

Q277



National Group: Hungary
Title: Registrability of trade marks against public order or morality
Contributors: Enikő KARSAY (chair), Gusztáv BACHER,
Daisy MACHYTKA-FRANK, Barnabás MEZŐ, Kristóf ORMOS,
Dorottya VITTAY
E-mail: karsay@sbgk.hu
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Questions

I. Current law and practice

Please answer the below questions with regard to your Group's current laws and practice.

- 1) a) Are trade marks contrary to public order refused or invalidated under your law? Please answer YES or NO.

YES.

- b) Are trade marks contrary to morality refused or invalidated under your law? Please answer YES or NO.

YES.

- c) Please state any applicable legal provisions.

Section 3 Subsection 1 point a) of the Act XI of 1997 on the Protection of Trade Marks and Geographical Indications (hereinafter referred to as "Trade Mark Act") states that a sign may not enjoy trade mark protection, if it is in conflict with the public order or with the accepted principles of morality (in the following: public morality).

- 2) a) Is there an explicit definition of public order and/or morality under your law? Please answer YES or NO.

NO.

- b) If your answer is YES, please state the definition. If your answer is NO, please still indicate what you believe to be the definition.

On the basis of the Hungarian case law, a generally accepted definition of the concepts of public order and public morality have been evolved.

According to the Methodological Guidelines of the Hungarian Intellectual Property Office (hereinafter referred to as "Hungarian IP Office") revised on September 28, 2017, public morality is the collective concept of the forms of behavior that the society as a whole, but at least the vast majority accepts and recognizes as binding on itself not only out of coercion, but also out of internal conviction. In order to establish a conflict with public morality, it is necessary to examine whether the violation of these positive values and the confrontation with them cause outrage in a significant part of the society. In particular, the mark is in conflict with public morality if the meaning of the mark is harsh, frightening, aggressive due to its verbal and / or figurative elements.

In addition to the above, the Hungarian IP Office addressed the meaning of the concept of public morality in its recent decision on recognizing the protection of the international trade mark registration under No. A1520812 issued on March 11, 2021. According to the standpoint of the Hungarian IP Office, public morality is a lifelike moral standard that is originated from the social environment; therefore, it is not an abstract, high-level moral requirement. The Hungarian IP Office referred to the decision of the Metropolitan Court in the case of "SWISS CANNABIS ICE TEA" (1.Pk.25.297/2006/3.). In its decision, the court seized stated that public morality is a set of rules, values, behaviours, and forms of action that a community of a given culture generally considers to be good and right, and their compliance is recognized as mandatory. In fact, public morality is nothing more than the recommended forms of behaviour, irrespective of whether they appear in written norms or customary law. Public morality is the collective concept of the forms of behaviour that the whole society, but at least the vast majority of the society, recognizes as binding on itself not only by necessity, but also out of internal conviction.

According to the Methodological Guidelines of the Hungarian IP Office revised on September 28, 2017, the concept of public order shall be given the same meaning as the concept of the French term 'ordre public' and of the English term 'public order'. In view of the above, the concept of public order includes the fundamental institutions and principles of our legal system. The above has been confirmed by the finding of the Metropolitan Court in a trade mark cancellation procedure. According to the findings of the Metropolitan Court, public order is the legally regulated order of social coexistence, a set of written and unwritten legal and moral norms to which members of a given society usually submit themselves voluntarily, and the implementation of these norms is ensured by the state, if necessary by coercion (1.Pk.20.828/2007/5.)

c) What is the difference between morality and public order?

Public moral rules are not followed by the society on the basis of necessity or obligations arising from the legislation, but rather they are based on the social value judgement. In contrast, public order includes constitutional principles, institutions, fundamental rights and obligations enshrined in the constitution and therefore their compliance is determined and facilitated by external standards and norms.

3) a) Is this ground applied to the trade mark per se, i.e. to the intrinsic qualities of the trade mark in question?¹ Please answer YES or NO.

YES.

¹ The answer should be NO if e.g. also the use of the mark in practice is taken into account (e.g. if it is used for hard drugs), or if the goods or services for which the trade mark is applied for or registered are considered illegal. If circumstances are taken into account that help establish how the public will perceive the trade mark itself, the answer should however be YES; in that case, these circumstances are used to help establish if the mark itself is contrary to public order or morality.

b) Please explain.

In that regard, we note that according to the original wording of the Hungarian Trade Mark Act, a sign could not be protected as a trade mark if its use would be in conflict with public order, public morality or law. That wording of the Hungarian Trade Mark Act was in force from 1 July 1997 until 31 December 2001, and in accordance with the provisions of the Directive 2008/95/EC of the European Parliament and of the Council, the previous wording has been modified so that only the conflict of the sign with public order or public morality can be considered as a ground for exclusion. Thus, a conflict with public order or public morality on the basis of use of the sign does not constitute a ground for refusal and the conflict of the sign with public order or public morality became the ground for exclusion.

4) a) What is the relevant date for applying the ground of public order or morality?

- (i) date of application of the trade mark
- (ii) date of the examination/assessment by the office or the court
- (iii) date of filing of the proceedings (e.g. when the invalidation request is filed)
- (iv) other, namely _____

b) Bearing in mind that views regarding morality and public order can be dynamic and change over time, which of the following is possible?

- (i) refile a trade mark that has been refused or declared invalid for being contrary to public order or morality
- (ii) file a new action against a trade mark that previously survived a challenge on this ground
- (iii) other, namely _____

c) Must this ground apply in the entire territory² covered by the trade mark? Please answer YES or NO.

NO.

5) From whose perspective is it judged whether or not a trade mark is contrary to public order or morality?

- (i) the relevant consumer
- (ii) the general public
- (iii) a reasonable person with average thresholds of sensitivity and tolerance, taking into account the context in which the mark may be encountered
- (iv) other, namely _____

6) What factor or factors are taken into account when assessing whether a trade mark is contrary to public order or morality?

² This question aims to establish if e.g. in the EU the trade mark should be contrary to public order or morality in every member state, or if in a country with multiple languages and other differences it should be contrary to public order or morality in the entire country.

- (i) the meaning of the words or other elements contained in the mark
- (ii) the background or origin of the words or other elements contained in the mark
- (iii) the identity or origin of the applicant/registrant
- (iv) the designated goods and/or services
- (v) the goods and/or services for which the mark is used in practice by the applicant/registrant
- (vi) fundamental rights (e.g. freedom of speech/expression)
- (vii) other, namely _____

7) In what types of proceedings can the morality and/or public order ground be invoked?

- (i) examination (i.e. ex parte examination by the trade mark office)
- (ii) opposition proceedings (i.e. inter partes proceedings before the trade mark is approved for registration, or after registration in jurisdictions with post-registration oppositions)
- (iii) invalidation/cancellation proceedings before the trade mark office (i.e. inter partes proceedings after the trade mark is approved for registration)
- (iv) invalidation/cancellation proceedings before a court (i.e. inter partes proceedings after the trade mark is approved for registration)
- (v) other, namely: observation proceedings (that allows third parties to indicate that the registration of the sign would, in the opinion of the party lodging an observation, violate one or more of the absolute grounds for refusal specified in the Hungarian Trade Mark Act.)

II. Policy considerations and proposals for improvements of your Group's current law

8) Can your Group's current laws or practice relating to the registrability of trade marks contrary to public order or morality be improved? Please explain.

Taking into account the law currently in force and the relevant case law, we would propose the following improvements.

A) We consider it important to have a consolidated position in case law as to from whose perspective the conflict of a sign with public order or public morality should be examined. We note that a part of decisions issued by courts or the Hungarian IP Office examines the ground for refusal from the perspective of the relevant consumer, but there are several cases in which the conflict of public order or public morality has been examined from the perspective of the general public. In that regard, we refer to the following cases:

1) Examples for examinations that were concluded from the view of the relevant consumer:

- The Hungarian IP Office found the figurative trade mark application containing the word element 'SZENT VÉR' (in English 'Holy Blood') in Classes 33, 35 and 39 in conflict with public morality, because the term 'SZENT VÉR' is a symbolic name for the blood of Jesus Christ in the Christian Catholic religion. The term 'SZENT VÉR'

denotes a sublime concept, the use of which in commercial trade as an indication in large quantities of bottled wines can cause resentment and outrage in the average consumer. Seeing the symbol created with graphic elements and the inscription, the Hungarian consumer living in the European cultural circle can associate it with a Christian relic, as they are aware of the religious respect associated with this Christian symbol (M1200455).

- The trade mark application 'Vörös Iszap' (in English: 'Red Mud') (word) applied for Classes 29, 30, 33 and 39 had been filed three days after the disaster caused by the flood of red mud in Veszprém county, Hungary, and was rejected on the ground that it may cause revulsion in consumers therefore it violates public morality (FÍT 8.Pkf.25.658/2012/6.).

2) Examples for examinations that were concluded from the view of the general public:

- A sign representing a cannabis leaf has been applied for registration in respect of Classes 3, 16, 30, 32, 33, 35 and 43. In that case, the Hungarian IP Office found that the sign could not be protected as a trade mark because its use is in conflict with public morality, since cannabis is the raw material for marijuana cigarette. The majority of the Hungarian society does not accept the so-called soft drugs, so the use of the generally known figurative sign of marijuana made from wild hemp is in conflict with public morality. The Metropolitan Court upheld the Hungarian IP Office's decision and dismissed the applicant's petition for reversal (M0401986 and Metropolitan Court 3.Pk.25.343/2006/3).
- In another case, the applicant filed a trade mark application for the word element 'KAMIONOSOK ÉS KURVÁK' (in English 'TRUCKERS AND BITCHES') for services in Classes 35, 41 and 43. The Office found that the sign cannot be protected because it contains a pejorative adjective and an extremely vulgar term in everyday contact, its use in public constitutes an act of incurring explicit displeasure which is highly morally reprehensible (M0903382).
- A recent case involving the issue of public morality is a trade mark application for a combined mark 'NE BÁNTSD A MAGYART, MERT PÓRUL JÁRSZ!' (in English 'Don't hurt Hungarian, because you come to grief!') in Classes 16, 24, 25 and 41. The Hungarian IP Office refused the trade mark application because of its conflict with public morality. The Office stated that public morality is a moral standard attached to the social environment, that has been recognized as binding on itself from internal convictions by the whole or a significant part of the given society. The findings of the Hungarian IP Office have been confirmed by the Metropolitan Court and the Metropolitan Court of Appeal (M1802169; Pk. 20.670/2020/3., Pkf. 25.411/2020/3.).

In light of the above, it depends on the specific sign and circumstance from whose perspective it shall be judged whether or not a trade mark is in conflict with public order or public morality (i.e., the relevant consumer, the general public, or the reasonable person with average thresholds of sensitivity and tolerance, taking into account the context in which the mark may be encountered (see Question 5)). We consider it also important to have clear guidance how the forum can decide on setting the applicable standard.

B) According to the Hungarian Trade Mark Act, the trade mark shall be revoked if the subject of trade mark protection was excluded from the trade mark protection on the basis that it is in conflict with public order or public morality. In that regard, a trade mark can be revoked if the ground for refusal existed on the date of the application of the trade mark. However, we suggest considering that the present regulations solely reflect to the public order and moral standards valid on the date of filing of the trade mark application and their potential later changes may not affect a registered trade mark. It would be worth investigating what other legal guarantees may govern the use of trade marks that may come into conflict with public order or public morality after the date of filing due to a change in public order and public morality.

9) Are there any other policy considerations and/or proposals for improvement to your Group's current law falling within the scope of this Study Question?

III. Proposals for harmonisation

Please consult with relevant in-house / industry members of your Group in responding to Part III.

10) Do you believe that there should be harmonisation in relation to the registrability of trade marks contrary to public order or morality?

YES.

If YES, please respond to the following questions without regard to your Group's current law or practice.

We support to reach a harmonization in relation to the registrability of trade marks in conflict with public order or public morality, however, we do not mean full harmonization. In that regard we suggest that a common standpoint be established as to e.g. what the relevant date for applying the ground of public order or public morality is, from whose perspective shall be examined whether or not a sign is in conflict with public order or public morality, and what factors are taken into account when assessing such a conflict. However, considering that social perceptions may vary from country to country, given the cultural and historical differences we cannot recommend that the conflict with public order or public morality be judged on the basis of the same principles, norms and moral values in all countries.

Even if NO, please address the following questions to the extent your Group considers your Group's current law or practice could be improved.

11) a) Should trade marks contrary to public order be refused or invalidated? Please answer YES or NO.

YES.

b) Should trade marks contrary to morality be refused or invalidated? Please answer YES or NO.

YES.

- 12) a) Should there be an explicit definition of public order or morality? Please answer YES or NO.

NO.

- b) If your answer is YES, please state the definition.
c) What should be the difference between morality and public order?

We agree with the above as stated in Question No. 2, that moral rules are the collective concept of behaviours that the given society recognizes as binding but not on the basis of necessity or obligations arising from the legislation, but from an internal conviction. In contrast the compliance of public order is determined and facilitated by external standards and norms.

- 13) a) Should this ground be applied to the trade mark per se, i.e. to the intrinsic qualities of the trade mark in question?³ Please answer YES or NO.

YES.

- b) Please explain.

According to our view, it is a broader category if the mark by itself can be a ground for exclusion, and not just the use of the mark may be qualified as an absolute ground for refusal. All in all, this wording is more general and covers any act (not just the use of the mark) related to the mark applied for.

- 14) a) What should be the relevant date for applying the ground of public order or morality?

- (i) date of application of the trade mark
(ii) date of the examination/assessment by the office or the court
(iii) date of filing of the proceedings (e.g. when the invalidation request is filed)
(iv) other, namely _____

- b) Bearing in mind that views regarding morality and public order can be dynamic and change over time, which of the following should be possible?

- (i) refile a trade mark that has been refused or declared invalid for being contrary to public order or morality
(ii) file a new action against a trade mark that previously survived a challenge on this ground
(iii) other, namely _____

- c) Should this ground apply in the entire territory⁴ covered by the trade mark? Please answer YES or NO.

³ See also footnote 13 above.

⁴ See also footnote 14 above.

NO.

- 15) From whose perspective should it be judged whether or not a trade mark is contrary to public order or morality?
- (i) the relevant consumer
 - (ii) the general public
 - (iii) a reasonable person with average thresholds of sensitivity and tolerance, taking into account the context in which the mark may be encountered
 - (iv) other, namely

In that regard, we agree with the contents of the opinion of Advocate General M. Bobek in Case C-240/18 P ('Fack Ju Göhte'). On the one hand, the term of the 'average thresholds of sensitivity and tolerance' does not only include consumers who are targeted by the given goods or services, but also those who are not directly in connection with the goods and services applied for but may encounter the mark. On the other hand, the term may be considered potentially more normative, because it may be able to exclude the extreme aspects but still not completely disregarding them.

- 16) What factor or factors should be taken into account when assessing whether a trade mark is contrary to public order or morality?
- (i) the meaning of the words or other elements contained in the mark
 - (ii) the background or origin of the words or other elements contained in the mark
 - (iii) the identity or origin of the applicant/registrant
 - (iv) the designated goods and/or services
 - (v) the goods and/or services for which the mark is used in practice by the applicant/registrant
 - (vi) fundamental rights (e.g. freedom of speech/expression)
 - (vii) other, namely _____
- 17) In what types of proceedings should it be possible to invoke the morality and/or public order ground?
- (i) examination (i.e. ex parte examination by the trade mark office)
 - (ii) opposition proceedings (i.e. inter partes proceedings before the trade mark is approved for registration, or after registration in jurisdictions with post-registration oppositions)
 - (iii) invalidation/cancellation proceedings before the trade mark office (i.e. inter partes proceedings after the trade mark is approved for registration)
 - (iv) invalidation/cancellation proceedings before a court (i.e. inter partes proceedings after the trade mark is approved for registration)

(v) other, namely observation proceedings (that allows third parties to indicate that the registration of the sign would, in the opinion of the party lodging an observation, violate one or more of the absolute grounds for refusal specified in the Hungarian Trade Mark Act.)

- 18) Please comment on any additional issues concerning any aspect of the registrability of trade marks contrary to public order or morality you consider relevant to this Study Question.

With reference to **Question No. 4/C**, we note that if the mark applied for would be in conflict with public order or public morality due to its effect on a minority group in Hungary, the application shall be still rejected, regardless of the fact that it may not provoke resentment in the vast majority of the Hungarian society.

With regard to **Question No. 11/A**, we agree that marks shall be refused or invalidated if they are in conflict with public order, because the legal system should not grant official recognition or protection to facts and acts, including granting a trade mark protection for a mark, that are in conflict with public order or public morality. Further, we note that such marks that are in conflict with the public order may be suitable for committing a crime (according to the Hungarian Criminal Code, e.g., using of symbols of totalitarianism, blasphemy of national symbol, promoting terrorism).

In relation to **Question No. 11/B**, legal system should not grant official recognition or protection to facts and acts, including granting a trade mark protection for a mark that are in conflict with public morality. We note that marks that are in conflict with public morality may be able to jeopardize minorities and threaten certain social groups.

With reference to **Question No. 12**, we may not suggest creating an explicit definition for public order or public morality. In this context, we emphasize that it shall be taken into account that public morality, given that it covers moral norms prevailing in a large part of the society, may change over time. Further, similarly to public morality, the term of public order may evolve as well, regarding that in parallel with the development of law, the scope of constitutional rights is constantly expanding (i.e. first-generation, second-generation and third-generation human rights).

- 19) Please indicate which industry sector views provided by in-house counsel are included in your Group's answers to Part III.

There is no in-house counsel in the working group. It consists of attorneys and patent attorneys advising and representing clients in various fields of industry, in particular: pharmaceuticals, food, confectionary, alcoholic beverages, music ensemble, airline industry, mechanical tools industry, consumer goods, retail, fashion, toy industry, FMCG (fast moving consumer goods).