

## Chapter 11: Absolute grounds for refusal of registration

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### **Absolute grounds: accepted principles of morality**

*Constantin Film*, C-240/18 P, ECLI:EU:C:2020:118, concerned the registrability of the sign ‘Fack Ju Göhte’, which is the name of a successful German comedy. Both the EUIPO Fifth Board of Appeal and the General Court denied registration on the basis of the morality absolute ground. The appellant submitted that the General Court breached the principle of individual examination in that it did not examine the mark applied for, namely Fack Ju Göhte, but rather the sign ‘Fuck you, Goethe’.

The CJEU defined ‘accepted principles of morality’ as

‘the fundamental moral values and standards to which a society adheres at a given time. Those values and norms, which are likely to change over time and vary in space, should be determined according to the social consensus prevailing in that society at the time of the assessment.’

In the determination of whether a sign is contrary to accepted principles of morality or not (Article 7(1)(f) EUTMR), the concept of ‘accepted principles of morality’:

1. should be construed on the basis of ‘social consensus’;
2. may change over time;
3. has to be objectively assessed, namely from the perspective of a reasonable person; and
4. should take into account all relevant factors.

On the basis of this test, the CJEU concluded that ‘the German-speaking public at large does not perceive the word sign “Fack Ju Göhte” as morally unacceptable’.

### **Distinctiveness**

In *AS v Deutsches Patent- und Markenamt*, C-541/18, ECLI:EU:C:2019:725, subject to discussion was the registration of a sign comprising a hashtag # and the phrase *darferdas?* (‘can he do that?’ (Darf er das?)) as a trade mark for goods in class 25

(“Clothing, in particular tee-shirts; footwear; headgear”). The case originated from proceedings in Germany, where the signs in question were initially refused registration due to lack of distinctive character. The German Federal Supreme Court was of the view that, to be considered as having a distinctive character, not all the possible uses of the sign have to be uses of the sign as a trade mark. However, this Court decided to stay proceedings and refer the case to CJEU. The CJEU held that

‘in examining the distinctive character of a sign in respect of which registration as a trade mark is sought, all the relevant facts and circumstances must be taken into account, including all the likely types of use of the mark applied for. The latter correspond, in the absence of other indications, to the types of use which, in the light of the customs in the economic sector concerned, can be practically significant.’

This has the effect that in examining distinctiveness the court ought to take into account all practically significant and demonstrated uses.