

**DECISION
of the Second Board of Appeal
of 28 October 2024**

In Case R 740/2024-2

KCT GmbH ction Co. KG

Robert -Bosch -Str. 30
72348 Rosenfeld
Germany

Applicant/Appellant

represented by PAUSTIAN aces PARTNER Patentanwälte mbB, Oberanger 32, 80331
Munich, Germany

Appeal relating to European Union trade mark application No 18 906 690

.

THE SECOND BOARD OF APPEAL

composed of S. Stürmann (Chairperson and Rapporteur), S. Martin (Member) and K. Guzdek (Member)

Registrar: H. Dijkema

gives the following

Language of the case: German

28/10/2024, R 740/2024-2, BEWEGUNG VON EINER KLAPPFENSTER

Decision

Established Facts

- 1 By an application filed on 26 July 2023, KCT GmbH blocks Co. KG ('the applicant') sought to register the motion mark

Motion

as a European Union trade mark in respect of the following goods:

Class 12: *Vehicle windows for exfoliating motors.*

- 2 On 25 August 2023, the application was objected to on the following grounds:
 - The application is a motion mark. The file submitted by the applicant shows how a clip window opens and reends in an expeditional smobile.
 - The sign is devoid of distinctive character with regard to the goods for which protection is sought.
 - It is to be assumed from the impression of experienced customer circles, namely those who make themselves or have expedition engines and therefore know (to a certain extent) this market tension.
 - No average consumer will enter a showroom in order to purchase an expedition, accessories or spare parts therefor without having been prepared and read in advance. The mobile devices are available at a price of EUR 100. Spare parts and accessories are therefore expensive. When purchasing these parts, the buyer is therefore well prepared and pay an above-average level of attention.
 - The file submitted shows a clip window for exinfective motors which looks like a layman that looks like a clip window. It opens and joins by two black-coloured hinges.
 - These clip windows can be installed or changed by the owner of an exportment stream, which has technical knowledge and DIY skills. However, the targeted consumers are more likely than the professional dealers, who sell exfoliants as well as spare parts and accessories therefor.
 - Nothing about the representation of the crisp window appears striking or remarkable in the manner of a trade mark: The window and hinges are standard and the opening and closing movement is also the same as would be expected. Furthermore, there is no presentation, such as embellishments or colours, and there are no word elements. Accordingly, it is unclear why the owner or seller of an expedition engine should assume a particular commercial indication in this representation of a clip player.

- 3 By written submission of 25 October 2023, the applicant submitted its observations. It maintained its request for registration.
- 4 By decision of 14 February 2024 ('the contested decision'), the examiner refused the application pursuant to Article 7(1)(b) EUTMR in respect of all the goods applied for.

The examiner based his decision on the following reasons in particular, in addition to those already set out in the initial objection:

- The applicant's assertion that it was the market leader is not proven by means of evidence and in any case has nothing to do with the distinctive character of this application for movement.
 - The statement that the market was very manageable and that there was little competition could be true per se. It is probably logical that clip windows for excavation and dwellers are not everyday goods. However, this has nothing to do with the distinctive character of the movement. Even in a small market, a sign must be able to differ from the products of other manufacturers. That is not the case here.
 - Even in a manageable market, the targeted purchaser of living and exutive motors cannot be required to know from all windows in those vehicles how they open and closed them, with the result that he can compare the movement of the window applied for with the windows of other manufacturers only by opening and closing them and immediately perceiving these movements as a reference to the applicant.
 - The argument that a party is a market leader in a very manageable market can never be the basis for the fact that certain characteristics of products of that undertaking are immediately seen as a trade mark and thus function as a reference to that undertaking simply because there are not many competitors. If this were the case, companies operating in a small market sector would always have a great advantage in terms of protecting IP rights compared with companies operating in large market sectors that are more competitive.
 - With regard to the argument that the hinges and struts are in different colours to that of the surface of a large series, it should be emphasised that the window is white and the hinges are black. These are not particular colours that the relevant public will remember.
- 5 The applicant filed a notice of appeal on 5 April 2024 and requested that the contested decision be annulled. The grounds of appeal were received by the Office on 14 June 2024.

Grounds of appeal

- 6 The arguments of the statement of grounds can be summarised as follows:
- The sign is described incorrectly. It is a motion mark. The file shows how a clip window opens and reends in an expediment engine. When opened, the window

flower curves downwards and externally in relation to the fixed frame. The window flower 'slip' in the fixed frame is downwards. Furthermore, a black strut is visible in each case on both sides of the moving window flower.

- The Examination Division itself established the high level of attention of the consumer.
- According to the examiner, the clip window in the file looks exactly like a layman would assume that a clip window looks like. However, the consumer is the opposite of a layperson.
- The window does not look like a clip window (of course relating to the open state), as is not the case. Clip windows are hanging upwards to the frame and are folded out there, as can be seen, for example, on the following example (copies of a competitor of the applicant). The window casing is attached to the upper frame and, as is customary, has a silver position indicator:



- The movement of a clip window is completely different from that of the sign applied for. In the case of a clip window, the frame narrows outwards (as is the case with all windows known from the camping or caravans area) with a rotating hose which is arranged firmly on the upper part of the fixed window frame. It is therefore clear that hinges (responsible for the rotation in a clip window) and exhibitors ('visible bar') are completely different components which are arranged in different positions and have nothing to do with one another.
- Furthermore, the window does not open 'over two black-coloured hinges'. The hinges are not even shown in the application. The black struts are visible. The statements made in the reasons for the decision are therefore simply incorrect, as hinges are not involved.
- The Examination Division did not take account of the attentiveness of the public in the assessment. Technically incorrect features were assessed from the point of view of laymen.
- The examiner is based purely on the fact that the colour selection and type of movement would not differ from those of the competition or be those which the relevant public would remember.
- The public pays an above-average level of attention (as in the case of spare parts).
- There are only a few manufacturers that manufacture similar products to those of the applicant.

- The consumer with an above-average level of attention, who ‘to a certain extent’, knows all of the comparable products and knows how the respective windows function. Attached is an exhaustive list of the types of constructions and their method of operation of currently available variations of expedition screens, with the exception of the trade mark applied for:

Der Fensterflügel ist am oberen Rahmen angeschlagen mit Scherenaussteller:



Hünerkopf

Der Fensterflügel "rutscht" im Rahmen (wie in der Anmeldung) mit Scherenaussteller:



EW3.1

Der Fensterflügel "rutscht" im Rahmen (wie in der Anmeldung) mit silbernem Stangenaussteller:



Pabst Air Tec

- As the sign applied for differs from the above models, it therefore fulfils the function of indicating origin for this reason alone, as all windows (currently still) originate from a manufacturer according to the sign applied for.
- If the consumer sees a window as in the sign applied for, is installed individually or in a vehicle, then it is a window of the applicant.
- The public is familiar with all forms of design, as there is no longer any such form. All struts look clearly different from that in the sign applied for, as they are constructed in a completely different way and are silver.
- Naturally, undertakings in a small market sector are clearly preferred because the level of attention paid by the relevant public also always relates to the size of the market.
- It is irrelevant whether, according to the Examination Division's assessment, a characteristic is 'not a particular colour', but rather whether the colour is perceived as particular to the consumer on the market, also or precisely because of the prevailing circumstances on the market.
- By analogy, a tyre manufacturer that produces only white tyres would certainly also be recognised by its white tyres. It is not because it is an unusual colour per se, but merely because all the other tyres are black. If a market participant makes something different from all others on the market, this circumstance is capable of performing the function of indicating origin. The manufacturer is identified by the characteristic. The definition of origin function is contrary to the definition of origin, as explained in the judgment of the Court of Justice in Case C-379/97.
- The public is only accustomed to silver struts, because there is nothing else. Black struts in conjunction with an unusual opening movement in which they are visible externally, and therefore for all discernible, are not known on the market and therefore already perform the function of indicating origin: they make the applicant's products objectively distinguishable and assigned to all other products on the market. This is certainly more than a small degree of distinctive character.
- The trade circles involved are as observant and informed as possible, as the purchase of windows for exportational motors is certainly not commonplace and this undertaking is very expensive. It is therefore preceded by extensive employment with the subject. This applies both to the end consumer and to the manufacturer of exuting fluids, as they must share the information in the sales conversation to the vehicle customer and certainly know each of the few variants available.
- The only thing to decide on the exhibitor or the struts is usually the costs alone. All manufacturers buy mass-produced goods from the field of house windows for their export-conditioning windows. They therefore also all look the same. The applicant alone manufactures the said struts itself, which is why these are different.
- The following images show an expeditonal strip with the trade mark applied for. The struts are pronounced and are present in a otherwise smooth vehicle wall,

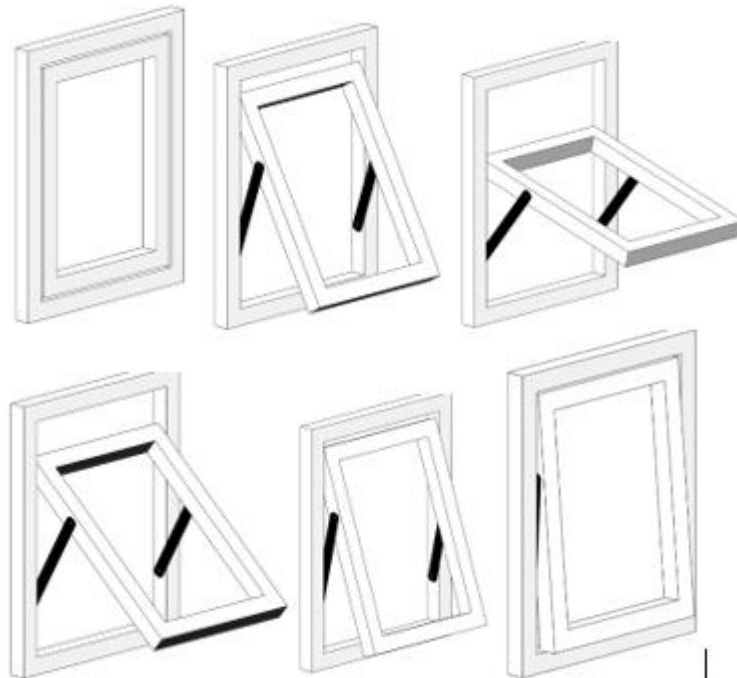
apart from the window wing, the only projecting and therefore prominently visible component:



- The applicant's windows can be identified immediately on a vehicle equipped therewith. If one is placed before a vehicle with closed windows, the vehicle wall is completely smooth. When the window is opened, the unusual opening movement on its own and the struts thus prominently visible are noticeable.
- 7 On 6 September 2024, the rapporteur informed the applicant of the following in a communication:
- After preliminary examination of the file, the rapporteur takes the view that the reasoning given by the examiner for refusing the application is incomplete.
 - In particular, for the reasons given below, registration of the sign applied for as a European Union trade mark in addition to the ground for refusal under Article 7(1)(b) EUTMR is also precluded by the further ground for refusal under Article 7(1)(e) (ii) EUTMR.
 - Pursuant to Article 7(1)(e) (ii) EUTMR, signs which consist exclusively of the shape or another characteristic of the goods which is necessary to obtain a technical result shall not be registered.
 - The legal objective of the grounds for refusal set out in Article 7(1)(e) EUTMR is to prevent trade mark protection from granting its proprietor a monopoly on technical solutions or functional characteristics of a product which the user is also able to seek in the products of competitors. The purpose of this is to prevent the protection afforded by trade mark law going beyond the protection of signs by

means of which a product or service can be distinguished from the goods or services offered by competitors, and will cause competitors to freely offer goods with these technical solutions or their functional characteristics in competition with the proprietor of the trade mark (18/06/2002, C-299/99, Remington, EU:C:2002:377, § 78). In particular, it is necessary to prevent other industrial property rights with limited periods of protection (patents, designs) from obtaining unlimited protection via the route of trade mark law (18/09/2014, C-205/13, Tripp Trapp, EU:C:2014:2233, § 19).

- Those conditions are satisfied in the present case. This is because the sign applied for is the opening and closing movement of a window. The representation of the sign consists of a 6-seconds, animated sequence of simple, simply stylised images, in which only the movement process, i.e. the mode of operation of the window, is visible. The window is closed at the beginning, then it opens slow and is closed again:



- In its grounds of appeal, the applicant itself states that the movement of its window is ‘unusual’.
- It therefore follows that this movement is a ‘characteristic feature’ of the vehicle windows *for exaggerated motors claimed by the applicant, and that precisely this movement is necessary to obtain a technical result, namely the particular opening and closing system of the product, in the view of the applicant.*
- It follows from this that the movement represented by the sign applied for in connection with vehicle windows *for exfoliating arms* is purely dictated by technical function.
- As regards the condition that the ground for refusal referred to includes all signs which consist ‘exclusively’ of the shape or another characteristic of the goods

which are necessary to obtain a technical result, the Court has held that the presence of one or more minor arbitrary elements in a sign where all essential characteristics are determined by the technical solution which gives expression to that sign does not alter the fact that the sign consists exclusively of the shape or characteristic of the goods which is necessary to obtain a technical result. Furthermore, the ground for refusal set out in Article 7(1)(e) (ii) EUTMR applies only where all the essential characteristics of the sign are functional, so that the registration of such a sign as a trade mark cannot be refused pursuant to that provision where an important, non-functional element, such as a decorative or fanciful element that is important to that shape or characteristic, is embodied in the shape or characteristic of that product (11/05/2017, C-421/15 P, A surface covered with circle (fig.), EU:C:2017:360, § 27).

- That is not the case here. There are no decorative or fanciful elements in the sequence of movement applied for that are part of the sign for purely arbitrary reasons and are important or otherwise important as a characteristic feature of the window.
- It is also not necessary for the application of the ground for refusal under Article 7(1)(e) (ii) EUTMR that the characteristic in question, that is to say in the present case the movement of the window, is unique (11/05/2017, C-421/15 P, A surface covered with approximately (fig.), EU:C:2017:360, § 28; 14/09/2010, C-48/09 P, Lego brick, EU:C:2010:516, § 53). It is therefore irrelevant whether other openings and closing movements for windows for exfoliating substances were also technically possible or already exist on the market.

8 By written submission of 2 October 2024, the applicant submitted observations thereon. The applicant's arguments may be summarised as follows:

- Absolutely no opening and closing system is at issue in the present motion mark.
- The opening and closing system introduced by the Board of Appeal is also not a technical result. At best, a technical system has an effect, but cannot itself be.
- All the customary 'camping windows' have a movement that is determined by a fixed rotating point which is arranged on one of the frame sides. All well-known and produced windows in the form of an exhibition wing/windscreen clip window are usually provided with a rotary point on the upper window frame. By contrast, the fundamental movement of the present trade mark application is unusual.
- The technical result of any movement on a window is opening and closing. However, this can be done in different ways.
- As stated, almost exclusively this takes place by means of a swivel point on one of the horizontal or vertical frame parts.
- The fundamental movement of the present trade mark application was chosen in order to be different and alternative.
- There can therefore be no objection to the fundamental movement of the present trade mark application, as there are alternatives to the fundamental movement

selected which are also almost exclusively to be found on the market or have a good command thereof.

- The Board of Appeal’s argument appears to be a type of circular conclusion: the particularly chosen movement would, as a result of its peculiarity, become a technical result and would therefore not be eligible for registration because it is special.
- The opening and closing of a window is technically dictated and necessary. How this happens can be arbitrary; there are infinitely many ways of achieving this. The most common possibility in the field of windows is a fixed rotating point on one of the frame parts and – in particular in the area of the windows for exfoliating engine – a fixed rotating point in the upper horizontal framework part.
- It is strongly pointed out that the basic movement of the present trade mark application inextricably links the vision or disks of two black struts.
- The Board of Appeal’s considerations are therefore inadmissibly dissecting. If there is a characteristic feature of the present trade mark application, it is the movement in conjunction with the visibility of the black struts. It is precisely for this reason that the application was filed as ‘simple, simply stylised pictures’. The movement and associated visibility of the two black struts is the only characteristic feature of the present trade mark application.
- Just one strut per page is a selection of many alternatives. Scissors are customarily used. It could also only be used as a strut or pair of scissors, or none at all – everything is technically feasible.
- Registration is only to be denied if the trade mark application consists exclusively of the shape or another characteristic of the goods which is necessary to obtain a technical result. Simply because of the presence of alternatives, the ground for refusal cannot apply; the arbitrary black struts are not even considered in the middle.
- The movement in connection with the two black struts is completely unusual on the very specific market for the goods claimed.
- This market is proven to be completely different from a technical perspective but visually very different, which the relevant and very attentive public also knows all.
- In its very small and special niche, the present trade mark application certainly has more than the absolutely necessary minimum degree of distinctive character.

Reasons

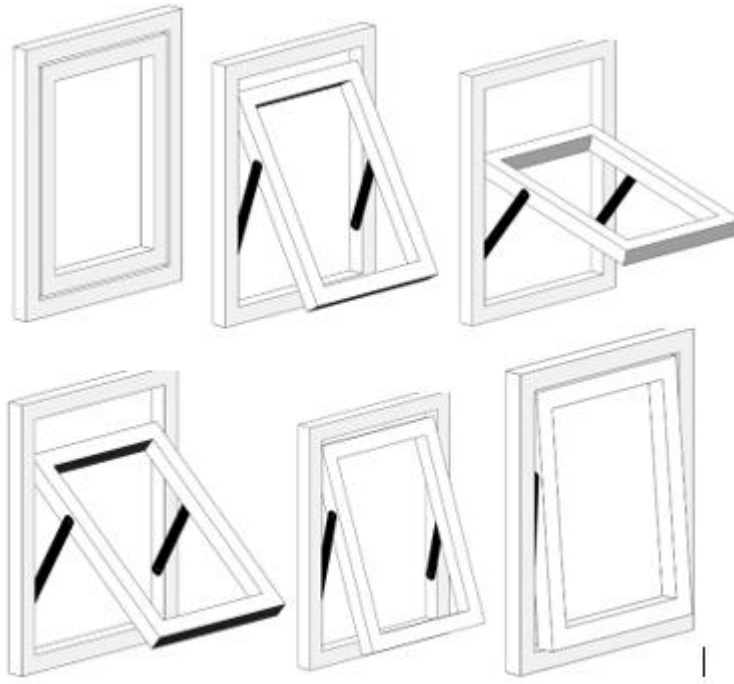
- 9 The appeal complies with Articles 66, 67 and Article 68(1) EUTMR. It is admissible, but unfounded.

Article 7(1)(e) (II) EUTMR

- 10 Pursuant to Article 7(1)(e) (ii) EUTMR, signs which consist exclusively of the shape or another characteristic of the goods which is necessary to obtain a technical result shall not be registered.
- 11 The legal objective of the grounds for refusal set out in Article 7(1)(e) EUTMR is to prevent trade mark protection from granting its proprietor a monopoly on technical solutions or functional characteristics of a product which the user is also able to seek in the goods of competitors (05/07/2023, T-10/22, FORM EINER FLASCHE (3D), EU:T:2023:377, § 35 and the case-law cited therein). The purpose of this is to prevent the protection afforded by trade mark law going beyond the protection of signs by means of which a product or service can be distinguished from the goods or services offered by competitors, and will cause competitors to freely offer goods with these technical solutions or their functional characteristics in competition with the proprietor of the trade mark (18/06/2002, C-299/99, Remington, EU:C:2002:377, § 78). In particular, it is necessary to prevent other industrial property rights with limited periods of protection (patents, designs) from obtaining unlimited protection via the route of trade mark law (18/09/2014, C-205/13, Tripp Trapp, EU:C:2014:2233, § 19).
- 12 As regards the condition that the grounds for refusal referred to include all signs which consist ‘exclusively’ of the shape or another characteristic of the goods which is necessary to obtain a technical result, the Court has stated that the presence of one or more minor arbitrary elements in a sign where all essential characteristics are determined by the technical solution which gives expression to that sign does not alter the fact that the sign consists exclusively of the shape or another characteristic of the goods which is necessary to obtain a technical result. Furthermore, the ground for refusal set out in Article 7(1)(e) (ii) EUTMR applies only where all the essential characteristics of the sign are functional, so that the registration of such a sign as a trade mark cannot be refused pursuant to that provision where the shape of the product in question embodies an important non-functional element, such as a decorative or fanciful element that is relevant to that shape (05/07/2023, T-10/22, FORM EINER FLASCHE (3D), EU:T:2023:377, § 37 and the case-law cited therein).
- 13 As this is the condition provided for in Article 7 (1) (e) (ii) EUTMR, which targets a shape or other characteristic which is ‘necessary’ to obtain the technical result in question, this does not mean that the shape or characteristics in question must be the only one that enables that result to be achieved. For example, there may be alternative shapes or characteristic features that allow the same technical result. In other words, Article 7(1)(e) (ii) EUTMR precludes registration of any shape which consists exclusively of the shape or another characteristic of the product which is technically causal and sufficient to achieve the technical result in question, even if that result can also be achieved by other shapes or features which use the same or another technical solution (26/06/2024, T-192/23, SHAPE OF METAL beams Construction (3D), EU:T:2024:420, § 14 and the case-law cited therein).
- 14 In contrast to the examination of the grounds for refusal under Article 7(1) (b) and (c) EUTMR, the presumed perception by the relevant public is not a decisive factor in the examination of Article 7(1) (e) (ii) EUTMR. At best, this factor may constitute a useful element in determining the essential characteristics of the sign. The characteristics of the sign must be determined purely objectively, on the basis of its representation, for

the assessment under Article 7(1)(e) (ii) EUTMR (26/06/2024, T-192/23, SHAPE OF METAL beams FOR Construction (3D), EU:T:2024:420, § 36-38).



- 15 In order to examine the functionality of a sign within the meaning of Article 7(1)(e) (ii) EUTMR, it is necessary, first, to properly identify the essential characteristics of the sign and, second, to assess those characteristics with regard to the technical function of the specific product at issue (10/11/2016, C-30/15 P, CUBES, EU:C:2018:353, § 46, 48; by analogy, 23/04/2020, C-237/19, Gömböc, EU:C:2020:296, § 28).
- 16 The goods are vehicle *windows for exfoliating arms* in Class 12.
- 17 According to the *Duden dictionary*, a window is a ‘mostly glazed opening, which allows Lights and air urs to penetrate into a closed space.’ <https://www.duden.de/rechtschreibung/Fenster>, accessed on 16/10/2024. This designation also applies to the window of an exaggerated vehicle. It must therefore be concluded that the technical result of a window is the penetration of light and air in a closed space. It is obvious that a window must be opened for this purpose (at least to emit air). It is also obvious that the window must be closed again after the opening. The opening (and the closure) of a window is therefore an action which is necessary to obtain the technical result of the window.
- 18 Accordingly, the applicant is to be agreed with in that the opening and closing system of the window does not in itself constitute a technical result. Rather, and as already argued in the rapporteur’s communication, certain steps or movements of the window are required in order to achieve the technical result of its opening. In other words, in order to allow the effect of the air intake, a window must be opened through certain actions.
- 19 The sign applied for is a motion mark, that is to say a trade mark consisting of a movement of the elements of the mark (Article 3(3)(h) EUTMIR). In this case, the elements represent the opening and closing movement of a window. The sign was represented by an animated sequence of simple, simply stylised images, which is 6 seconds, in which the movement of the opening and closing of the window is visible. The window is closed at the beginning, then it opens slow and is closed again:




- 20 In the grounds of appeal, the applicant describes its trade mark as follows:

When opened, the window flower curves downwards and externally in relation to the fixed frame. The window flower ‘slip’ in the fixed frame is downwards. Furthermore, a black strut is visible in each case on both sides of the moving window flower.

- 21 The Board sees no reason not to adopt this description as it appears to correspond to an objective consideration of the sign. It should be pointed out that the applicant’s statements as to whether or not it is a clip window appear somewhat contradictory, but this is irrelevant to the decision.
- 22 As claimed by the applicant in its grounds of appeal, the above description does not correspond to the examiner’s opinion. In the contested decision, the examiner had

confused the black colouring of the window  and  with hinges. According to the *Duden dictionary* (<https://www.duden.de/rechtschreibung/Scharnier>, retrieved on 18/10/2024), a hinge is a ‘decision serving to create a movable connection (e.g. between door and frame) or the like, in which two elements are connected to one another by a pin or the like in such a way that they can turn around its longitudinal

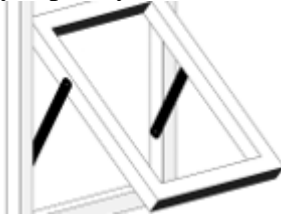
axis’. It usually has the following appearance:  However, the Board points out that this error is not capable of influencing the final outcome of this appeal.

- 23 It should be noted at the outset that the trade mark applied for is not a figurative mark. It is therefore not the pictures reproduced above that need to be analysed, but only the movement sequence in their entirety. Nor does it depend on the specific characteristics of the individual components of the window, which appear in the movement sequence,

such as, for example, the appearance of the window frame and its proportions or the visibility and colour of the struts.

- 24 Rather, it must be examined whether the movement mark applied for constitutes exclusively a characteristic feature of the goods which is necessary to obtain a technical result.
- 25 As already explained above, one of the technical effects of the product in question is vehicle *windows for exfoliating motors and*, accordingly, the opening (and accordingly the closing) of the window. The movement applied for merely shows how the window opens and ends. The trade mark application contains no further elements. For this reason alone, the requirements of the ground for refusal under Article 7(1)(e) (ii) EUTMR are met in the present case.
- 26 The applicant also does not dispute that the application is a movement sequence that depicts the opening and closing of the window. However, it argues that the sign should be registered as a European Union trade mark on account of its uniqueness: on the one hand, the movement was unique in comparison with the opening and closing systems of other vehicle windows currently offered on the market for exfoliating engine, and on the other hand, no black struts were visible in any of the other comparable windows. The targeted, specialist and very attentive consumer of vehicle windows *for exinfective motors would* therefore perceive the movement movement applied for as unusual and therefore as an indication of commercial origin.
- 27 However, these considerations are unconvincing, as the present case does not concern whether the applicant's movement sequence is customary or unusual. In contrast to the examination of the grounds for refusal of descriptive character and lack of distinctive character, Article 7(1)(e) (ii) EUTMR will not be examined on the basis of the perception of the public targeted or the market conditions. It cannot be assumed that the relevant consumers have the necessary technical knowledge for assessing a characteristic which is necessary to obtain a technical result. In particular, it cannot be ruled out that the public targeted will understand certain characteristics as essential and functional, even though they are not at all technically, and vice versa (30/03/2022, T-264/21, forma DE Bota DE REBOTE CON elementos DENOMINATIVOS 'AEROWER JUMPER1 M' (3D), EU:T:2022:193, § 41; 24/09/2019, T-261/18, Device OF A BLACK SQUARE CONTAINING SEVEN CONCENTRIC BLUE Circles (fig.), EU:T:2019:674, § 55).
- 28 In the present case, however, the examination is to be carried out only from an objective point of view, having regard to the purely factual characteristics of the application. Objectively, the present trade mark application consists exclusively of a video sequence, which shows how a window opens and closes.
- 29 Furthermore, it is also irrelevant in the present case whether the movement sequence applied for is capable of distinguishing the applicant's goods from those of its competitors, as distinctive character and technical result are two autonomous principles which are also to be applied independently of one another (28/06/2021, R 0912/2020-1, POSITION OF A ROAD panel, § 60).
- 30 The motion mark applied for does not contain any components that are not dictated by technical function. Even the black struts, which, in the applicant's opinion, are

unusually visible, have a purely technical function in connection with windows, as this is a trace element which serves to stabilise and reinforce the window. In the present case too, the black struts support the window wings moving forwards and therefore obviously do not play a purely decorative or aesthetic role in the window opening and



closing system: (05/07/2023, T-10/22, FORM EINER FLASCHE (3D), EU:T:2023:377, § 45).

- 31 The applicant's argument that there were additional technical alternatives for the opening and closing of vehicle windows *for exfoliating engine* also comes to nothing. It is known that the characteristic required to achieve a particular technical result (in this case: a sequence of movement) is not necessarily the only possible feature of this kind (that is to say: be the only possible sequence of movement) that is capable of achieving this result (14/11/2023, T-801/22, Device of two luminous yellow band with a silver grey band between (fig.), § 31, 32, 47; 05/07/2023, T-10/22, SHAPE OF A BOTTLE (3D), EU:T:2023:377, § 46; 28/06/2021, R 0912/2020-1, POSITION OF A CUT-OUT ON A ROAD wheel, § 61-62 and the case-law cited therein).
- 32 For the sake of completeness, it should be pointed out that in the Common Practice, the European Intellectual Property Network CP11 on the subject of New types of trade marks: Examination of formal requirements and grounds for refusal' (<https://tmdn.org/#/practices>, retrieved on 17/10/2024) is an (invented) example of a trade mark application for *thermostats* in Class 9, which, in the view of the Board, is comparable to the present trade mark application (see page 47 of the Common Practice, German version). It is a motion mark which shows the movement of a thermostat in increasing the temperature from 17 °C to 26.5 °C, represented in an animated sequence of 3 seconds:



According to the Common Practice, this application must be refused on the basis of Article 4(1)(e) (ii) TMD, which corresponds to Article 7(1)(e) (ii) EUTMR, because the movement of the goods applied for is necessary to obtain a technical result.

- 33 In summary, the Board is of the opinion that the registration of the sign applied for without essential aesthetic elements which do not have a technical function would be liable to unduly affect the possibility for competitors to offer certain movement sequences *for the opening and closing of vehicle windows for exinfective motors on the market*. In this context, it should be pointed out that the registration of an exclusively

functional shape of a product as a trade mark allows the trade mark proprietor, pursuant to Article 9(2) EUTMR, to prohibit other undertakings not only from using the same sequence of movement, but also to use similar sequences of movement, which would be too restricted to competition (14/09/2010, C-48/09 P, 3D SHAPE OF A LEGO BRICK, EU:C:2010:516, § 56, 72). The sign applied for is therefore precluded by the ground for refusal under Article 7(1)(e) (ii) EUTMR.

Article 7(1)(b) EUTMR

- 34 Pursuant to Article 7(1)(b) EUTMR, trade marks which are devoid of any distinctive character shall not be registered.
- 35 For the trade mark to possess distinctive character for the purposes of that provision, it must serve to identify the product or service in respect of which registration is applied for as originating from a particular undertaking, and thus to distinguish that product or service from those of other undertakings (25/09/2002, T-316/00, Grün/Grau, EU:T:2002:225, § 25; T-408/15, son D'UN Jceramsonore PLIM (marque sonore), EU:T:2016:468, § 37), thus enabling the consumer who acquired the product or services identified by the trade mark to repeat the experience if it proves to be positive, or to avoid it if it proves to be negative, on the occasion of a subsequent acquisition (05/12/2002, T-130/01, Real People, Real Solutions, EU:T:2002:301, § 18).
- 36 The distinctive character of a trade mark must be assessed, first, by reference to the goods or services in respect of which registration has been applied for and, second, by reference to the perception of them by the relevant public, which consists of the average consumers of those goods or services (29/04/2004, C-473/01 P Metal C-474/01 P, Tabs (3D.), EU:C:2004:260, § 33; 17/01/2013, T-582/11 ure T-583/11, Premium XL/Premium L, EU:T:2013:24, § 16; 28/04/2015, T-216/14, EXTRA, EU:T:2015:230, § 15; 30/09/2015, T-385/14, ULTIMATE, EU:T:2015:736, § 12).
- 37 Although, according to the case-law, the criteria for the assessment of distinctive character are the same for different categories of marks, account must be taken, for the purposes of applying those criteria, of the fact that the relevant public's perception is not necessarily the same in relation to each of those categories and it could therefore prove more difficult to establish distinctiveness in relation to marks of certain categories as compared with marks of other categories (28/06/2004, C-445/02 P, Glass Pattern, EU:C:2004:393, § 23; 13/09/2016, T-408/15, son D'UN Jeds sonore PLIM (marque sonore), EU:T:2016:468, § 41).
- 38 The present case involves a motion mark which has already been reproduced and described in its essential elements in paragraphs 19 and 20 above.
- 39 The goods that are the subject of these proceedings are *vehicle windows for exfoliating motors* in Class 12. As correctly explained by the examiner, they are aimed not at general consumers or laymen, but at an experienced public, which includes those which take expettional substances or deal with expeditionment engines. The trade circles targeted are therefore at least partially familiar with this market landscape and will also pay an above-average level of attention when purchasing these vehicle windows.
- 40 However, the Board takes the view that the public, even if it is specialised and attentive, will not perceive this sign as an indication of origin, but rather as a

representation and reproduction of an essential mode of operation of the window, namely how it opens and ends, by means of an animated video sequence.

- 41 It is generally known that many manufacturers of technical goods produce videos and publish them on the internet (e.g. on the video platform ‘YouTube’), in order to explain the functionality of the product or also to promote their technical peculiarities (see e.g. 09/10/2023, R 2053/2022-4, BILBA (fig.), § 84; 01/12/2022, R 0714/2022-1, FASTACCESS, § 26). There are often even links to videos which further illustrate the mode of operation of the product in the official instructions for use of the product.
- 42 In the present case, the movement sequence applied for shows how a window opens and closes. In connection with vehicle windows *for exfoliating components*, the targeted consumer would merely perceive the movement sequence as a demonstration of the mode of operation of the window and not as an indication of commercial origin. Accordingly, the sign applied for must also be refused owing to a lack of distinctive character within the meaning of Article 7(1)(b) EUTMR.
- 43 In its decision of 20/09/2023, R 314/2023-2, *fromage découpé et arrangé en forme de coeur*, the Board of Appeal had already refused a motion mark that constituted the action of cutting a cheese, *inter alia* because numerous such videos could be found on the Internet, for example as cooking cables (20/09/2023, R 314/2023-2, *fromage découpé et arrangé en forme de coeur*, § 18).
- 44 It should be emphasised here whether or not the mode of operation of the applicant’s window or the window itself has unique peculiarities in comparison with comparable goods on the corresponding market. The eligibility for registration of a trade mark does not depend on the characteristics or uniqueness of the product to be designated thereby. Novelty or originality are not relevant criteria for assessing the distinctive character of a trade mark, and there are other property rights to protect an original design (03/10/2024, R 0947/2024-5, CHECKERED BLUE AND WHITE PATTERN, § 37). In other words, in the context of the examination of distinctive character within the meaning of Article 7(1)(b) EUTMR, there is no need to determine whether the applicant’s vehicle windows are the only ones on the market which have the opening and closing system depicted in the movement mark.
- 45 Rather, the motion mark applied for is to be classified as ineligible for registration because it is not capable of conveying, beyond a simple representation of the mode of operation of the window, a message that could be understood by the targeted consumers as an indication of origin. The sequence of movement contains no significant deviation from the simple animated image sequence of the opening and closing of the window. The sign applied for is therefore unable to fulfil an identification function in relation to the goods concerned.
- 46 It also follows that the motion mark applied for will not enable the consumer to repeat the experience of a purchase if it proves to be positive, or to avoid it if it proves to be negative, on the occasion of a subsequent acquisition (08/07/2010, T-385/08, *Hund*, EU:T:2010:295, § 20).
- 47 Finally, the applicant claims that when considering the movement sequence applied for, the relevant public would immediately know that the window depicted therein is one of the applicant. This argument cannot be agreed with. The sign must be examined in the

form submitted, and the application contains no references to the applicant in the context of these proceedings. Furthermore, and as correctly explained by the examiner, even in a manageable market, the targeted purchaser of living and expetive motors cannot be required to know from all windows in these vehicles how they can be opened and re-inferred, with the result that he could only compare the movement of the window applied for with the windows of other manufacturers and thus immediately perceive these movements as a reference to the applicant.

- 48 It must finally be remembered that the possibility that the public would understand the sign as originating from the applicant is not a relevant factor in the context of the application of Article 7(1)(b) EUTMR. The actual use of the sign plays a role only in the context of the application of Article 7(3) EUTMR (29/09/2021, T-60/20, Mastihacare, EU:T:2021:629, § 44); However, in the present case, distinctiveness in consequence of use of the trade mark within the meaning of Article 7(3) EUTMR was not claimed.
- 49 In summary, there is absolutely no evidence to suggest that the relevant public will perceive the sign applied for, beyond its purely informative content, as an indication of commercial origin.
- 50 The sign applied for lacks the minimum degree of distinctive character. It is therefore also to be refused as ineligible for registration owing to a breach of Article 7(1)(b) EUTMR.
- 51 The appeal remains unsuccessful.

Order

On those grounds,

THE BOARD

hereby:

Dismisses the appeal.

Signed

S. Stürmann

Signed

S. Martin

Signed

K. Guzdek

Registrar

Signed

H. Dijkema

