

As with any other brand device, its use in branding and marketing, as frequent as it may be, must be distinguished from its ability to be protected as a trade mark. Art. 4 and 7 CTMR contain no provision suggesting that the number of signs eligible for trade mark protection is *prima facie* limited. In theory, therefore, smells can be protected as trade marks. However, since European courts interpret the requirement of graphical representability quite narrowly compared to some other jurisdictions, the protection of a smell as a trade mark is more or less impossible. As the ECJ stated in *Sieckmann*, the requirements of graphical representability of an olfactory sign are not satisfied by “a chemical formula, a description in words or the deposit of an odour sample” or by a combination of those elements.<sup>695</sup>

As laid down in *Sieckmann*,<sup>696</sup> the current state of the art of technology does not enable a smell to be graphically represented in a way satisfying the relevant criteria. Hence, there are no olfactory trade marks validly registered at OHIM at present.<sup>697</sup>

### 5.2.5.3 Audio Marks

Like other non-traditional signs, sounds have become increasingly popular in branding in recent years, as companies seek new ways of product positioning and differentiation in light of increasing local and global competition. *Deutsche Telekom*’s five-tone jingle<sup>698</sup> and *Audi*’s heartbeat sound played at the end of each commercial<sup>699</sup> are good examples. However, the application of sounds in branding is not confined to advertisements but can also be found as mobile ringtones, background soundscapes in stores, telephone waiting loops and – as forms of internal communication – anywhere within the corporate building, e.g. in elevators.<sup>700</sup>

The ECJ has held that, in case of an audio sign, above criteria for graphical representation are neither met by a description in writing nor by an ono-

proprietary scents, cf. *Orth*, *Wie riecht ein Zimmermädchen im Hilton?*.

695 *Supra*, fn. 691 – *Sieckmann*, para. 72.

696 Fn. 691.

697 As of January 14, 2008, there were seven applications for an olfactory trade mark which had either been refused, withdrawn or the registration of which had lapsed.

698 Registered with OHIM on February 1, 2001 under the file number 001416858.

699 Applied with OHIM under the file number 006111009. Not yet registered as of January 12, 2008.

700 *Hirt*, *Audio-Branding: Klingel-Fluch oder Markensegen?*, p. 3.

matopoeia or a sequence of musical notes without further clarification, as these lack sufficient precision and clarity, which makes it impossible to determine the scope of protection sought.<sup>701</sup> However, what is sufficient is a stave divided into bars and providing a clef, musical notes and rests with exact notation of their relative value, duration and pitch.<sup>702</sup> Sonograms have initially been declined but are now accepted by OHIM if they are accompanied by an MP3 file.<sup>703</sup>

#### 5.2.5.4 Abstract Colour Marks

Even though ECJ case law constantly approves of abstract (and sometimes of concrete) distinctiveness of abstract colour marks per se,<sup>704</sup> the problematic issue with respect to registrability of abstract colours rests with graphical representation. In case of single abstract colours, the requirement of graphical representability can be met by a description in words coupled with a sample. In case sample and description do not constitute a clear, precise, self-contained, easily accessible, intelligible, durable and objective representation, this can be remedied by designating the colour on the basis of an internationally recognised code such as the Pantone code.<sup>705</sup> With respect to marks consisting of two or more abstract colours, proper graphical representation can only be approved if, in addition to the above requirements, the application contains a systematic arrangement of the colours specifying how they are joined “in a predetermined and uniform way”.<sup>706</sup> Only in this case is the necessary degree of certainty for others in what they need to avoid in order not to infringe achieved.

701 ECJ, judgment of 27 November 2003, Case C-283/01, [2003] ECR I-14313, *Shield Mark BV v. Joost Kist h.o.d.n. Memex – Shield Mark/Kist*, para.s 59-61.

702 *Ibid.*, para. 62.

703 *Office for Harmonization in the Internal Market (Trade Marks and Designs) (OHIM)*, Tarzans berühmter Schrei.

704 See above at 5.2.3.3; ECJ, above fn. 636 – *Libertel* and above fn. 661 – *Heidelberger Bauchemie*.

705 ECJ, above fn. 636 – *Libertel*, para.s 36-38.

706 ECJ, above fn. 661 – *Heidelberger Bauchemie*, para. 33. The German Federal Supreme Court (BGH) decided accordingly in *Farbmarke gelb/grün II*, judgment of 5 October 2006, Case I ZB 86/05, being concerned with the undelinated colour combination green/yellow and accordingly denying sufficient graphical representation.