

general and abstract manner, all the conceivable shapes” of such a transparent bin or collection chamber.

II. Formal requirement – the graphical representation

The requirement that a registrable sign must be capable of being represented graphically, as stipulated under Article 4 of the CTMR, is reinforced under Article 26 of the CTMR, which requires an applicant for CTM registration to furnish OHIM with a representation of the trademark.²⁵¹ The legal significance of the requirement for such a representation is mirrored by the fact that an application for trade mark registration may “claim special graphic features or colours, the use of small and capital letters and three dimensional marks” only through graphical representation.²⁵²

Graphical representation required under Article 4 of the CTMR does not mean actual reproduction of a sign in the register. Nevertheless, this is one methodology. The second method is to provide some contours representing the sign and some description enough to make the trademark examiner and other interested parties know what is claimed and the extent of the consequential monopoly.²⁵³

III. Essence of the formal requirement

A trademark protection regime must, as a matter of principle, encourage and foster the principle of legal certainty.²⁵⁴ A registered trade or service mark affords to its proprietor a monopoly over the exclusive use of the signs constituting such a trade or service mark.²⁵⁵ The use of a registered trade or service mark by third parties having no authorisation from the owner infringes the exclusive right(s) bestowed upon the right holder. The legal certainty, in

251 Article 26(1) (d) of the CTMR.

252 KOOIJ, P.A.C.E. van der, “The Community Trade Mark Regulation: An Article by Article Guide” 60 (Sweet & Maxwell, London 2000). *See also* Rule 3(1) of the CTMIR.

253 DUMFARTH, P., “Prozessuale und materiellrechtliche Aspekte des Widerspruchsverfahrens der Gemeinschaftsmarkenverordnung” 39 (Trauner, Linz 2008). Cf. also FEZER, K.-H., “Die Grafische Darstellbarkeit eines Markenformats” 44, in: BOMHARD, V. von, PAGENBERG, J. & SCHENNEN, D., (eds.), “Harmonisierung des Markenrechts: Festschrift für Alexander von Mühlendahl zum 65. Geburtstag am 20. Oktober 2005” (C. H. Verlag, München 2005).

254 See the opinion of Advocate-General Ruiz-Jarabo Colomer in case C-273/00, *Ralph Sieckman* [2002] ECR I-11737.

255 Cf. Articles 9 and 8 of the CTMR.

relation to trade or service mark protection, should enable a person to know, through an inspection of the register the nature and scope of the signs protected as trade or service marks. This position is in line with a view that:

... the trade mark register is not supposed to be the result of an academic exercise in turning intangible concepts such as sounds and scents into words and pictures: it is a practical tool for any businessman who wants to go into business and who wants to know if he will get into legal trouble if he gives his goods a particular name, appearance, colour or smell. If the register cannot give him that information, it has failed in its primary objective.²⁵⁶

The legal monopoly with respect to a trade or service mark is not granted automatically. Such monopoly is contingent upon the applicant furnishing the examiners with information sufficient to establish clearly what the signs are, which constitute a service or trade mark in question. The clarity and preciseness of this information make others aware of what they must refrain from doing in relation to a registered trade or service sign. This is the major reason why graphical representation (under the CTMR) of a sign in the register is mandatory.

IV. Formal and substantive requirements vis-à-vis non-traditional marks

The standard required for the advancement of legal certainty under the CTMR is based on graphical representation. However, the CTMR does not give an exact and precise definition as to what the phrase “graphical representation” means. It only provides instances of signs that are capable of this kind of reproduction and representation.²⁵⁷ Thus, it is pertinent to find out whether and how some new forms of trade symbols such as smells, sounds, colours and three dimensional marks²⁵⁸ are responsive of the formal and substantive requirements for trademark registration under the CTMR.²⁵⁹

256 Cf. PHILLIPS, J., “Trade Mark Law: A Practical Guide” 65 (OUP, New York 2003).

257 Cf. Article 4 of the CTMR.

258 These signs are often referred to as non-traditional marks. For instance, while *Sehirali Celik* uses the phrase in the article entitled „An overview of Turkish Case-Law on Trademark Disputes with Special Consideration Regarding the Rules of the European Court of Justice“, in 39(3) IIC 326 (2008); Ströbele refers to the same concept by using the phrase ‘new trademark forms’ in his article entitled “The Registration of New Trademark Forms”, in 32(2) IIC (2001).

259 For an extensive discussion on graphical representation of the non-traditional marks see JACONIAH, J., “The Requirements for Registration and Protection of Non-Traditional Marks in the European Union and in Tanzania”, 40(7) IIC 756 et seq. (2009). Cf. Also BENDER, A., “Die grafische Darstellbarkeit bei den neuen Markenformen” 157 et seq., in: BOMHARD, V. von, PAGENBERG, J. & SCHENNEN, D. (eds.), “Harmonisierung