, furniture and different types of clothing, with the explicit mention of none of these, excluding furniture, being related to the sport of rugby. This remark was not included in the original application,⁸⁰ but was added later, based on a Notice of grounds for refusal of application for a Community trade mark, that made it a condition for approval.⁸¹

⁷³ “Dietary and nutritional supplements including mineral food supplements, nutritional supplements, dietary food supplements, vitamins and vitamin preparations, vegetable based nutritional supplements, prebiotic fibre supplements, probiotic bacterial preparations, protein dietary supplements, and electrolyte replacement solutions and beverages”. Application for a Community trade mark (014194492 – “LES MILLS”), [online]. Available at: <https://euipo.europa.eu/copla/trademark/data/014194492/download/1-135801353/incoming> [Accessed 17 Nov. 2018], p. 2.

⁷⁴ Certificate of Registration (014194492 – “LES MILLS”), [online]. Available at: <https://euipo.europa.eu/copla/trademark/data/014194492/download/1-10893049/outgoing> [Accessed 21 Nov. 2018].

⁷⁵ “Bags; Athletic bags; Sports bags; Gym bags; Handbags; Travelling bags; Satchels; Beach bags; Back packs; Luggage; Key cases; Wallets; Purses; Rucksacks”. Application for a Community trade mark (014713796 – “LES MILLS”), [online]. Available at: <https://euipo.europa.eu/copla/trademark/data/014713796/download/1-138402896/incoming> [Accessed 17 Nov. 2018], p. 2.

⁷⁶ Certificate of Registration (014713796 – “LES MILLS”), [online]. Available at: <https://euipo.europa.eu/copla/trademark/data/014713796/download/1-11189767/outgoing> [Accessed 21 Nov. 2018].

⁷⁷ “Bags made of leather, nylon, canvas, knapsacks, week-end bags; small leather goods namely agendas, wallets, moneybelts, shaving kit, portfolios, pencil cases, credit card holders; hand bags; none of them being used to play rugby”. Certificate of Registration (000321471 – “RUGBY”), [online]. Available at: <https://euipo.europa.eu/copla/trademark/data/000321471/download/1-854168/outgoing> [Accessed 21 Nov. 2018], p. 2.

⁷⁸ “Furniture”. Certificate of Registration (000321471 – “RUGBY”), p. 2.

⁷⁹ “Leather clothing namely jackets, vests, skirts, pants; belts; scarves, shawls, capes; gloves; shoes; wool outerwear; cotton or nylon outerwear; none of them being used to play rugby”. Certificate of Registration (000321471 – “RUGBY”), p. 2.

⁸⁰ Application for a Community trade mark (000321471 – “RUGBY”), [online]. Available at: <https://euipo.europa.eu/copla/trademark/data/000321471/download/1-27471492/incoming> [Accessed 17 Nov. 2018].

⁸¹ Notice of grounds for refusal of application for a Community trade mark issued under Article 7 of the Regulation under Rule 11(1) of the Implementing Regulation (000321471 – “RUGBY”), [online]. Available at: <https://euipo.europa.eu/copla/trademark/data/000321471/download/1-173845/outgoing> [Accessed 18 Nov. 2018].

4.1.8 Word Mark 003883758, RUGBY (14/06/2004)

Word mark 003883758, “RUGBY” was registered for products in Nice classes 9,⁸² 18⁸³ and 25⁸⁴ and services in Nice classes 35⁸⁵ and 42⁸⁶, mainly apparatus and instruments, leather and goods made of leather, clothing and services related to advertising, business, science and technology, none being related to the sport or sports in general. However, the products and services listed in the application,⁸⁷ differ from those the sign is currently registered for, namely due to Notices of requirement to amend classification,⁸⁸ and the proceedings following a declaration of invalidity filed against the sign⁸⁹. The aforementioned proceedings will be discussed in more detail under section 4.3.3.

⁸² “Scientific, nautical, surveying, photographic, cinematographic, optical, weighing, measuring, signalling, checking (supervision), life-saving and teaching apparatus and instruments; apparatus and instruments for conducting, switching, transforming, accumulating, regulating or controlling electricity; apparatus for recording, transmission or reproduction of sound or images; magnetic data carriers, recording discs; automatic vending machines and mechanisms for coin-operated apparatus; cash registers, calculating machines, data processing equipment and computers; fire-extinguishing apparatus”. Certificate of Registration (003883758 – “RUGBY”), [online]. Available at: <https://euipo.europa.eu/copla/trademark/data/003883758/download/1-3417719/outgoing> [Accessed 21 Nov. 2018], p. 2.

⁸³ “Leather and imitations of leather, and goods made of these materials and not included in other classes; animal skins, hides; trunks and travelling bags; umbrellas, parasols and walking sticks; whips, harness and saddlery; bags made of leather, nylon, canvas, knapsacks, week-end bags; small leather goods, namely covers for agendas, wallets, moneybelts, bags for shaving kits (not fitted), portfolios, credit card holders; hand bags”. Certificate of Registration (003883758 – “RUGBY”), p. 2.

⁸⁴ “Clothing, footwear, headgear; leather clothing namely jackets, vests, skirts, pants, belts, scarves, shawls, capes, gloves; shoes; wool outerwear; cotton and nylon outerwear; none of the aforementioned goods relating to clothing used for playing rugby or being made in a style similar or identical to clothing use for playing rugby”. Certificate of Registration (003883758 – “RUGBY”), p. 3.

⁸⁵ “Advertising; business management; business administration; office functions; retail services”. Certificate of Registration (003883758 – “RUGBY”), p. 3.

⁸⁶ “Scientific and technological services and research and design relating thereto; industrial analysis and research services; design and development of computer hardware and software; legal services”. Certificate of Registration (003883758 – “RUGBY”), p. 3.

⁸⁷ Application for a Community trade mark (003883758 – “RUGBY”), [online]. Available at: <https://euipo.europa.eu/copla/trademark/data/003883758/download/1-70771670/incoming> [Accessed 17 Nov. 2018], p. 4.

⁸⁸ Notice of requirement to amend classification issued under Article 28 of the Regulation and Rule 9 of the Implementing Regulation (003883758 – “RUGBY”) A, [online]. Available at: <https://euipo.europa.eu/copla/trademark/data/003883758/download/1-2626476/outgoing> [Accessed 23 Nov. 2018]; Notice of requirement to amend classification issued under Article 28 of the Regulation and Rule 9 of the Implementing Regulation (003883758 – “RUGBY”) B, [online]. Available at: <https://euipo.europa.eu/copla/trademark/data/003883758/download/1-2277046/outgoing> [Accessed 23 Nov. 2018].

⁸⁹ Decision of the Second Board of Appeal of 18 February 2013 In Case R 39/2012-2, [online]. Available at: https://oami.europa.eu/copla/trademark/data/003883758/download/CLW/APL/2013/EN/20130218_R0039_2012-2.pdf?app=caselaw&casenum=R0039/2012-2&trTypeDoc=NA [Accessed 17 Nov. 2018].

4.1.9 Word Mark 004556718, RUGBY (24/08/2005)

Word Mark 004556718, “RUGBY” was applied and registered for other than sport-related products in Nice class 3⁹⁰, mainly different types of cosmetics.

4.1.10 Word Mark 006624142, RUGBY (30/01/2008)

Word mark 006624142, “RUGBY” was registered for products in Nice classes 9⁹¹, 14⁹² and 16⁹³ and services in Nice class 35⁹⁴, mainly different kinds of instruments and apparatus, printed matter and retail store related services, none related to the sport itself or sports at large. The application for the trade mark included a wider variety of products and services,⁹⁵ however, due to Notices of requirement to amend classification,⁹⁶ and a Refusal of application for a

⁹⁰ “Perfumes, eaux de toilette; bath and shower gels and salts not for medical purposes; toilet soaps; deodorants for personal use; cosmetics, in particular creams, milks, lotions, gels and powders for the face, body and hands; sun-tanning milks, gels and oils and after-sun preparations (cosmetics); make-up preparations; shampoos; gels, mousses, balms and preparations in aerosol form for hairdressing and haircare; hair lacquers; hair-colouring and hair-decolorizing preparations; preparations for waving and setting hair; essential oils”. Certificat d’enregistrement (004556718 – “RUGBY”), [online]. Available at: <https://euipo.europa.eu/copla/trademark/data/004556718/download/1-3376922/outgoing> [Accessed 21 Nov. 2018], p. 1; Demande de marque communautaire [Application for a Community trade mark] (004556718 – “RUGBY”) (French), [online]. Available at: <https://euipo.europa.eu/copla/trademark/data/004556718/download/1-72735028/incoming> [Accessed 17 Nov. 2018], p. 1.

⁹¹ “Instructional and teaching apparatus”. Certificate of Registration (006624142 – “RUGBY”), [online]. Available at: <https://euipo.europa.eu/copla/trademark/data/006624142/download/1-8417515/outgoing> [Accessed 21 Nov. 2018], p. 2.

⁹² “Horological and chronometric apparatus and instruments; jewellery; precious metals and precious stones; articles made from precious metals and precious stones and/or imitations thereon; parts and fittings for all the aforesaid goods”. Certificate of Registration (006624142 – “RUGBY”), p. 2.

⁹³ “Paper; paper goods; printed matter; books; publications; stationery; office requisites; none of the aforementioned goods being in relation to the sport of rugby or specific to any other sports”. Certificate of Registration (006624142 – “RUGBY”), p. 2.

⁹⁴ “Retail store services and electronic and online retail store services, all relating to clothing, watches, jewellery, bags, cosmetics and toiletries, personal care products, headwear, key chains and key fobs, wallets, purses, sunglasses, footwear, shoe cleaning kits and clothing brushes; none of the aforementioned goods being in relation to the sport of rugby or specific to any other sports: advisory and consultancy services relating to all the aforesaid”. Certificate of Registration (006624142 – “RUGBY”), p. 2.

⁹⁵ Application for a Community trade mark (006624142 – “RUGBY”), [online]. Available at: <https://euipo.europa.eu/copla/trademark/data/006624142/download/1-93258120/incoming> [Accessed 17 Nov. 2018], p.1.

⁹⁶ Notice of requirement to amend classification issued under Article 28 of the Regulation and Rule 9 of the Implementing Regulation (006624142 – “RUGBY”) A, [online]. Available at: <https://euipo.europa.eu/copla/trademark/data/006624142/download/1-4301657/outgoing> [Accessed 27 Nov. 2018]; Notice of requirement to amend classification issued under Article 28 of the Regulation and Rule 9 of the Implementing Regulation (006624142 – “RUGBY”) B, [online]. Available at: <https://euipo.europa.eu/copla/trademark/data/006624142/download/1-5775313/outgoing> [Accessed 27 Nov. 2018].

Community trade mark,⁹⁷ the final registration was more limited. These proceedings will be discussed in more detail under section 4.3.4.

4.1.11 Word Mark 015218324, RUGBY (15/03/2016)

Word mark 015218324, “RUGBY” was applied for products in Nice class 12⁹⁸, mainly different types of cars, none of which have any relation to the sport or sports at large, leading to successful registration.⁹⁹

4.2 Approved Figurative Trade Marks

4.2.1 Figurative Mark 014423362, CRICKET (30/07/2015)

Figurative mark 014423362, “CRICKET” was, after a Notice of requirement to amend classification,¹⁰⁰ applied for products in Nice classes 3¹⁰¹, 14¹⁰², 18¹⁰³ and 25¹⁰⁴, largely cleaning preparations, cosmetics, metals, jewellery, bags and clothing. While the application was

⁹⁷ Refusal of application for a Community trade mark (006624142 – RUGBY), [online]. Available at: https://oami.europa.eu/copla/trademark/data/006624142/download/CLW/RFS/2009/EN/20090525_006624142.pdf?app=caselaw&casenum=006624142&trTypeDoc=NA. [Accessed 17 Nov. 2018].

⁹⁸ “Passenger cars; Touring cars; Driverless cars [autonomous cars]; Camping cars; Driverless cars; Racing cars; Motor cars; Hybrid cars; Sports cars; Armoured cars; Dump cars; Container cars”. Application for a Community trade mark (015218324 – “RUGBY”), [online]. Available at: <https://euipo.europa.eu/copla/trademark/data/015218324/download/1-141120067/incoming> [Accessed 17 Nov. 2018], p. 1.

⁹⁹ Certificate of Registration (015218324 – “RUGBY”), [online]. Available at: <https://euipo.europa.eu/copla/trademark/data/015218324/download/1-11620345/outgoing> [Accessed 21 Nov. 2018].

¹⁰⁰ Notice of requirement to amend classification issued under Article 28 of the Regulation and Rule 9 of the Implementing Regulation (014423362 – “CRICKET”), [online]. Available at: <https://euipo.europa.eu/copla/trademark/data/014423362/download/1-10812827/outgoing> [Accessed 29 Nov. 2018].

¹⁰¹ “Bleaching preparations and other substances for laundry use; cleaning, polishing, scouring and abrasive preparations; soaps; perfumery, essential oils, cosmetics, hair lotions; dentifrices”. Application for a European Union trade mark (014423362 – “CRICKET”), [online]. Available at: <https://euipo.europa.eu/copla/trademark/data/014423362/download/1-148962531/incoming> [Accessed 21 Nov. 2018], p. 1.

¹⁰² “Precious metals and their alloys and goods in precious metals or coated therewith, included in class 14 namely jewelry, watches, ornaments and trophies; jewellery, precious stones; horological and chronometric instruments”. Application for a European Union trade mark (014423362 – “CRICKET”), p. 1.

¹⁰³ “Bags, belts, wallets, straps, shoulder straps; animal skins, hides; trunks and travelling bags; handbags, rucksacks, purses; umbrellas, parasols and walking sticks”. Application for a European Union trade mark (014423362 – “CRICKET”), p. 1.

¹⁰⁴ “Clothing, footwear, headgear, wristbands”. Application for a European Union trade mark (014423362 – “CRICKET”), p. 1.

approved for certain products,¹⁰⁵ a partial rejection and a restriction of the list of goods or services in a European Union trade mark limited the products of the registration to Nice classes 3 and 18,¹⁰⁶ the proceedings of which, together with the figurative elements of the sign, will be discussed in more detail under section 4.4.2.



EUTM 014423362

4.2.2 Figurative Mark 016515728, CRICKET (28/03/2017)

Figurative mark 016515728, “CRICKET” was applied for products in Nice classes 3¹⁰⁷, 18¹⁰⁸ and 25¹⁰⁹, namely different types of cosmetics, beauty products, perfumes and scents, bags of different kind, suitcases, leather, imitation leather, clothing, hats and footwear. However, the mark was eventually registered only for clothing of leather and leather clothing in Nice class

¹⁰⁵ “Bleaching preparations and other substances for laundry use; cleaning, polishing, scouring and abrasive preparations; soaps; perfumery, essential oils, cosmetics, hair lotions; dentifrices” in class 3 and “Wallets; animal skins, hides; purses; umbrellas, parasols and walking sticks” in class 18. Certificate of Registration (014423362 – “CRICKET”), [online]. Available at: <https://euipo.europa.eu/copla/trademark/data/014423362/download/1-12256084/outgoing> [Accessed 21 Nov. 2018], p. 2.

¹⁰⁶ Confirmation of a restriction of the list of goods or services in a European Union trade mark application (014423362 – “CRICKET”), [online]. Available at: <https://euipo.europa.eu/copla/trademark/data/014423362/download/1-12208135/outgoing> [Accessed 21 Nov. 2018]; Certificate of Registration (014423362 – “CRICKET”).

¹⁰⁷ “Perfumes, cosmetics, skin care (cosmetic preparations), creams cosmetics, make-up preparations, soap, shampoos, powder, nail polish, oils for perfumes and scents”. Application for a European Union trade mark (016515728 – “CRICKET”), [online]. Available at: <https://euipo.europa.eu/copla/trademark/data/016515728/download/1-148295253/incoming> [Accessed 29 Oct. 2018], p. 1.

¹⁰⁸ “Bags, school bags, hand bags, imitation leather, leather (unworked/semi worked), leather straps, suit cases, purses, sports bags, travelling bags”. Application for a European Union trade mark (016515728 – “CRICKET”), p. 1.

¹⁰⁹ “Clothing of leather, footwear, hats, jackets (clothing), leather clothing, readymade clothing, shoes, sports shoes, tee shirts, underwear”. Application for a European Union trade mark (016515728 – “CRICKET”), p. 1.

25.¹¹⁰ The proceedings that resulted in this partial rejection, as well as the figurative elements of the sign, will be discussed in more detail under section 4.4.3.



EUTM 016515728

4.2.3 Figurative Mark 003508116, Football (31/10/2003)

Figurative mark 003508116, “Football”, was applied and registered for products in Nice class 31¹¹¹, namely agricultural, horticultural and forestry products, none of which have any connection with the sport football or sports at large. The sign consists of a black rectangle on which there is a man running with a football and italicized white writing consisting of the word “Football”.



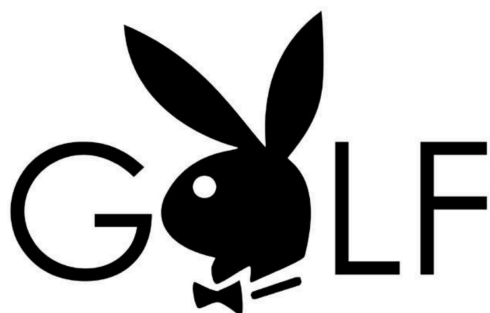
EUTM 003508116

4.2.4 Figurative Mark 007278492, GOLF (01/10/2008)

¹¹⁰ Certificate of Registration (016515728 – “CRICKET”), [online]. Available at: <https://euipo.europa.eu/copla/trademark/data/016515728/download/1-12635548/outgoing> [Accessed 21 Nov. 2018].

¹¹¹ “Agricultural, horticultural and forestry products”. Certificate of Registration (003508116 – “Football”), [online]. Available at: <https://euipo.europa.eu/copla/trademark/data/003508116/download/1-2794378/outgoing> [Accessed 21 Nov. 2018]; Solicitud de marca Comunitaria [Application for a Community trade mark] (003508116 – “FOOTBALL”) (Spanish), [online]. Available at: <https://euipo.europa.eu/copla/trademark/data/003508116/download/1-62010519/incoming> [Accessed 17 Nov. 2018], p. 5.

Figurative mark 002422863, “GOLF” was applied for products in Nice classes 18¹¹², 24¹¹³, 25¹¹⁴, 28¹¹⁵ and 41¹¹⁶, largely leather and imitations thereof, textile and textile goods, clothing, footwear, headgear, education, entertainment, activities, including several products and services related to the sport, the application further leading to registration.¹¹⁷ The sign consists of black writing in the form of GOLF, where the “O” has been replaced by a bunny with a bowtie.



EUTM 007278492

4.2.5 Figurative Mark 002877173, LES MILLS (03/10/2002)

Figurative mark 002877173, “LES MILLS” was applied for products in Nice class 25¹¹⁸ and services in Nice classes 35¹¹⁹ and 41¹²⁰, including products and services directly or indirectly

¹¹² “Leather and imitations of leather, and goods made of these materials and not included in other classes; animal skins, hides; trunks and travelling bags; umbrellas, parasols and walking sticks; whips, harness and saddlery”. Application for a Community trade mark (007278492 – “GOLF”), [online]. Available at: <https://euipo.europa.eu/copla/trademark/data/007278492/download/1-96196973/incoming> [Accessed 17 Nov. 2018], p. 1.

¹¹³ “Golf towels; textiles and textile goods, not included in other classes; bed and table covers”. Application for a Community trade mark (007278492 – “GOLF”), p. 2.

¹¹⁴ “Clothing, footwear, headgear”. Application for a Community trade mark (007278492 – “GOLF”), p. 2.

¹¹⁵ “Golf accessories, namely, golf bags, golf tees, head covers, ball markers, pitch forks, golf balls, drivers, golf bag tags, golf grips, golf gloves, golf clubs; games and playthings; gymnastic and sporting articles not included in other classes; decorations for Christmas trees”. Application for a Community trade mark (007278492 – “GOLF”), p. 2.

¹¹⁶ “Golf tournaments; education; providing of training; entertainment; sporting and cultural activities”. Application for a Community trade mark (007278492 – “GOLF”), p. 2.

¹¹⁷ Certificate of Registration (007278492 – “GOLF”), [online]. Available at: <https://euipo.europa.eu/copla/trademark/data/007278492/download/1-6312120/outgoing> [Accessed 21 Nov. 2018].

¹¹⁸ “Clothing, footwear, headgear”. Application for a Community trade mark (002877173 – “LES MILLS”), [online]. Available at: <https://euipo.europa.eu/copla/trademark/data/002877173/download/1-73257436/incoming> [Accessed 17 Nov. 2018], p. 4.

¹¹⁹ “Business management and organisation consultancy; business management assistance; professional business consultancy; advertising including on-line advertising; publicity; business research; business appraisals; provision of all of the above services over the Internet”. Application for a Community trade mark (002877173 – “LES MILLS”), p. 4.

¹²⁰ “Recreation and training services; sporting activities; education services; producing and conducting exercise to music classes and programmes; gymnasium services; health club services; sports club services; fitness club

related to sports in general, largely clothing, footwear, headgear and services related to business management, exercising, health and recreation. The trade mark was successfully registered.¹²¹ The sign consists of a striped white and black globe, on which there is a black rectangle with the words “LES MILLS” written in grey, bolded letters.



EUTM 002877173

4.2.6 Figurative Mark 003794575, Les Mills (26/04/2004)

Figurative mark 003794575, “Les Mills”, was applied for products in Nice classes 9¹²², 16¹²³, 25¹²⁴ and 28¹²⁵ and services in Nice class 41¹²⁶, largely (audio)visual material, computer

services; exercise instruction, advisory and training services; provision of exercise facilities; sports tuition, coaching and instruction; rental of sports or exercise equipment; information, advisory and consultancy services relating to any or all of the aforesaid”. Application for a Community trade mark (002877173 – “LES MILLS”), p. 4.

¹²¹ Certificate of Registration (002877173 – “LES MILLS”), [online]. Available at: <https://euipo.europa.eu/copla/trademark/data/002877173/download/1-2986766/outgoing> [Accessed 21 Nov. 2018], pp. 1–2.

¹²² “Audio recordings, video recordings and audio-visual recordings, including cassette tapes, compact discs, phonograph records, audio and video tapes, and CD Rom; information, data, recordings and publications in electronic form supplied online from databases, from the Internet (including web-sites), from intranets or from extranets; computer software and computer games; CDs and DVDs; mousepads”. Application for a Community trade mark (003794575 – “Les Mills”), [online]. Available at: <https://euipo.europa.eu/copla/trademark/data/003794575/download/1-66103506/incoming> [Accessed 17 Nov. 2018], p. 4.

¹²³ “Paper, cardboard and goods made from these materials, not included in other classes; printed matter; book-binding material; photographs; stationery; adhesive for stationery or household purposes; artists' materials; paint brushes; typewriters and office requisites (except furniture); instructional and teaching material (except apparatus); plastic materials for packaging (not included in other classes); printers' type; printing blocks; posters, calendars, plastic/vinyl banners”. Application for a Community trade mark (003794575 – “Les Mills”), p. 4.

¹²⁴ “Clothing, footwear, headgear”. Application for a Community trade mark (003794575 – “Les Mills”), p. 4.

¹²⁵ “Gymnastic and sporting articles not included in other classes; barbells; body building apparatus; body training apparatus; boxing gloves; exercise bicycles and equipment; games and playthings”. Application for a Community trade mark (003794575 – “Les Mills”), p. 4.

¹²⁶ “Recreation and training services; sporting activities; education services; producing and conducting exercise to music classes and programmes; gymnasium services; health club services; sports club services; fitness club

software and games, printed matter, clothing, footwear, headgear, gymnastic and sporting articles and services related to exercising, recreation and fitness. The application resulted in successful registration of the mark.¹²⁷ The sign consists of a grey rhombus with rounded corners, inside of which there is a partial grey and white, striped globe and writing consisting of “Les Mills” in grey.



EUTM 003794575

4.2.7 Figurative Mark 000763789, SPINNING (05/03/1998)

Figurative mark 000763789, “SPINNING”, was applied for products in Nice classes 25¹²⁸ and 28¹²⁹ and services in Nice class 41.¹³⁰ After a Restriction of goods or services,¹³¹ the mark was registered for products and services in the latter two Nice classes, all exclusively related to sports, largely exercise equipment and services related to physical fitness and exercising.¹³² The

services; exercise instruction, advisory and training services; provision of exercise facilities; sports tuition, coaching and instruction; rental of sports or exercise equipment; producing and conducting personal training programs and services; information, advisory and consultancy services relating to any or all of the aforesaid”. Application for a Community trade mark (003794575 – “Les Mills”), p. 4.

¹²⁷ Certificate of Registration (003794575 – “Les Mills”), [online]. Available at: <https://euipo.europa.eu/copla/trademark/data/003794575/download/1-3099360/outgoing> [Accessed 21 Nov. 2018].

¹²⁸ “Clothing”. Application for a Community trade mark (000763789 – “SPINNING”), [online]. Available at: <https://euipo.europa.eu/copla/trademark/data/000763789/download/1-42213813/incoming> [Accessed 17 Nov. 2018].

¹²⁹ “Exercise equipment”. Application for a Community trade mark (000763789 – “SPINNING”).

¹³⁰ “Services in the field of exercise and physical training, namely provision of sport instruction, fitness studio services, development of concepts for physical fitness, in particular training concepts for physical fitness using stationary training equipment; providing facilities for recreation, physical fitness, exercising activities, fitness instruction and fitness consultation”. Application for a Community trade mark (000763789 – “SPINNING”).

¹³¹ Confirmation of a restriction of goods and services in a Community trade mark application (Article 44(1) of the Regulation) (000763789 – “SPINNING”), [online]. Available at: <https://euipo.europa.eu/copla/trademark/data/000763789/download/3-300205/outgoing> [Accessed 17 Nov. 2018].

¹³² Certificate of Registration (000763789 – “SPINNING”), [online]. Available at: <https://euipo.europa.eu/copla/trademark/data/000763789/download/1-1234830/outgoing> [Accessed 21 Nov. 2018].

sign consists of a person cycling, drawn in white on a black rectangle, and white writing consisting of the word “SPINNING”.



EUTM 000763789

4.2.8 Figurative Mark 002422863, tennis (23/10/2001)

Figurative mark 002422863, “tennis”, was applied for,¹³³ and after a Notice of grounds for refusal of application for a Community trade mark,¹³⁴ registered for other than sports-related products in Nice classes 18¹³⁵, 24¹³⁶ and 25¹³⁷, mainly bags, wallets, woven and textile products and clothing. The sign consists of bold white writing spelling out the word “tennis” on a dark grey rectangle with black borders.

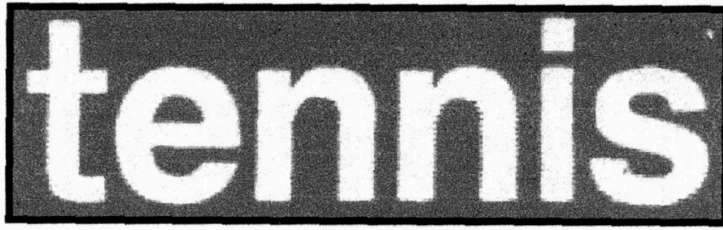
¹³³ Solicitud de marca Comunitaria [Application for a Community trade mark] (002422863 – “TENNIS”) (Spanish), [online]. Available at: <https://euipo.europa.eu/copla/trademark/data/002422863/download/1-66086492/incoming> [Accessed 17 Nov. 2018].

¹³⁴ Notificación de los motivos de denegación de una solicitud de marca comunitaria, expedida de acuerdo con el Artículo 7 del reglamento y la Regal 11.1 del Reglamento de ejecución [Notice of grounds for refusal of application for a Community trade mark issued under Article 7 of the Regulation under Rule 11(1) of the Implementing Regulation] (002422863, “tennis”) (Spanish), [online]. Available at: <https://euipo.europa.eu/copla/trademark/data/002422863/download/1-2103400/outgoing> [Accessed 30 Nov. 2018].

¹³⁵ “Shopping bags, handbags, travelling bags, pocket wallets, wallets (leatherware), haversacks, suitcases, haversacks for food, haversacks of leather, bags for climbers, school bags, beach bags, bags (envelopes, pouches) of leather, for packaging, garment bags for travel, bags (envelopes, pouches) of leather, for packaging, card cases (note cases), garment bags for travel, travelling bags”. Certificate of Registration (002422863 – “tennis”), [online]. Available at: <https://euipo.europa.eu/copla/trademark/data/002422863/download/1-2773039/outgoing> [Accessed 21 Nov. 2018], p. 1.

¹³⁶ “Woven and textile products not included in other classes; bed and table covers.” Certificate of Registration (002422863 – “tennis”), p. 1.

¹³⁷ “Blouses, shirts, waterproof clothing, jeans, excluding footwear of all kinds”. Certificate of Registration (002422863 – “tennis”), p. 1.



EUTM 002422863

4.3 Rejected Word Trade Marks

4.3.1 Word Mark 013362314, CRICKET (14/10/2014)

Word mark 013362314, “CRICKET” was applied for services in Nice class 41¹³⁸, mainly educational services and providing information in the field of education over a global computer network. The mark was objected against by the Office due to its descriptive nature and its lack of distinctive character, i.e. based on articles 7(1)(b), (c) and 7(2) of Council Regulation (EC) No 207/2009 of 26 February 2009 on the Community trade mark, OJ L 78 (CTMR).¹³⁹ The Office argued that all sports can be taught, resulting in it being reasonable for consumers to make a link between the mark and the teaching of the sport cricket.¹⁴⁰ The applicant had also offered to limit the services it applied for by adding “but none of the aforementioned services relating to crickets (insects), the sport of cricket or stools”,¹⁴¹ however, the Office rejected the limitation as it did not consider this to constitute a clear unconditional request for limitation.¹⁴²

This decision was appealed by the applicant, who now offered the limitation to be “but none of the aforementioned services relating to the sport of cricket”¹⁴³, rather than the limitation provided for previously. The applicant based its appeal on three grounds. First, it considered that it could not monopolize the word “cricket” in relation to any educational services related to

¹³⁸ “Educational services, namely organizing and conducting educational programs; Providing information in the field of education over a global computer network, namely providing lesson plans, project ideas, educational matters, and links to websites of other featuring educational content”. Decision of the First Board of Appeal of 24 September 2015 In Case R 876/2015-1, [online]. Available at: https://oami.europa.eu/copla/trade-mark/data/013362314/download/CLW/APL/2015/EN/20150924_R0876_2015-1.pdf?app=caselaw&case-num=R0876/2015-1&trTypeDoc=NA [Accessed 17 Nov. 2018], para. 1.

¹³⁹ *Ibid.*, para. 5.

¹⁴⁰ *Ibid.*

¹⁴¹ *Ibid.*, para. 4.

¹⁴² *Ibid.*, para. 5.

¹⁴³ *Ibid.*, para. 6.

sport, as it wouldn't be differentiable from other marks related to the sport, resulting in it being evident that the educational services were not related to the sport. Rather the applicant was to be considered an educational media company with a focus on providing educational resources for children, for which the mark was to be considered fanciful.¹⁴⁴ Second, the applicant argued that its intention was to restrict its services in its application, which was the reason for mentioning the limitation, and this should therefore have been taken into account.¹⁴⁵ Finally, the applicant argued that the restriction would not create any legal uncertainty for its competition, considering the fact that the applicant had restricted its educational services from being related to the sport of cricket.¹⁴⁶

The First Board of Appeal (First Board) started with elaborating that the services the mark was applied for were directed at the general public as well as professionals in the educational field, in the UK, Ireland and Malta.¹⁴⁷ The First Board then delved into an assessment of the descriptiveness of the mark, holding the term "cricket" referring to the sport of cricket,¹⁴⁸ meaning that the mark was an immediate and direct indication of the kind, content and subject matter of the services it was applied for, in general and as a whole, it informing the relevant public that these were related to the learning of the sport cricket.¹⁴⁹ In this vein, the First Board rejected the applicants first argument, explaining that it could change its business at any time and hence, also start offering services related to the sport. Additionally, the First Board held that the business in which the applicant was active could also be related to the sport of cricket, resulting in the mark not being fanciful.¹⁵⁰ The mark was effectively held to be descriptive, in violation of article 7(1)(c) of the CTMR.¹⁵¹

As for the lack of distinctive character of the sign, the First Board held that the word "cricket":

"has a specific meaning in the field of education and there is nothing vague or unusual about the mark applied for in relation to the services in the application. Indeed, there is

¹⁴⁴ *Ibid.*, para. 8.

¹⁴⁵ *Ibid.*

¹⁴⁶ *Ibid.*

¹⁴⁷ *Ibid.*, para. 16.

¹⁴⁸ *Ibid.*, para. 17.

¹⁴⁹ *Ibid.*, paras. 18–19.

¹⁵⁰ *Ibid.*, para. 20.

¹⁵¹ *Ibid.*, para. 21.

no element which would allow the view to be reached that the mark applied for is unusual or might have its own meaning which, in the perception of the relevant public, distinguishes the services offered by the applicant from those of a different commercial origin.”¹⁵²

The mark was effectively held to lack distinctive character therefore being in violation of article 7(1)(b) of the CTMR.¹⁵³

Finally, the Board considered the new limitation of the services that the mark was applied for admissible, but incapable of overcoming the aforementioned absolute grounds of refusal, as the limitation would not change the perception of the mark by the relevant public.¹⁵⁴

The appeal was dismissed, and the application was rejected in its entirety.¹⁵⁵

4.3.2 Word Mark 009783614, GYMKHANA (03/03/2011)

As stated previously, word mark 009783614, “GYMKHANA” was applied for goods in Nice class 9 and services in Nice class 41,¹⁵⁶ the registration for the former being successful, but the registration for the latter being rejected.

The Office objected against the mark based on articles 7(1)(b), (c) and 7(2) of the CTMR, holding the mark to lack distinctive character in addition to being descriptive. More precisely, the Office explained that the services in Nice class 41 which the mark was applied for, were mass consumption services aimed at both average and professional consumers, the relevant public having an awareness “of the average consumer who is reasonably well-informed and reasonably observant and circumspect”¹⁵⁷. The Office further held that the relevant public should be considered to be English-speaking, as the mark consisted of an English word. More specifically, as to the word “Gymkhana”, the Office considered it to have three separate definitions:

¹⁵² *Ibid.*, para. 27.

¹⁵³ *Ibid.*, para. 28.

¹⁵⁴ *Ibid.*, para. 30.

¹⁵⁵ *Ibid.*, para. 31.

¹⁵⁶ For a complete list of the applied and registered products and services, see Section 4.1.3.

¹⁵⁷ Refusal of application for a Community trade mark (009783614 – GYMKHANA), [online]. Available at: https://oami.europa.eu/copla/trademark/data/009783614/download/CLW/RFS/2011/EN/20110616_009783614.pdf?app=caselaw&casenum=009783614&trTypeDoc=NA [Accessed 17 Nov. 2018], pp. 1–2.

“The word “GYMKHANA” applied for means a place of public resort at a station, where the needful facilities for athletics and games of sorts are provided. Hence, an athletic sports display. It is also used to describe a meeting at which horses and their riders take part in games and contests. Finally, it refers also to a competition designed to test driving skill...the relevant consumer will not perceive it as unusual but rather as a meaningful expression: a place where sports events take place or a sports event with regard to horses or else a motor sport driving competition.”¹⁵⁸

As for the descriptiveness of the mark, the Office held that the aforementioned immediately informs the relevant public, without further reflection, that the services applied for in Nice class 41 are rendered in relation to sports related to horses or motor sports driving skills, resulting in it being descriptive and in violation of articles 7(1)(c) and 7(2) CTMR.¹⁵⁹

As for the lack of distinctive character of the mark, the Office relied on its arguments holding the aforementioned to be descriptive in nature, resulting in the sign not being able to indicate a trade origin and therefore being in violation of article 7(1)(c) CTMR.

The Office concluded by rejecting the application for all the services the sign was applied for in Nice class 41.¹⁶⁰

4.3.3 Word Mark 003883758, RUGBY (14/06/2004)

As was mentioned in section 4.1.8, word mark 003883758, “RUGBY” was originally registered for products in Nice classes 9, 18 and 25 and services in Nice classes 35 and 42.¹⁶¹ However, a request for declaration of invalidity in respect of all the products and services covered by the sign was filed in 2009, based on articles 7(1)(b), 7(1)(c), 7(1)(g) and 52(1)(a) of the CTMR, in other words, claiming the sign lacked distinctive character, was descriptive of the products and services it was registered for and finally, was of such a nature as to deceive the public. The

¹⁵⁸ *Ibid.*, p. 2.

¹⁵⁹ *Ibid.*

¹⁶⁰ *Ibid.*, p. 3.

¹⁶¹ For a complete list of the applied and registered products and services, see Section 4.1.8.

application was originally rejected in its entirety, however, the applicant filed an appeal against the decision.

In the appeal proceedings, the Second Board of Appeal (Second Board) started with stating that the word “rugby”, in several of the languages used in Member States of the EU, refers to a team game played with an oval ball,¹⁶² which is a commonly known sport¹⁶³. The Second Board further explained the word to be associated with specific types of shirts, originally worn for the sport in question but now also worn in casual settings.¹⁶⁴

As for the descriptiveness of the sign, the Second Board started with assessing the relevant public. As for the goods in Nice class 9 and legal services in Nice class 42, the Second Board held these to be aimed at professionals and the public at large, the former being highly attentive and observant, the latter reasonably well informed with their level of attention being rather high.¹⁶⁵ As for the goods in Nice class 25, most of the goods in Nice class 18, and retail services in Nice class 35, the relevant public was considered the general public, with normal awareness.¹⁶⁶ Finally, as for the remaining goods in Nice class 18 and services in Nice classes 35 and 42, the Second Board held the relevant public to be highly specialized, including business and industry professionals within different areas and scientists and IT experts, resulting in a high a degree of attention.¹⁶⁷

In this vein, the Second Board declared the sign invalid for “magnetic data carriers, data processing equipment and computers” in Nice class 9, due to the fact that these goods could be rugby video games or computers with rugby video games, and could therefore be perceived as the description of the game that the goods concern.¹⁶⁸ Furthermore, the Second Board declared the sign invalid for “goods made of leather and imitations of leather (not included in other classes); trunks and travelling bags; bags made of leather, nylon, canvas, knapsacks and weekend bags” in Nice class 18, as the sign could indicate the area of use, such as bags intended for

¹⁶² Decision of the Second Board of Appeal of 18 February 2013 In Case R 39/2012-2, para. 16.

¹⁶³ *Ibid.*, para. 17.

¹⁶⁴ *Ibid.*, para. 18.

¹⁶⁵ *Ibid.*, para. 19.

¹⁶⁶ *Ibid.*, para. 20.

¹⁶⁷ *Ibid.*, para. 21.

¹⁶⁸ *Ibid.*, para. 24.

rugby equipment, therefore being descriptive.¹⁶⁹ Third, the Second Board declared the sign invalid for the products in Nice class 25, due to the fact that the specification was not clear and precise enough to provide a clear differentiation between rugby clothing and all other styles of clothing.¹⁷⁰ Finally, as for the “retail services” in Nice class 35, the Second Board considered this to also include retail services for rugby clothing and rugby equipment, therefore being descriptive of the service.¹⁷¹ As for the remaining goods and services, the Second Board did not consider the sign to be descriptive,¹⁷² as first, it did not see that needing umbrellas or parasols when watching a rugby game, and buying one sold under the trade mark discussed, would be especially useful, nor that it had been shown that a special type of umbrella was used when watching the sport.¹⁷³ As for the accepted services in Nice class 35, these were not found to have any special relation to rugby, instead being provided by consultants or consulting businesses to other businesses, in addition to which it was in the interest of the former to avoid having several clients within the same field, this providing potential for conflict.¹⁷⁴ As for the services the registration was sought for in Nice class 42, the Second Board’s line of argumentation followed largely the lines of its argumentation for the services in Nice class 35, finding that “it seems farfetched that a research company would specialize in developing rugby training and high contact equipment only or that a computer hardware or software company would concentrate on developing rugby computers or rugby games only.”¹⁷⁵

As for the argument of the sign being devoid of any distinctive character, the Second Board held this to be true as goes for the products and the services it found the sign to be descriptive of.¹⁷⁶ However, this was not the case for the sign’s more arbitrary uses under discussion, i.e. as goes for the products and services which the sign was not held to be descriptive of.¹⁷⁷

¹⁶⁹ *Ibid.*, para. 25.

¹⁷⁰ *Ibid.*, paras. 27–28.

¹⁷¹ *Ibid.*, para. 29.

¹⁷² *Ibid.*, paras. 31 and 34.

¹⁷³ *Ibid.*, para. 31.

¹⁷⁴ *Ibid.*, para. 32.

¹⁷⁵ *Ibid.*, para. 33.

¹⁷⁶ *Ibid.*, para. 38.

¹⁷⁷ *Ibid.*, para. 40.

Finally, the Second Board also rejected the claim that the sign was deceiving the public, considering there was no relation between the word “rugby” and the products and services that the applicant argued the deceptive nature to stem from.¹⁷⁸

4.3.4 Word Mark 006624142, RUGBY (30/01/2008)

Word mark 006624142, “RUGBY” was originally applied for products in Nice classes 9, 14 and 16, and services in Nice class 35,¹⁷⁹ however, as was previously mentioned, this list was partially rejected, the proceedings of which will be discussed here.

The Office started by holding the word “rugby” not to diverge from English grammar rules, but to comply with them, meaning “a sport where two teams try to score points by carrying an oval ball across a particular line or kicking it over and between an H-shaped set of posts”, resulting in consumers perceiving the word as the sport in question as well.¹⁸⁰ The Office found that the:

“sign immediately informs consumers without further reflection that the goods applied for in class 16 are connected to the game of rugby and as regards the clothing and footwear are used for playing rugby. There are a lot of rugby magazines and publications on the market where news about the sport of rugby can be read. Therefore, this expression contains obvious and direct information on the subject matter of the goods and services in question. It follows that the link between the expression “RUGBY” and the goods and services referred to in the application for registration is sufficiently close for the sign to fall within the scope of the prohibition laid down by Article 7(1)(c) and 7(2) CTMR.”¹⁸¹

As for the distinctiveness of the mark, the Office elaborated that the sign is a commonly used term in the relevant market, which it proved by means of an internet search, in addition to which the mark was held descriptive for the goods and services it was applied for, resulting in it being devoid of distinctive character.¹⁸²

¹⁷⁸ *Ibid.*, para. 43.

¹⁷⁹ For a complete list of the applied and registered products and services, see Section 4.1.10.

¹⁸⁰ Refusal of application for a Community trade mark (006624142 – RUGBY) p. 1.

¹⁸¹ *Ibid.*, p. 2.

¹⁸² *Ibid.*, p. 3.

Although the applicant sought to overcome the objection made by the Office by excluding any links of the applied goods and services with the sport of rugby, the Office did not accept the application as such, considering that “the restriction would exclude precisely the characteristic of the objected goods and services which is being described by the mark. In that sense, it would create uncertainty about the scope of protection of the mark and would lead the consumer to be misled”.¹⁸³

The Office concluded by partially rejecting the mark, namely for “printed matter; publications; neither of the above being in relation to the sport of rugby or sport in general; paper; paper goods; books; stationery; office requisites; instructional and teaching apparatus” in Nice class 16 and “Retail store services and electronic and online retail store services, all relating to clothing and footwear (other than sporting goods)” in Nice class 35.¹⁸⁴

However, a later correspondence between the applicant and the Office resulted the mark being registered for “paper; paper goods; printed matter; books; publications; stationery; office requisites; *none of the aforementioned goods being in relation to the sport of rugby or specific to any other sports*” [emphasis added], in Nice class 16 and “Retail store services and electronic and online retail store services, all relating to clothing, watches, jewellery, bags, cosmetics and toiletries, personal care products, headwear, key chains and key fobs, wallets, purses, sunglasses, footwear, shoe cleaning kits and clothing brushes, *none of the aforementioned goods being in relation to the sport of rugby or specific to any other sports*; advisory and consultancy services relating to all the aforesaid” [emphasis added] in Nice class 35.¹⁸⁵

4.4 Rejected Figurative Trade Marks

4.4.1 Figurative Mark W1161610, ATHLETICS (17/12/2009)

¹⁸³ *Ibid.*, p. 4.

¹⁸⁴ *Ibid.*, p. 5.

¹⁸⁵ General Correspondence Between the Applicant and the EUIPO (006624142 – “RUGBY”), [online]. Available at: <https://euipo.europa.eu/copla/trademark/data/006624142/download/1-6592723/outgoing> [Accessed 30 Nov. 2018].

International figurative mark registration W1161610, “ATHLETICS”, was applied for protection in the EU for products in Nice classes 18¹⁸⁶, 25¹⁸⁷ and 28¹⁸⁸, mainly for leather and goods made of leather, different types of bags, clothing, footwear, headgear, games, playthings, Christmas tree decorations and sporting articles. The protection was objected against based on articles 7(1)(b) and (c) and 7(2) of the CTMR, i.e. due to the descriptive nature and lack of distinctive character of the mark.

The Office started with holding that the goods applied for were mass consumption goods and aimed at average consumers, the relevant public being the average English-speaking consumer who is reasonably well-informed and reasonably observant.¹⁸⁹ The Office further explained that the aforementioned will understand the word to relate to the sport in question.¹⁹⁰

As for the descriptiveness of the mark, the Office held that the mark:

“immediately informs consumers without further reflection that the goods applied for can be used or are specially adapted for use when one is engaged in the sport of athletics, in track and field events or other athletic activity.”¹⁹¹

In this vein, the Office concluded the mark to convey obvious and direct information as goes for the intended purpose of the goods the mark was applied for, therefore resulting in the mark being descriptive in nature and in violation of articles 7(1)(c) and 7(2) of the CTMR.¹⁹²

¹⁸⁶ “Leather and imitations of leather, and goods made of these materials and not included in other classes; animal skins; trunks and travelling bags; rucksacks, sports bags, handbags and carrier bags; umbrellas, parasols and walking sticks; whips, harness and saddlery”. Ex officio refusal of protection pursuant to Article 7, Articles 92(2) and 93(1) CTMR and Rule 11(3) CTMIR (1161610 – ATHLETICS), [online]. Available at: https://oami.europa.eu/copla/trademark/data/W01161610/download/CLW/RFS/2013/EN/20130916_W01161610.pdf?app=caselaw&case-num=W01161610&trTypeDoc=NA. [Accessed 17 Nov. 2018], p. 2.

¹⁸⁷ “Clothing, footwear, headgear”. Ex officio refusal of protection pursuant to Article 7, Articles 92(2) and 93(1) CTMR and Rule 11(3) CTMIR (1161610 – ATHLETICS), p. 2.

¹⁸⁸ “Games and playthings; gymnastic and sporting articles not included in other classes; decorations for Christmas trees”. Ex officio refusal of protection pursuant to Article 7, Articles 92(2) and 93(1) CTMR and Rule 11(3) CTMIR (1161610 – ATHLETICS), p. 2.

¹⁸⁹ Ex officio refusal of protection pursuant to Article 7, Articles 92(2) and 93(1) CTMR and Rule 11(3) CTMIR (1161610 – ATHLETICS), p. 2.

¹⁹⁰ *Ibid.*, p. 2.

¹⁹¹ *Ibid.*

¹⁹² *Ibid.*, p. 3.

The mark was further considered to lack distinctive character due to the descriptive nature of it in relation to the goods it was applied for.¹⁹³ The figurative elements did not make a difference in this assessment as these were too minimalistic to give the mark distinctive character.¹⁹⁴

The holder of the mark submitted that the Office did not perform an in-depth analysis of the mark's individual elements, coming to an incorrect conclusion as to the sign's registrability, as the mark consists of two separate elements, the figurative letter A which is "different from the letter 'A' in that it is represented with two double lines which cross each other, as opposed to the two single lines in the letter 'A'"¹⁹⁵ and as "the element does not have a horizontal line in the middle, unlike the letter"¹⁹⁶, followed by "athletics", both of which, separately, are distinctive.¹⁹⁷ This they held to be in line with the Office's Manual concerning proceedings before it, based on which they considered the mark to be distinctive and not descriptive, in addition to being confirmed by registrations of the mark by the EUIPO and the Benelux Patent Office.¹⁹⁸

The Office did not agree with the holder's arguments, holding that, first, even with trade marks consisting of more than one element, these should be assessed as a whole.¹⁹⁹ Second, they held the mark to be a representation of a verbal element, not an arbitrary combination of two separately distinctive elements, the relevant public seeing the figurative representation of the letter "A" as indeed that letter, resulting in the overall impression of the mark being the word "Athletics".²⁰⁰ The differences to the letter "A" argued by the holder were not accepted, on the contrary, the Office considered the mark bearing a resemblance to an athletics track, further reinforcing the descriptiveness of the mark.²⁰¹ The Office concluded by considering the separate elements and stylisations not being able to take the consumers attention away from the semantic meaning of the word, holding the mark descriptive.²⁰²

¹⁹³ *Ibid.*

¹⁹⁴ *Ibid.*

¹⁹⁵ *Ibid.*, pp. 3–4.

¹⁹⁶ *Ibid.*, p. 4.

¹⁹⁷ *Ibid.*, pp. 3–4.

¹⁹⁸ *Ibid.*, p. 4.

¹⁹⁹ *Ibid.*

²⁰⁰ *Ibid.*, p. 5.

²⁰¹ *Ibid.*

²⁰² *Ibid.*

As for the argument of the objection being contradictory to the aforementioned manual, the Office rejected the claim as the mark was not to be considered two separate elements, but rather one “partially endowed with figurative stylisation”.²⁰³

Finally, as for the approved registrations of the figurative stylisation of the letter “A” of the mark, the Office explained that registrability of Community marks must be assessed by reference to Community rules only, and that it is therefore not bound by Member State or third country decisions holding the sign registrable.²⁰⁴

The Office concluded by rejecting protection of the mark in the EU in its entirety.²⁰⁵



Figurative mark W1161610

4.4.2 Figurative Mark 014423362, CRICKET (30/07/2015)

Briefly discussed previously, figurative mark 014423362, “CRICKET” was applied for products in Nice classes 3, 14, 18 and 25, largely cleaning preparations, cosmetics, metals, jewellery, bags and clothing.²⁰⁶ The application was partially rejected based on articles 7(1)(b) and (c) and 7(2) of the EUTMR, i.e. due to the lack of distinctiveness and the descriptive nature of the mark.

The applicant first argued that the letter “i” being replaced by a cricket bat and a cricket ball, adds a creative and fanciful element to the sign which results in it not being descriptive, and can be remembered by the relevant public in addition to resulting in the aforementioned being able to identify the origin of the goods in question and distinguish these from the competitors.²⁰⁷ The EUIPO did not accept the argument, holding on the contrary that the replacement of the

²⁰³ *Ibid.*

²⁰⁴ *Ibid.*

²⁰⁵ *Ibid.*

²⁰⁶ For a complete list of the applied and registered products, see Section 4.2.1.

²⁰⁷ Refusal of application for a European Union trade mark (014423362 – “CRICKET”), [online]. Available at: https://oami.europa.eu/copla/trademark/data/014423362/download/CLW/RFS/2016/EN/20160406_014423362.doc?app=caselaw&casenum=014423362&trTypeDoc=NA. [Accessed 17 Nov. 2018], p. 1.

letter “i” in the sign with a cricket bat and ball reinforces the descriptive meaning of the word, depicting the equipment used in the sport, effectively resulting in the relevant public immediately understanding the sign as meaning the sport in question and therefore informing the aforementioned that the goods applied for relate to the sport.²⁰⁸

The applicants second argument was that cricket equipment and clothing is regulated, and should therefore fall under Nice class 28, not Nice classes 14, 18 and 25 which the sign was applied for.²⁰⁹ The EUIPO held that the argument could not be taken into consideration due to the administrative purpose of the Nice classification, the details of which are unknown to the relevant market and its actual average consumers. Further, the Office held that the relevant consumers would likely not be able to distinguish between some of the goods in Nice classes 18 and 25 the sign was applied for “based on the assumption that some of them might, or might be not used in professional cricket sport”.²¹⁰

The applicant’s final argument relied on similar signs having been granted protection previously. However, this argument was denied by the Office as:

“according to settled case-law, ‘decisions concerning registration of a sign as a European Union trade mark ... are adopted in the exercise of circumscribed powers and are not a matter of discretion’. Accordingly, the registrability of a sign as a European Union trade mark must be assessed solely on the basis of the EUTMR, as interpreted by the Union judicature, and not on the basis of previous Office practice”²¹¹

Additionally, due to the figurative registrations addressed by the applicant including additional eye-catching and distinctive graphic elements, and the referred word marks including additional word elements, these cases were considered to differ clearly from the one discussed here.²¹²

In this vein, the Office concluded by rejecting the application for “trophies” in Nice class 14, “bags, belts, straps, shoulder straps; trunk and travelling bags; handbags and rucksacks” in Nice

²⁰⁸ *Ibid.*, p. 3.

²⁰⁹ *Ibid.*, p. 1.

²¹⁰ *Ibid.*, p. 3.

²¹¹ *Ibid.*

²¹² *Ibid.*

class 18 and “clothing, footwear, headgear and wristbands” in Nice class 25.²¹³ The decision was appealed, however, the appeal fee was not paid and the appeal was therefore deemed not to have been filed based on article 49(3) Commission Regulation (EC) No 2868/95 of 13 December 1995 implementing Council Regulation (EC) No 40/94 on the Community trade mark, OJ L 303.²¹⁴ After an additional limitation by the applicant, the trade mark was eventually registered only for the remaining products in Nice classes 3 and 18.²¹⁵



EUTM 014423362

4.4.3 Figurative Mark 016515728, CRICKET (28/03/2017)

As was stated previously, figurative mark 016515728, “CRICKET” was applied for products in Nice classes 3, 18 and 25, namely different types of cosmetics, beauty products, perfumes and scents, bags of different kind, suitcases, leather, imitation leather, clothing, hats and footwear.²¹⁶ However, the Office objected the mark based on articles 7(1)(b) and (c) EUTMR and 7(2) of the EUTMR, finding the applied trade mark to be lacking distinctive character as well as being descriptive of the products it was applied for.²¹⁷ In this vein, the applicant requested that the application be limited, omitting the products in Nice classes 3 and 18 entirely, while keeping the application as was for Nice class 25, except for the omission of “sports

²¹³ *Ibid.*, p. 4.

²¹⁴ Decision of the Second Board of Appeal of 14 September 2016 In Case R 1015/2016-2, [online]. Available at: https://oami.europa.eu/copla/trademark/data/014423362/download/CLW/APL/2016/EN/20160914_R1015_2016-2.pdf?app=caselaw&casenum=R1015/2016-2&trTypeDoc=NA [Accessed 30 Oct. 2018].

²¹⁵ Confirmation of a restriction of the list of goods or services in a European Union trade mark application (014423362 – “CRICKET”); Certificate of Registration (014423362 – “CRICKET”).

²¹⁶ For a complete list of the applied and registered products, see Section 4.2.2.

²¹⁷ Refusal of application for a European Union trade mark (016515728 – “CRICKET”), [online]. Available at: https://oami.europa.eu/copla/trademark/data/016515728/download/CLW/RFS/2017/EN/20170628_016515728.doc?app=caselaw&casenum=016515728&trTypeDoc=NA [Accessed 17 Nov. 2018], p. 1.

shoes”.²¹⁸ The office ended up partially rejecting the trade mark application with the amended products, namely for “footwear, hats, jackets (clothing), readymade clothing, shoes, tee shirts and underwear” in Nice class 25.²¹⁹ The rationale behind the rejection was the homogenous nature of the aforementioned goods and that they were considered directly or ancillary to be related to the sport cricket by the Office.²²⁰ However, the trade mark was not rejected for “clothing of leather and leather clothing”, which the mark is registered for at the time of writing of this thesis.²²¹



EUTM 016515728

4.5 Conclusive Remarks

This section has made it evident that valid sports name trade marks do exist, registered for a variety of products and services. As for the addressed word marks, these were registered for products and services in Nice classes 3, 5, 9, 12, 14, 16, 18, 20, 25, 28, 35, 38, 41 and 42, while the addressed figurative trade marks were registered for products and services in Nice classes 3, 9, 14, 16, 18, 24, 25, 28, 31, 35 and 41. However, several of the discussed trade marks were also fully or partially rejected, including both similar and dissimilar trade marks applied for both similar and dissimilar products and services. The underlying reasons behind these decisions will be taken apart and discussed in the following section.

²¹⁸ *Ibid.*, pp. 1–2.

²¹⁹ *Ibid.*, p. 3.

²²⁰ *Ibid.*

²²¹ *Ibid.*

5 The EUIPO's Practice Analysed

In the previous section it became evident that descriptiveness, and the lack of distinctive character resulting from this, are the most common reasons for the Office or the Boards to object against, or reject, a sports name trade mark application. From the seven rejected applications discussed, all seven were denied protection entirely or partly because of this reason.

This does not come as surprise for anyone who is familiar with EU trade mark law, and the requirements for a sign to be granted protection. After all, it would seem rather obvious that a mark consisting of a sports name, especially when applied for products that are in any way related to that specific sport or sports at large, would be descriptive by nature and lack distinctive character. However, from the decisions discussed above, it becomes clear that the matter is not this straightforward. Some sports name trade marks were registered for products and/or services that were explicitly related to that sport or sports at large, others for products and/or services less obviously related to sports, but depending on the interpretation, which could still be linked to sports to some degree, and finally of course, some were registered for products and/or services not in any way related to sports.

This raises several questions, including why the Office and the Boards find some sports name trade marks to be descriptive and lacking distinctive character, but not all of them? Does the popularity or conspicuousness of the sport in question make a difference in this regard? Does the difference entirely lie in the Nice classes and/or the specific products and/or services the mark is applied for? Is it a combination of the aforementioned, or perhaps, is this a point where the Office and the Boards do not have specific enough rules, resulting in the decisions and judgments being arbitrary and/or contradictory to a lesser or more significant degree? These questions will be addressed in the following subsections.

5.1 Overlap Between Approved and Rejected Products/Services

Several Nice classes, including specific products and services, overlap in the sense of having been both approved and rejected as part of sports name trade mark applications. This is the case namely for Nice classes 9, 16, 18, 25, 35 and 41 as goes for word marks, and Nice classes 18, 25 and 28 as goes for figurative marks. However, the overlap does not extend to all particular products/services of the aforementioned Nice classes, nor all of the products/services the discussed trade marks have been applied for in these Nice classes. Rather, the particular

products/services, which have been both approved and rejected, are only a part of the applied products/services within these Nice classes.

5.1.1 Products/Services Which Have Been Both Approved and Rejected for Sports Name Word Mark Applications

Products that have been applied for sports name word marks, which have been both approved and rejected, include magnetic data carriers in Nice class 9; paper; paper goods; printed matter; books; publications; stationery; office requisites (the rejected application lacking the specification of the products not being related to the sport of rugby nor sports in general, except for printed matter and publications, but with slightly differing wording) in Nice class 16; imitations of leather; travelling bags; bags made of leather, nylon, canvas, knapsacks and week-end bags in Nice class 18; clothing, footwear, headgear; leather clothing namely jackets, vests, skirts, pants, belts, scarves, shawls, capes, gloves; shoes; wool outerwear; cotton and nylon outerwear (with the difference that the first three products mentioned have been approved as such, and all of the mentioned goods have been registered with the additional restriction of these not being used in connection with playing rugby, while the rejected products were followed by a more specific restriction mentioning the products not being related to clothing used for playing rugby nor being identical to clothing used in connection with playing rugby) in Nice class 25.

Overlapping services in Nice class 35 include retail store services and electronic and online retail store services (with the services in the rejected application only relating to clothing and footwear (other than sporting goods), while the products of the registered mark related to both the aforementioned and several other products, also adding the restriction of these not being related to the sport of rugby nor sports in general); and education services (the rejected application being more specific in its wording specifying this as organizing and conducting educational programs); provision of education on-line from a computer database or via the Internet or extranets (the rejected application being more specific in its wording, specifying this as providing information in the field of education over a global computer network, and specifying this even further as providing lesson plans, project ideas, educational matters, and links to websites of other featuring educational content); provision of online journals and blogs (albeit the rejected services related to information with regards to sporting, recreational and cultural events and activities, while the approved mark related to fitness and nutrition, and fitness and special events, respectively) in Nice class 41.

5.1.2 Products/Services Which Have Been Both Approved and Rejected for Sports Name Figurative Mark Applications

Products and services that have been applied for sports name figurative marks, which have been both approved and rejected include leather and imitations of leather, and goods made of these materials and not included in other classes; animal skins; trunks and travelling bags; handbags; umbrellas, parasols and walking sticks; whips, harness and saddlery in Nice class 18; clothing, footwear, headgear in Nice class 25 and finally, games and playthings; gymnastic and sporting articles not included in other classes; decorations for Christmas trees in Nice class 28

5.2 Nice Classes Most Likely Leading to Complete Registration, Partial Rejection and Complete Rejection

While this thesis has in no way quantitatively analysed all sports name trade marks in the EU, some general points on the different Nice classes discussed can be inferred, albeit these should be taken with a grain of salt due to the aforementioned reason.

As for sports name word marks, it would seem that applications of products and services in all of the discussed Nice classes are more likely to succeed, or partially succeed, than they are to be fully rejected, with the exception of services in Nice class 41.²²² Especially applications for products in Nice classes 9, 16, 18 and 28 seem to have a higher likelihood of (partial) success, while applications for services in Nice classes 35 seem to be most controversial only having partial rejections.²²³

Figurative sports name marks differ slightly from its word counterparts, in that applications for products in Nice classes 24, 25 and 28 and services in Nice class 41 seem to be most likely to lead to successful registration.²²⁴ However, Nice class 25 also seems to be rather controversial with four complete registrations, one partial rejection as well as two full rejections. Additionally, also Nice classes 14 and 18 seem controversial, the former having only a partial rejection and the latter having two complete registrations, a partial rejection and a complete rejection.²²⁵

²²² Appendix 2 – Frequency of Complete Registration, Partial Rejection and Complete Rejection of Nice Classes of the Addressed Sports Name Word Marks.

²²³ *Ibid.*

²²⁴ Appendix 3 – Frequency of Complete Registration, Partial Rejection and Complete Rejection of Nice Classes of the Addressed Sports Name Figurative Marks.

²²⁵ *Ibid.*

5.3 Assessment – Conspicuousness, Characteristics, Timing and Figurative Elements

From the discussion above, it becomes evident to some degree that the Office and the Boards do not have any absolute way of measuring whether or not a sports name trade mark is descriptive of the products and/or services it is applied for, and consequently lack distinctive character, considering the several products and services which have been both rejected and registered for such marks. Rather, it seems that these are assessed on a case by case basis, based on several considerations, discussed below.

5.3.1 Conspicuousness

First, the conspicuousness of the sport the trade mark consists of cannot be excluded from the analysis. It could be argued that sports such as football and rugby are, and have for some time been, known by the vast majority of EU citizens as such, however, sports such as Les Mills, Gymkhana and perhaps even CrossFit are not as widely known. This must play a significant role considering the descriptiveness of a mark always relates to the relevant public,²²⁶ as how could something which is a meaningless term to the majority of the relevant public be considered descriptive and therefore be rejected as a trade mark on this basis? It could not, since the mark would not provide information about “the quantity, quality, characteristics, purpose, kind and/or size of the goods or services”²²⁷ nor would the relationship between the mark and the products and/or services be “sufficiently direct and specific, as well as concrete, direct and understood without further reflection”²²⁸ Rather, the relationship between these, in such a situation, is quite the opposite. Furthermore, the several sports-related products and/or services discussed that have been rejected, especially of the discussed trade marks consisting of more conspicuous sports names, would seem to confirm that the conspicuousness of the sport is of importance to the registrability of the sports name trade mark.

²²⁶ Decision EX 17-1 of the Executive Director of the European Union Intellectual Property Office B. (2017). GUIDELINES FOR EXAMINATION OF EUROPEAN UNION TRADE MARKS, EUROPEAN UNION INTELLECTUAL PROPERTY OFFICE (EUIPO), PART B, EXAMINATION, SECTION 4, ABSOLUTE GROUNDS FOR REFUSAL, CHAPTER 4, DESCRIPTIVE TRADE MARKS ARTICLE 7(1)(c) EUTMR. European Union Intellectual Property Office, [online]. Available at: https://euipo.europa.eu/tunnel-web/secure/webdav/guest/document_library/contentPdfs/law_and_practice/decisions_president/EX-17-1_en.pdf [Accessed 26 Nov. 2018], p. 3.

²²⁷ *Ibid.*

²²⁸ *Ibid.*

Therefore, it can be concluded that the conspicuousness of the sport that a sports name trade mark consists of plays a more or less vital role in whether the sports name can be registered as a trade mark. However, considering the existence of rejected inconspicuous sports name trade mark applications and approval of conspicuous such, this alone cannot be concluded to be the deciding factor.

5.3.2 Characteristics of the Sport and the Products/Services Applied

Second, the characteristics of the sport that the applied trade mark consists of must be taken into account as well, considering the relationship between these characteristics and the specific products and/or services that the mark was applied for. The trade marks discussed in this thesis have been applied for a vast variety of products and services, some explicitly related to sports, some impliedly related to sports, some impliedly not related to sports and some explicitly not related to sports. A sports name trade mark application for products and/or services that are explicitly related to sports should, on the face of it, mean the rejection of that application, based on the descriptiveness of the mark and the subsequent lack of distinctive character. On the other hand, a sports name trade mark application for other than sports-related products and/or services should, on the face of it, mean that the application is not rejected based on descriptiveness, obviously not excluding other potential reasons for rejection.

However, as stated previously, from the decisions discussed above it becomes evident that this is not necessarily the case. The Office has approved several sports name trade marks applied for sports-related products and or services, such as 005049192, "CROSSFIT" (fitness-related services), 012850673, "CROSSFIT" (fitness-related products and a variety of exercising equipment), 003792686, "LES MILLS" (Gymnastic and sporting articles, equipment and apparatus for exercising, activities and services related to sports and fitness), 014713796, "LES MILLS" (Athletic, gym and sports bags), 002422863, "GOLF" (golf products, golf tournaments, providing of training and sporting activities), 000763789, "SPINNING" (exercise equipment, services in the field of exercise and physical training), 002877173, LES MILLS (training, gymnasium, fitness club, sports club services; sporting activities; exercise instruction, advisory and training services; provision of exercise facilities; sports tuition, coaching and instruction; rental of sports or exercise equipment; information, advisory and consultancy services relating to any or all of the aforesaid). Further, the Office has also rejected sports name trade mark applications that have been applied for products and/or services explicitly or impliedly not related to sports.

Unfortunately, the Office does not provide considerations behind their approvals of trade mark applications, instead, only stating reasons for objections. This means that there is no way of being certain of the degree the characteristics of a sport, in combination with specific products and/or services applied for, play in the acceptance or rejection of sports name trade marks, leaving room mainly for speculation. However, it does not seem far-fetched to consider that some sports are more descriptive of certain products and/or services than others, resulting in the characteristics of a sport assessed with a view to specific products and/or services being of relevance as goes for the registrability of sports name trade marks.

5.3.3 The Chicken or the Egg – Which Came First?

Another significant factor in whether a sports name trade mark is approved or rejected can be argued to lie in whether the sport or the trade mark was created first. This is not meant in the absolute sense of the term,²²⁹ but rather in close connection with the conspicuousness discussed above. Was the sports name trade mark applied for around the same time the same sport was invented, or had the sport been established for a reasonable length of time before the trade mark application was submitted? This line of inference stems mainly from the discussed trade marks consisting of the sports Les Mills, CrossFit and Spinning, as trade marks and/or companies with these sports names were created reasonably concurrently with the invention of the sports they relate to.²³⁰

However, this raises the question of whether these trade marks would be invalidated, at least as far as the sports-related products and services they are registered for go, would they be opposed today. This would seem possible, considering the arguable present-day conspicuousness the sports enjoy, which could result in the aforementioned being considered descriptive and lacking distinctive character, at the very least for some of the products and/or services they are currently registered for.

²²⁹ I.e. as in trade marks that are inherently distinctive/fanciful.

²³⁰ MAXIM, (2015). EXCLUSIVE: ON THE WARPATH WITH CROSSFIT'S GREG GLASSMAN, [online]. Available at: <https://www.maxim.com/maxim-man/crossfit-greg-glassman-exclusive-2015-9> [Accessed 22 Nov. 2018]; SPINNING, (2018). SPINNING® HISTORY, [online]. Available at: <https://spinning.eu/spinning-history> [Accessed 22 Nov. 2018]; LesMills, (2018), THE LES MILLS STORY, [online]. Available at: <https://www.lesmills.com/about-us/our-story/> [Accessed 22 Nov. 2018].

5.3.4 The Significance of Added Figurative Elements

The afore discussed does not, however, necessarily provide sufficient explanation for the acceptance or rejection of all of the trade marks discussed, namely the figurative marks.

For example, golf has been an established and widely known sport since arguably hundreds of years ago,²³¹ but still, figurative mark 007278492 “GOLF” was accepted for products and services explicitly related to the sport in question in 2009. The only viable reasoning behind its acceptance must therefore lie in the rather strong figurative elements of the mark, which in the aforementioned consist of black writing in the form of GOLF, the “O” being replaced by a bunny with a bowtie, being very similar to the famous Playboy-trade mark,²³² alleviating the descriptiveness and providing it distinctive character to a sufficient degree. This raises the question of where the definitive line goes – which kind of figurative elements, and what degree of such, suffice to provide a sports name figurative mark with the level of distinctiveness that it is accepted by the Office.

Looking at the approved marks discussed, the threshold seems to be rather low, almost non-existent, for figurative sports name marks, registered for other than sport-related products and/or services, or only impliedly sports-related products and/or services. For example, figurative mark 002422863 “TENNIS” consists of the word in bold writing, with the addition of one dark grey rectangle with black borders on which the word is written on. On the other hand, figurative mark 014423362, “CRICKET” was partially rejected, despite being applied for products and services connected to sports to a similar degree the ones approved mark 002422863 “TENNIS” was applied for, while being reasonably similar in its figurativeness. Naturally, however, a major difference does lie in the CRICKET-mark having the “i” replaced by a cricket bat and a cricket ball, which could be argued to be considerably more implicit of the applied products and services being related to the sport of cricket, than the plain-coloured rectangle with black borders.

However, as goes for figurative marks which are applied and registered for explicitly sports-related products and/or services, the required level of figurativeness seems to be higher, such

²³¹ IGF – INTERNATIONAL GOLF FEDERATION, (2018). History of Golf, [online]. Available at: <https://www.igfgolf.org/about-golf/history/> [Accessed 16 Nov. 2018].

²³² See e.g. EUTMs 000053629, 004609012, 005289475, 007513286, 008776635, 010580975, 011286671 and 012303913.

as in the previously mentioned 007278492 “GOLF”. Further, in approved trade mark 000763789, “SPINNING”, the mark consists of a person cycling, drawn in white on a black rectangle, and white writing consisting of the word “SPINNING”, based on which it could be argued that the figurative elements of the mark are strong. Also trade marks 002877173, “LES MILLS” and 003794575, “Les Mills”, with their respective black rectangle and rhombus with rounder corners, in combination with striped globes, could be considered to have strong figurative elements. It must be noted, however, that the previously argued lack of conspicuousness of the sports might have played a role in the approval of the latter three marks. Rejected figurative mark W1161610, “ATHLETICS”, where only the first letter slightly differs from common typography, and partially rejected figurative mark 016515728, CRICKET, where only the third letter differs from common typography, further confirm this analysis, as the figurative elements could be argued to be weak in both marks.

In conclusion, it would seem like the more the products and/or services a sports name figurative mark is applied for are related to sports, the stronger the figurative elements of the mark must be, and vice versa.

5.3.5 The Arbitrariness of the EUIPO in Assessing the Registrability of Sports Name Trade Marks

From the decisions of the Office and the Boards, and the discussion in this section, it becomes clear that there are some general matters the aforementioned take into consideration when assessing the registrability of sports name word or figurative marks, including the conspicuousness of the sport, the characteristics of the sport in combination with the type of products and/or services applied for, the time of invention of the sport and the time of application for the trade mark and finally, the strength of the figurative elements of the mark.

However, while the aforementioned arguments are based on the prominence of these being evident in the decisions of the Office and the Boards, all of these points are also contradicted in other decisions, albeit to a lesser degree. This would indicate that as it stands, there is a level of arbitrariness to the Office’s decision-making when it comes to the registrability of sports name word or figurative marks, meaning that while some degree of certainty can be inferred, absolute such cannot.

5.4 Conclusive Remarks

It does seem that the Nice classes a sports name trade mark application is filed for play a role, to some degree, in the successful registration of such. Additionally, the Office's assessment on the registrability of sports name trade marks seems to be based on four main points.

First, the conspicuousness of the sport plays a vital role, as it is hard to argue a mark to be descriptive if the sports name is an arbitrary term to the relevant public.

Second, the characteristics of the sport and the specific products and/or services the mark is applied for play a role, considering the connection between these two is of importance in the sense that the sports name must be descriptive of the products and/or services protection is applied for, in order to be violating article 7(1)(c) EUTMR.

Third, the time of invention of the sport and the submission of the application for the mark is of relevance, relating to the conspicuousness of the sport, considering the fact that a trade mark consisting of a non-existent or unknown sport cannot be descriptive of that sport, or sports at large, as long as this is an arbitrary term.

Finally, in connection with figurative sports name marks, the strength of the figurative elements of the mark play a vital role, stronger figurative elements alleviating the descriptiveness of the typographical elements, providing distinctive character to the mark.

However, considering the contradictory decisions of the Office and the Boards, it can be concluded that there are no absolute criteria which a trade mark applicant could follow, would they like to register a sports name trade mark, based on which they can be certain of having their application accepted and subsequently their trade mark registered. Rather, the arguments provided for in this section should serve as general guidelines providing for the *likelier* success of an application, as in the end, the Office's and the Boards' decisions on the registrability of sports name word and figurative marks are arbitrary and contradictory to some degree.

6 Conclusion

This thesis has discussed the registrability of sports names as word or figurative marks in the EU. First, trade marks were discussed briefly, explaining these to be signs used in trade which provide for the identifying of goods and services,²³³ distinguishing tools that help customers in differentiating similar products and services of one company from that of another,²³⁴ guarantees of quality²³⁵ and engines of innovation²³⁶. It was explained that several different types of trade marks exist, however, the main focus of this thesis being on word marks and figurative marks, the former exclusively consisting of words, letters, numerals, standard typographic elements or a combination of these, while the latter could also include these, but did not have to, as long as they included any figurative element.²³⁷ The benefits trade mark owners get from their trade marks were several, including brand value protection, asset building, right definition, counterfeit prevention, fraud prevention, the possibility of defending against rival marks,²³⁸ the sole right of enjoying the reputation-related rewards associated with the products and/or services sold in connection with the mark,²³⁹ and the possibility of utilizing the internet more effectively and making recruitment easier.²⁴⁰

Also the requirements in the EU for the registrability of trade marks at large were discussed, where the main criteria were held to boil down to distinguishability of the goods and/or services from those of others and that the mark is represented on the Register of European Union trade marks in such a way that the public and relevant authorities can determine the clear and exact subject matter of the protection.²⁴¹ Further, also absolute grounds of refusal as well as relative grounds of refusal were addressed. The former could be invoked by anyone, also *ex officio* by the Office, and related to the sign itself, where the fulfilment of one ground sufficed for the denial of an application,²⁴² while the latter could only be invoked by proprietors of earlier EU

²³³ EUIPO – EUROPEAN UNION INTELLECTUAL PROPERTY OFFICE A, (2018).

²³⁴ *Ibid.*

²³⁵ Bently, L. – Sherman, B. (2014), p. 815.

²³⁶ *Ibid.*; European Commission, (2013), 1, [1.1].

²³⁷ EUIPO – EUROPEAN UNION INTELLECTUAL PROPERTY OFFICE A, (2018).

²³⁸ EUIPO – EUROPEAN UNION INTELLECTUAL PROPERTY OFFICE B, (2018).

²³⁹ Bently, L. – Sherman, B. (2014), p. 815.

²⁴⁰ Rubinstein, A. (2014).

²⁴¹ Article 4 of Regulation (EU) 2017/1001, OJ L 154.

²⁴² Bently, L. – Sherman, B. (2014), p. 928; Decision EX 17-1 of the Executive Director of the European Union Intellectual Property Office A. (2017), p. 3.

trade marks,²⁴³ EU member state trade marks registered under the Benelux Office of Intellectual Property,²⁴⁴ or trade marks registered under international agreements which a member state of the EU²⁴⁵ or the EU as a whole²⁴⁶ is a party of. Finally, Nice classes were explained to be a classification system used for the registration of trade marks, differentiating between different types of products and services.²⁴⁷

The legislation most relevant to sports name trade mark applications in the EU, in the sense of potentially leading to their rejection, was considered to be articles 7(1)(b) and 7(1)(c) of the EUTMR, relating to lack of distinctive character and descriptiveness, respectively. However, no legislation specific to sports name trade marks was held to exist. Following this, several EU sports name trade mark applications were discussed. In this vein, approved EU sports name trade marks were addressed first, followed by a discussion on rejected EU sports name trade marks, partially rejected signs being discussed in both sections.

In the fifth section, the preceding sections were taken together and analysed. It was argued that the registration of a sports name figurative or word mark greatly relies on four points, namely the conspicuousness of the sport, the characteristics of the sport in combination with the specific products and/or services applied for, the time of invention of the sport and the time of submission of the application for the trade mark and finally, in connection with figurative marks, the strength of the figurative elements of the mark. It was further theorised that applications for products and/or services in certain Nice classes were more likely to succeed than in certain others. However, due to the thesis not providing a quantitative analysis on all sports name word and figurative marks registered and rejected in the EU, this could not be ascertained fully. Finally, due to the fairly arbitrary and contradictory nature of the decisions of the Office and the Boards, and despite the arguments provided in the thesis, it was held that no absolute criteria could be ascertained, the adherence of which would always lead to successful registration of sports name trade marks in the EU.

²⁴³ Article 8(2)(a)(i) of Regulation (EU) 2017/1001, OJ L 154.

²⁴⁴ Article 8(2)(a)(ii) of Regulation (EU) 2017/1001, OJ L 154.

²⁴⁵ Article 8(2)(a)(iii) of Regulation (EU) 2017/1001, OJ L 154.

²⁴⁶ Article 8(2)(a)(iv) of Regulation (EU) 2017/1001, OJ L 154.

²⁴⁷ WIPO C, (2018).

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Appendix 1 – Sports Names Searched for as Word and Figurative Marks in the EUIPO Database²⁴⁹

Sports Name	Word and/or Figurative Marks Registered	Word and/or Figurative Marks Rejected	Word and/or Figurative Marks Partially Rejected
Alpine Skiing*	-	-	-
American Football	-	-	-
Archery*	1178324 (W/IR)	-	-
Artistic Swimming*	-	-	-
Athletics*	000541086 (F) 003437928 (F) 011767167 (F)	1161610 (F/IR)	-
Badminton*	013849419 (W)	-	-
Baseball	-	-	-
Basketball*	-	-	-
Bat-and-ball/Safe haven	016812761 (F)	-	-
Baton Twirling	-	-	-
Beach Volleyball*	-	-	-
Biathlon*	002275527 (W) 007167703 (W) 013522354 (W)	-	-
Bobsleigh*	-	-	-
Bowling	-	-	-
Bowls	-	-	-
Boxing*	-	-	-
Canoe Slalom*	-	-	-
Canoe Sprint*	-	-	-
Canoeing	-	-	-
Climbing	0832344 (W/IR)	-	-
Cricket	004228466 (W) 013090667 (W) 014888333 (W) 017691189 (W) 017799487 (W) 005049192 (W) 012850673 (W)	013362314 (W)	014423362 (F) 016515728 (F) 011909066 (F)

²⁴⁹ W = Word mark; F = Figurative mark; IR = International registration designating the EU; E = Expired registration.; * = Olympic sport. See Olympic, (2018).

	1036852 (W/IR) 1062773 (W/IR) 1219627 (W/IR) 1242132 (W/IR) 000196089 (W/E) 010084861 (F) 010148005 (F) 000195966 (F/E) 002285831 (F/E)		
Cross Country Skiing*	-	-	-
Crossfit	005049192 (W) 012850673 (W) 0935608 (W/IR) 1086145 (W/IR) 1184215 (W/IR) 1131170 (W/IR/E)	-	-
Curling*	-	-	-
Cycling	-	-	-
Cycling BMX*	-	-	-
Cycling Mountain Bike*	-	-	-
Cycling Road*	-	-	-
Cycling Track*	-	-	-
Darts	003414596 (F)	-	-
Diving*	-	-	-
Equestrian	000856286 (F/E)	-	-
Equestrian/Dressage*	-	-	-
Equestrian Eventing*	-	-	-
Equestrian Jumping*	-	-	-
Fencing*	-	-	-
Figure Skating*	-	-	-
Fishing	-	-	-
Floorball	-	-	-
Football*	003508116 (F)	-	-
Freestyle Skiing*	-	-	-
Gaelic Games	-	-	-
Golf*	000751909 (W) 001917038 (W) 007278492 (F) 008913188 (F) 014518237 (F)	0968329 (IR)(W) 008876716 (F)	

	1148003 (F/IR) 1245316 (F/IR) 003692001 (F/E)		
Gymkhana	009725078 (W) 010028033 (W) 009665589 (F) 010049039 (F)	009539065 (W)	009783614 (W)
Gymnastics	-	-	-
Gymnastics Artistic*	-	-	-
Gymnastics Rhythmic*	-	-	-
Handball*	-	-	-
Hockey*	011672714 (W)	-	-
Horse Racing	-	-	-
Hunting	002494342 (F)	-	-
Hurling and Shinty/Shinty-Hurling	-	-	-
Ice Hockey*	-	-	-
Judo*	1392080 (W/IR) 001297761 (W/E) 004008645 (F)	-	-
Kayaking	-	-	-
Lacrosse	001045194 (W) 002906782 (W) 006815187 (W) 1051903 (W/IR)	-	-
Les Mills	1253629 (W/IR) 003792686 (W) 014194492 (W) 014713796 (W) 015556533 (W) 002877173 (F/E) 003794575 (F/E)	-	-
Luge*	-	-	-
Marathon*	000060558 (W) 000100420 (W) 000279166 (W) 000512319 (W) 000565028 (W) 000629683 (W) 001102656 (W) 001220789 (W)	000463026 (W) 000256321 (W) 000217877 (F)	-

	002574580 (W) 002660660 (W) 003099017 (W) 003121639 (W) 004366662 (W) 005154621 (W) 005938782 (W) 006026579 (W) 006275515 (W) 006866313 (W) 006904585 (W) 007581572 (W) 007589286 (W) 008217473 (W) 008580391 (W) 008677023 (W) 009164609 (W) 009490293 (W) 009951104 (W) 010214526 (W) 011422011 (W) 011548823 (W) 011655693 (W) 011860905 (W) 011890803 (W) 012707147 (W) 014589188 (W) 014910616 (W) 016187148 (W) 017928176 (W) 1289042 (W/IR) 000100420 (W/E) 000256321 (W/E) 000731307 (W/E) 000833723 (W/E) 001317429 (W/E) 004605945 (W/E) 004741708 (W/E) 007110521 (F) 015201668 (F) 0516861 (F/IR) 1156393 (F/IR)		
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Marathon Swimming*	-	-	-
Mixed Martial Arts	-	-	-
Modern Pentathlon*	-	-	-
Motorsport	-	-	-
Netball	005501581 (W)	-	-
Nordic Combined*	-	-	-
Olympic Sports	-	-	-
Racket (ball/sports)/Racquet (ball/sports)	002526796 (W/E)	-	-
Rafting	011766383 (W)	-	-
Rowing*	-	-	-
Rugby*	000321471 (W) 001121037 (W) 004556718 (W) 015218324 (W)	-	003883758 (W) 006624142 (W)
Running	013454533 (F)	-	-
Sailing*	013439955 (W)	-	-
Shooting*		-	-
Short Track*		-	-
Skeleton*	010889665 (W) 014418081 (W) 016075996 (W) 007418957 (F)	-	-
Skibob	-	-	-
Skiing	-	-	-
Ski Jumping*	-	-	-
Snooker	017351503 (W)	-	-
Snowboard*	-	-	-
Speed Skating*	-	-	-
Spinning	008264079 (W) 000763789 (F)	-	-
Squash	-	-	-
Stacking	-	-	-
Striking	-	-	-
Surfing	1048731 (F/IR)	-	-
Swimming*	-	-	-
Table Tennis*	-	-	-
Taekwondo*	1170433 (W/IR) 1295002 (F/IR) 004748604 (F/E)	-	-

Tennis*	011529179 (W) 012962676 (W) 002422863 (F)	-	-
Track and field	-	-	-
Trampoline*	-	-	-
Triathlon*	000175059 (W) 001909878 (W) 003524451 (W) 007167695 (W) 012255949 (W) 014408926 (W) 014439285 (W) 016328841 (W) 1186696 (W/IR) 001466044 (W/E) 008302101 (F) 011663771 (F) 013452354 (F)	-	-
Volleyball*	-	-	-
Water polo*	-	-	-
Weightlifting *	-	-	-
Wrestling	-	-	-
Wrestling Freestyle*	-	-	-
Wrestling Greço-ro- man*	-	-	-

Appendix 2 – Frequency of Complete Registration, Partial Rejection and Complete Rejection of Nice Classes of the Addressed Sports Name Word Marks

Nice Class	Complete Registrations (as listed in trade mark application)	Partial Rejections	Complete Rejections
3	1	0	0
5	1	0	0
9	4	1	0
12	1	0	0
14	1	0	0
16	2	1	0
18	2	1	0
20	1	0	0
25	2	0	1
28	2	0	0
35	0	2	0
38	1	0	0
41	2	0	2
42	1	0	0

Appendix 3 – Frequency of Complete Registration, Partial Rejection and Complete Rejection of Nice Classes of the Addressed Sports Name Figurative Marks

Nice Class	Complete Registrations (as listed in trade mark application)	Partial Rejections	Complete Rejections
3	1	0	0
9	1	0	0
14	0	1	0
16	1	0	0
18	2	1	1
24	2	0	0
25	4	1	2
28	3	0	1
31	1	0	0
35	1	0	0
41	4	0	0