

THE IMPACT OF THE NEW EU TRADEMARK REGIME ON ENTREPRENEURIAL COMPETITIVENESS

RADKA MACGREGOR PELIKÁNOVÁ, ROBERT MACGREGOR

ABSTRACT

This article addresses the impact of the new EU trademark reform and regime on businesses and their competitiveness. Under the auspices of the Europe 2020 strategy, the European Commission proclaimed its commitment to smart, sustainable and inclusive growth with the focus on supporting competitiveness. Consequently, the sphere of intellectual property became pivotal and led to the enactment of a set of Regulations and Directives designed to reform the EU trademark system. The ultimate goal of this reform was to facilitate competitiveness and to contribute to the entrepreneurial drive in this respect by reducing registration costs per class and by offering new types of trademark. The statistical data generated by the exploration of the EUIPO, along with data on all registered unconventional EUTMs and case studies of the annual filing of top applicants, provides a sufficient foundation for a critical meta-analysis in order to assess the business interest in one class of trademark, in new trademark types and in trademark portfolio strategies. The results reveal a split between the trademark perspective of the EU and that of businesses, and answer these three research questions in a surprising manner. The surrounding discussions and arguments even suggest that the entrepreneurial drive for competitiveness through the employment of EUTMs is not effectively and efficiently supported by the reform. A holistic approach and preferences recognised by businesses point to a need for the enhancement of awareness and significant changes to this reform to make it a true mechanism for protecting legitimate entrepreneurial interests and competitiveness.

KEY WORDS

Entrepreneurial preferences, entrepreneurial strategies, EU trademark (EUTM), EU trademark reform, EUIPO.

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**RADKA MACGREGOR
PELIKÁNOVÁ¹,**

e-mail: radkamacgregor@yahoo.com;

ROBERT MACGREGOR

e-mail: robertkmacgregor@yahoo.com

Metropolitan University Prague,

Czech Republic

¹ Corresponding author

Introduction

The postmodern global society is marked by eager competition and complex integration (Piekarczyk, 2016) and brings con-

traditions emerging at the intersection of business and law (MacGregor Pelikánová, 2019c). Indeed, decades of electronisation

underscore these features (Vivant, 2016), blur the distinction between the tangible and intangible (MacGregor Pelikánová, 2012) and lead to the so-called mature information society (Floridi, 2016).

On one hand, conventional economic studies and searches confirm the common notoriety that businesses follow the principle of maximising utility (Jindřichovská et al., 2019; MacGregor Pelikánová, 2017a). On the other hand, studies and searches suggest that humans, as well as their behaviour, are socially and long-term oriented (Hochman et al., 2015) and that businesses engage in cooperation in research and development (R&D) (Cygler & Wika, 2017; Cygler et al., 2018) and sustainable behaviour (MacGregor Pelikánová & MacGregor, 2018b), brag about it and even use it as an element for building a competitive advantage (MacGregor Pelikánová, 2019a). There is potential for synergetic mutual support between entrepreneurial competitiveness and competencies (Solesvik, 2019), the development of intellectual property (MacGregor Pelikánová, 2019b) and sustainability. Legal and ethical concerns should overlap (Sroka and Lörinczy, 2015; Sroka and Szanto, 2018) and make the competition both fair and sustainable. In any case, the concept of sustainability, as a systematic and visionary tool governed predominantly by soft law, has co-existed with the concept of corporate responsibility, as rather a normative and moral tool regulated by hard law, until together they merged into Corporate Social Responsibility (CSR) (Bansal, 2017; Čech et al., 2018, 2019). Desirable competitiveness is a key element of the SMART economy in which the entrepreneurial environment is characterised by innovative and creative spirit, flexibility and adaptability, initiative and entrepreneurship, inventions in human capital and production processes and

practices that are effective and socially responsible (Turečková and Nevima, 2018). Consequently, modern competitiveness is inherently linked to the well-protected self-image of the businesses and its goods and services, their quality and links to their source, the CSR of their provider and their protection against unfair practices (Jindřichovská and Kubíčková, 2018; MacGregor Pelikánová and MacGregor, 2018c). Since this competitiveness often occurs in a virtual setting without the possibility of verifying such matters easily, the dissemination of proper information is critical; a lack thereof can lead to unfair competition, with misleading commercial practices hurting competitors, consumers and ultimately the entire economy and society (MacGregor Pelikánová, 2017a). In addition, competitiveness is carried out by inventions and by other intellectual property assets based on ideas (Terzić, 2017), which are the product of costly processes requiring significant financial – and other – efforts. Since an innovation means not only developing a new idea, but putting it into business as well (Kalanje, 2018), there is no certainty of success (MacGregor Pelikánová, 2017b). In case of achieving success, innovations based on ideas developed and applied in practice are able to benefit many and so are at risk of expropriation (Yueh, 2007). Therefore their perception as intellectual property assets and protection by means of intellectual property rights, balancing the need for dissemination and the implied monopoly, is critical.

Indeed, intellectual property is pivotal for regional and global competitiveness (MacGregor Pelikánová, 2019b) and includes diverse assets (Roszkowska-Menkes, 2017). Within the sphere of intellectual property, there is a branch of industrial property led by patented inventions and trademarks (MacGregor Pelikánová, 2019b).

A trademark is a unique, typically registered, distinctive sign (Winckel, 2013) which fulfils a number of critical functions, such as the origin indication function, product differentiation function, guarantee function, advertising function, investment function, etc. (Chronopoulos, 2014) and these functions need to be readjusted for the 21st century (Long, 2011). Indeed, trademarks, regardless of whether they are brand-identification trademarks or brand-association trademarks, are important intellectual property assets that enhance the value of the particular business (Krasnikov et al., 2009; Ertekin et al., 2018). The origin indication function is probably the most important because it constitutes one of the most effective and efficient methods for linking businesses to their goods and services; thus, trademarks inform about and protect the competitive advantage of businesses (Dmitrieva and MacGregor Pelikánová, 2017).

The EU exercises its power through the externalisation of economic and social market-related policies and regulatory measures (Damro, 2012) where intellectual property should be key to the competitiveness of European businesses (MacGregor Pelikánová, 2013, Terzić, 2017, Polcyn 2018). Indeed, being aware of the critical importance of trademarks and their potential to support competitiveness, the EU did not satisfy itself merely with the harmonisation of national trademarks on the internal single market, but additionally launched regulatorily and inherently unified community trademarks (CTMs) registered via the Office for Harmonisation in the Internal Market (OHIM) and which became EU trademarks (EUTMs) registered by the EU Intellectual Property Office (EUIPO) by means of the 2015-2017 trademark reform (reform). As further examples of how this reform was designed to increase the competitiveness of European businesses, new

types of EUTMs were introduced, as well as a reduced fee for one class of applications for EUTMs.

A proper balance needs to be struck to protect businesses and their drive for competitiveness via trademark labelling with the interests of other stakeholders. In addition, this balance and matching regime should help the endeavours of EU business inside, and even outside, the EU market. The EUTMs, along with the operation of the EUIPO, should help Europeans and European businesses and not hinder them in their competition with businesses from other jurisdictions. EUTMs were conceived to contribute to and support the entrepreneurial drive for competitiveness, and thus to fully match the Europe 2020 strategy. However, what has happened in reality, especially from the perspective of the ultimate addressees – European businesses registering EUTMs?

1. Literature review

1.1 Europe 2020 and its approach to competitiveness and intellectual property

Although modern European integration is marked by the blurred distinction between historical truth and reality (Chirita, 2014), there is no doubt that it is founded upon the doctrine of the famous four freedoms of movement in the single internal market (Damro, 2012, MacGregor Pelikánová, 2017a). There are many challenges to modern European integration (MacGregor Pelikánová, 2013); the EU and the member states attempt to address this through various instruments designed to promote competitiveness, transparency, communication and CSR (Pasimeni and Pasimeni, 2016), with different levels of effectiveness and efficiency (Czyzewski et al., 2016; MacGregor Pelikánová, 2019a).

Consequently, the internal pro-European tandem, the European Commission and the Court of Justice of the EU ("CJ EU"), has consistently exercised its power (Damro, 2012) and stepped in to protect the single internal market and competition within by issuing, applying and enforcing a myriad of instruments, including policies, institutional arrangements, legislative and judiciary measures.

EU competition policy, focusing on the very existence of competition, is not the only one that is vital for the single internal market and its operation. In addition to these public law concerns related to monopolist, cartel practices and state aid practices, there are important private law concerns *vis-à-vis* daily competition and the fairness thereof, opening up to the technological potential of EU member states (Balcerzak, 2016a) and European businesses, and the possibility of incremental and radical openness to innovation. Therefore, in 2010 when the European Commission, influenced by both formal and informal institutions (Pasimeni and Pasimeni, 2016), issued a new decade-long strategy - Europe 2020 - to overcome the combined effects and impacts of the economic crises and the failed Lisbon Strategy 2000–2010, the digital single market and competition policy were strongly considered (MacGregor Pelikánová, 2019a).

Europe 2020 prioritises smart, sustainable and inclusive growth (EC, 2010) and believes that intellectual property potential (Balcerzak, 2016a), including trademarks (Dime et al, 2018), fair competition (MacGregor Pelikánová and Beneš, 2017) and the drive for sustainability (Pakšiová; 2016, Horváth et al., 2017; Szarowská, 2018) should develop and should push the EU to take a leadership role in a global context (Steca and Grzebyk, 2018) as eagerly proclaimed by the European Commission (EC, 2018). The goals of Europe 2020 lie

in the belief that the internal market requires a certain degree of homogeneity in the economic development of countries, which is not necessarily an automatic outcome of the European integration process but eventually has to be assisted by active policy interventions, especially regarding the existence of competition and fairness (MacGregor Pelikánová and MacGregor, 2018c), consumer protection, intellectual property (MacGregor Pelikánová, 2019c) and the enhancement of general awareness (Czyzewski et al., 2016) and ethics concerns (Sroka and Lörinczy, 2015; Sroka and Szanto, 2018). Indeed, the impersonality of e-business weakens the relationship between businesses and consumers, magnifies information asymmetry and increases consumer, and even market, vulnerability.

Therefore, intellectual property concerns have become an integral part of competition policies and of other policies to promote growth (Billon et al., 2017). In economic terminology, the protection of intellectual property assets, especially innovations, may increase the number of researchers who innovate, as described by the Romer model, and the cost of acquiring technology, as described by the Solow model (Yueh, 2007).

In particular, there is evidence that business efforts to build brand equity protected by trademarks have a positive impact on its financial value and are critical for competitiveness (Krasnikov et al., 2009). All this leads to the question of how effective and efficient these policies are (Turečková and Nevima, 2017), especially from the perspective of small and medium-sized enterprises (SMEs), as well as consumers.

Regarding certain aspects, Europe 2020 comes off as a good strategy, effectively and efficiently fostering pro-integration and pro-competition; but for other aspects, time has tended to confirm critical voices,

namely that the European Commission is trespassing beyond its competencies (Erixon, 2010), does not care enough about SMEs (MacGregor Pelikánová and MacGregor, 2018a) and is reaching unrealistically with Europe 2020 (Balcerzak 2016b; Çolak and Ege, 2013; Staničková, 2017). Consequently, some worship Europe 2020 while others consider it a failure due to the wrong setting, low mutual awareness and miscommunication (Cvik et al., 2018), poor balancing of competition and intellectual property interests (MacGregor Pelikánová and Cvik, 2018) and the insufficient efforts of many European economies, especially the most important ones (Balcerzak, 2015). What about the reform and the new EUTM? Are they conceived and applied sufficiently well to support competitiveness?

1.2. Foundations of the reform and selected provisions

EU member states belong to the EU, have to follow EU law and recognise the demands generated by globalisation, digitalisation and competitiveness. At the same time, a mere empirical observation reveals that EU member states, their businesses and individuals follow different social, political and economic traditions (MacGregor Pelikánová, 2017a). There are a myriad of reasons for these differences, including the fact that some EU jurisdictions belong to the continental law family more inclined to formalism, while others belong to the common law family more inclined to pragmatism (MacGregor Pelikánová, 2019c). Ultimately, each and every EU member state has national trademark laws and laws against unfair competition reflecting national particularities and traditions. However, the existence of the EU, EU law and the single internal market demand to overcome this fragmentation, especially with respect to intellectual property assets required to “create and retain custom” (Schechter, 1927)

in and even beyond the EU market – trademarks. Thus, the EU had to strategically decide how to progress when it came to harmonisation in this sphere, and decided to introduce a common trademark for the entire EU which would be able to co-exist with national and international trademarks, i.e. CTMs.

The popularity of traditional trademarks, aka conventional trademarks, including CTMs, consisting of letters, numbers, signs and picture letters, led to the status quo where basically “everything attractive was taken” Dmitrieva and MacGregor Pelikánová, 2017). This means that SMEs and start-ups, especially, were basically unable to register a traditional national trademark or CTM. Since the EU was aware of it, and has been proclaiming support for competitiveness and for SMEs via Europe 2020, as well as other strategies and policies, the reform was shaped to overcome the costliness, density and unfriendliness to newcomers of the previous CTM system.

As a result of the reform, EUTMs have a multi-functional purpose, and their potential to provide a reference, origin and guarantee should support competitiveness and fairness (MacGregor et al., 2017). Conceptually, current EUTMs represent a strong tool for unification, i.e. EUTMs are exclusively set by means of EU law and registered by the EU body, previously the OHIM and latterly the EUIPO. This should be in compliance with the core principles of the Europe 2020 strategy (MacGregor Pelikánová, 2017b) and match the distribution of competencies as set by EU primary law consisting of the Treaty on the EU (TEU) and the Treaty on the Functioning of the EU (TFEU) and Charter of Fundamental Rights of the EU, and is enacted by means of EU secondary law, especially Regulations and Directives.

The backbone of the reform was Regulation (EU) 2015/2424 of the European Parliament and the Council amending the Community trade mark regulation 207/2009 (Amending Regulation) and Regulation (EU) 2017/1001 of the European Parliament and of the Council (new EUTM Regulation). They were accompanied by secondary legislation consisting of the Delegated Regulation (EU) 2018/625 supplementing Regulation (EU) 2017/1001 and the Implementing Regulation (EU) 2018/626 laying down detailed rules for implementing certain provisions of Regulation (EU) 2017/1001. As a result of the Amending Regulation and the new EUTM Regulation, a set of changes occurred, such as the OHIM becoming the EUIPO and CTMs becoming EUTMs. Further, a myriad of modifications regarding requirements for applications and registrations and related

proceedings were introduced, especially regarding the payment, distinctiveness (Anemaet, 2016) and typisation in order to bring EUTMs into the 21st century (Long, 2011) and for businesses wanting to work on their competitiveness.

Firstly, the reform set out a new registration payment system. All goods and services were organised in 45 Nice classes (1-34 for goods, 35-45 for services); based on the old registration system, the fee for the CTM application in up to three classes was EUR 900 if filed electronically, and EUR 1050 if filed in paper form. The fee for a fourth and each subsequent class was EUR 150. However, the new EUTM is assumed to be applied to one class and if filing is done electronically, then the fee is EUR 850, for the second class it is EUR 50 and for the third and each subsequent class EUR 150.

Table 1. CTM and EUTM fees in EUR for e-application and e-renewal

	eFiling 1st class	eFiling 2nd class	eFiling 3rd class	eFiling 4th class	eFiling 5th class
New CTM	900			150	150
New EUTM	850	50	150	150	150
Renew CTM	1350			400	400
Renew EUTM	850	50	150	150	150

Source: Own elaboration.

Secondly, the reform opens the door for the registration of non-traditional EUTMs by dramatically relaxing the requirements for representation of an EUTM. Namely, pursuant to the new EUTM Regulation, the “graphic” representation requirement was dropped by omitting it from the definition of signs which can constitute an EUTM – Art. 4 “An EU trade mark may consist of any signs, in particular words, including personal names, or designs, letters, numerals, colours, the shape of goods or of the packaging of goods, or sounds, provided that such signs are capable of: (a) distinguishing the goods or services of one undertaking from those of other undertak-

ings; (b) being represented on the Register of European Union trade marks (‘the Register’), in a manner which enables the competent authorities and the public to determine the clear and precise subject matter of the protection afforded to its proprietor.” Consequently, along with traditional trademarks, also known as conventional trademark types including word marks, figurative marks (images), shape marks, and pattern marks, new types of EUTMs emerged including colour marks, sound marks, motion marks, multimedia marks and hologram marks.

Does the new EUTM system support the competitiveness of European businesses and, more specifically, do European businesses enjoy one class filing of new types of trademark while building trademark portfolios for success in the 21st century?

2. Methods and data

Since this article addresses the impact of the reform on businesses and their perception of it in the context of the focus of Europe 2020 on competitiveness, it is necessary to understand the interaction of the new regime with the behaviour of businesses. The ultimate goal of this reform was to facilitate competitiveness and to contribute to entrepreneurial drive, in this respect, by reducing registration costs per class and by offering new trademark types. Therefore, three research questions emerge. Firstly, are businesses responsive to the new financial incentive for single-class trademark applications? Secondly, are new trademark types attractive for businesses? Thirdly, can trademark portfolio trends be observed and, if so, what are they? Answers to these three research questions shed new light on the discussion about the appropriateness and feasibility of the reform for boosting the entrepreneurial drive for competitiveness, i.e. to show whether the reform is effective and efficient pursuant to EUTM application trends of businesses, and how it could be improved.

In order to scientifically and academically address these three research questions, an open-minded selection and search for primary and secondary sources is necessary. The legislative and judiciary foundation creates a framework for the practice of the EUIPO and businesses; it is precisely this practice which needs to be explored. This entails a myriad of instruments and processes from a field search and observation of the literate description and teleo-

logical interpretation of acts and commentaries, to academic materials from different jurisdictions. Naturally, the key institutional source will be the EUIPO with its database of applications and registered EUTMs and with its statistics and documents available on the OHIM and EUIPO portal, <https://eui-po.europa.eu/eSearch/>. This will also feed into the case study of current totals of registered unconventional EUTMs (2019) and the strategies of the dozen top EUTM applicants during the year of the full application of the reform (2018).

The cross-disciplinary and multi-jurisdictional nature suggests that the data yielded by the indicated search is to be processed by means of meta-analysis (Silverman, 2013), while using a holistic approach and while moving to comparisons, critical and open-minded glossing and Socrates questioning (Areeda, 1996).

The principal strength of the article rests in its pioneering nature; its determination to match the proclaimed goals and political-legislative expectations with the business reality regarding one of the key assets of modern enterprises in the EU, namely the EUTM; and in its assessment of the set, as opposed to the expected, framework with recommendations for improvements. The principal weakness of the paper is linked to its relevancy, namely that the reform took effect in 2017 and thus only data from the last two years can be used. Therefore, the article cannot observe the dynamics of progressive changes over time due to the reform. Naturally, a case study with more businesses would be desirable as well. Clearly, this article is just a first step and should be followed by research regarding hundreds of other applied-for and registered new EUTMs and by the processing of such data via a more developed methodology matching new EUTMs and their particular aspects with competitiveness.

3. Results and discussion

A market needs brands for consumer orientation and a strong brand identity is an important factor in a brand's success (Labrecque and Milne, 2013). Branding, referencing, guaranteeing, informing, and so on needs to be done in an official manner enjoying protection by the law, i.e. ideally by means of a trademark. Even before the turn of the millennium, it became obvious that basically all conventional trademarks, regardless of whether they are national, regional such as CTM or international, are already registered, and thus that "nothing attractive" is left for registration by start-ups, SMEs, etc. – and even that which is registered does not properly satisfy all the necessary trademark functions (Long, 2011).

Therefore, businesses have turned their attention to unconventional signs which help to distinguish their goods and services, such as colours, 3D images, smell, taste, etc. and attempted to register them as a trademark in order to obtain legal protection (Winckel, 2013). However, for each application, the fee must be paid, each application must pass the distinctiveness test and the capacity test to perform trademark functions (Anemaet, 2016; Winckel, 2013) and each sign to which the application pertains must be able to be recorded.

This brings about a set of questions of law and questions of facts, such as whether these signs are distinctive, able to perform trademark functions and suitable for being recorded.

Although the reform has changed the amount of the fee payable and relaxed the distinctiveness test, it does not imply per se that new businesses can get their EUTMs in a cheaper and easier manner, nor that these new EUTMs are highly unconventional and constitute new portfolios and inevitably support the competitiveness

of European businesses. However, there is sufficient data about EUTMs to indicate trends and to address all questions posed – about one class, new types, portfolios and competitiveness.

3.1. Business responsiveness to the incentive for one-class EUTM applications

The EUIPO register includes over 1.6 million EUTMs (TM View, 2019). The reform pushes the idea that everyone should pay only for what he or she uses and that, instead of "spam" multi-class applications (i.e. applications entailing an unreasonable number of classes), European businesses should pick the (one) class exactly matching their goods or services and not file applications preventively or speculatively covering a number of classes and so "chase" others away from them. The most obvious feature is that CTM set the basic application fee for a CTM application regarding up to three classes for EUR 900. However, the new EUTM application fee is set as EUR 850 for one class; an extra EUR 50 has to be paid for the second class and EUR 150 for the third and for each subsequent class. The idea behind it is that businesses should pick and pay for what they really want and not clutter-up the EUTM registries – i.e. a win-win situation for all parties. So do businesses file applications for one class of EUTM, i.e. do we have an increase in the number of applications and a decrease in the number of all classes filed?

Table 2. EUIPO statistics on EUTM applications in 2015-2018 (in thousands)

EUTMs	2015	2016	2017	2018
All applications	130	135	147	Not Available
Direct filings	108	116	122	123
- for one class	28	39	46	Not Available
- for two classes	17	25	28	Not Available
- for three or more classes	63	52	47	Not Available
Internet filings	22	19	25	Not Available
All classes filed	367	357	375	Not Available

Source: Own elaboration based on EUIPO data (EUIPO, 2019).

Table 2 reveals that so far, the expected trend, desired and promoted by the European Commission, has only partially occurred. Namely, the total number of EUTM applications has not significantly increased, but the number of classes per EUTM application is probably decreasing. It will be highly relevant to see the EUIPO annual report statistics for 2018 and 2019; based on them, it will be possible to observe and discuss trends and ultimately assess whether businesses go for more EUTM applications with fewer classes.

3.2. Is there business interest in new EUTM types?

In the universe of trademarks, and elsewhere besides, nothing comes for free. The required payment does not just include the fees indicated above. In addition, it is a notorious truism in the marketing sector that building a brand demands effort and support. Recent studies suggest that creating a distinctive sign, capable of and ripe for EUTM registration, is much more demanding and consumes greater time and money in the case of an unconven-

tional sign (Dmitrieva and MacGregor Pe-likánová, 2017). Further, it can be argued that unconventional trademarks, especially new EUTMs, are not easily understood by consumers and, deplorably, might end up blurring the differences between different businesses and their trademarks from a consumer perspective (van Horen and Pieters, 2012).

A search of the EUIPO database of EUTMs regarding conventional and unconventional EUTMs provides clear data. In May 2019, the most conventional type of EUTM, word trademarks, had over 1.1 million entries, i.e. there are over one million word EUTM applications and registrations, as opposed to less than 15,000 unconventional types of EUTMs. However, this data includes applications and even failed attempts. Consequently, data pertaining to valid, i.e. registered, EUTMs is more conclusive. There are over 660,000 registered word EUTMs and slightly over 5000 registered unconventional EUTMs (see Table 3 for information on how many registered unconventional EUTMs belong to each of the new types).

Table 3. EUTMs in May 2019 - new types

Title	3D	Colour	Hologram	Motion	Multimedia	Position	Sound
Total	10 096	1 079	11	57	25	112	342
Registered	4809	277	5	24	14	20	207

Source: Own elaboration based on the search of EUIPO registries.

This implies that new types of EUTMs are rare, except for 3D shape EUTMs, that they do not generate massive general interest and that their registration success rate is below 50%. At the same time, they can be a viable option in special circumstances. So who are the successful applicants and

consequently the owners of new types of EUTMs? It is beyond the scope of this article to extract, process and discuss the owners of over 5000 unconventional EUTMs. Thus, merely indicatively, Table 4 below provides information on the owners mentioned on the first page as well as results.

Table 4. Selected registered EUTMs and their owners in May 2019 - new types

	3D	Colour	Hologram	Motion	Multimedia	Position	Sound
Owner	Kraft Foods	Deutsche Telekom AG	Bioclin	Vodafone	Zitro IP	IZI Medical	Nokia
EUTM	Toblerone	Magenta	Box	Motion			

Source: Own elaboration based on a search of EUIPO registries.

Naturally, these results are neither robust nor conclusive. Nevertheless, they are sufficient to reveal a clear pattern regarding successful unconventional EUTM applicants, and they suit the abovementioned observation that unconventional trademarks inherently generate a distinctiveness and trademark incapacity issue, and so their registration is more demanding and time- and money-consuming than conventional EUTM applications. Large telecommunication and pharmaceutical businesses have taken advantage of the 2015-2017 reform and have also taken advantage of their deep pockets, their resources exceeding the possibilities of SMEs and start-ups. It can even be propounded that, despite the best intentions and the alleged drive for competitiveness - especially of SMEs - presented by the European Commission and other EU institutions pushing the reform, ultimately this reform magnifies the

differences between the large businesses with the vast resources to devote to proving their distinctiveness and SMEs and start-ups without such capacities. In summary, new types of EUTMs, i.e. unconventional EUTMs, are tools for the competitive advantage of large and well-established businesses, and basically mission impossible for SMEs and start-ups. And what is their position in the EUTM portfolios of these big players?

3.3. Patterns and trends of EUTM portfolio strategies

The most representative sample for new patterns and recent trends in EUTM portfolio strategy building includes five businesses which have filed the largest number of EUTM applications in 2018, i.e. during the first full year of the application of the new regulations allowing unconventional types of EUTMs (Table 5).

Table 5. EUTM application filings in 2018 – the most active applicants

	L'Oreal	Samsung Electronics Co., LTD	Novartis AG	Huawei Technologies Co. Ltd	Volkswagen AG
All EUTM filings	281	178	71	63	57
Word filings	224	155	66	54	48
Figurative filings	57	23	5	9	9
All other types	0	0	0	0	0

Source: Own elaboration based on a search of EUIPO registries

Top EUTM applicants have not filed any applications for a new type of EUTM, i.e. either they have already filed for unconventional EUTMs or they are just interested in the most conventional and typical EUTMs, i.e. word and figurative EUTMs. In order to reach and process data “above 0” regarding unconventional EUTMs and their

position in trademark portfolios, portfolios of businesses already having at least one valid, i.e. registered, unconventional EUTM have to be assessed. Such businesses are included in Table 4 and the EUTM portfolios of these businesses are included in Table 6.

Table 6. EUTM registrations as of May 2019 by selected owners of at least one unconventional EUTM

Owner	Kraft Foods Schweiz	Deutsche Telekom AG	Bioclin B.V.	Vodafone Group Plc	Zitro IP Sarl	IZI Medical Products	Nokia Corp.
Owner ID	519000	5805	93707	157363	394909	616532	14510
Registered EUTMs	47	473	5	197	387	14	78
Word	31	367	2	108	148	12	53
Figurative	6	102	2	87	231	0	20
3D	9	0	0	1	0	0	2
Colour	1	2	0	0	0	0	0
Hologram	0	0	1	0	0	0	0
Motion	0	0	0	1	0	0	0
Multimedia	0	0	0	0	8	0	0
Position	0	0	0	0	0	2	0
Sound	0	1	0	0	0	0	2
Other	0	1	0	0	0	0	1

Source: Own elaboration based on the search of EUIPO registries

Table 6 reveals that owners of unconventional EUTMs build trademark portfolios consisting predominantly of conventional types of EUTMs, i.e. word and figurative EUTMs. Typically, such an owner has a portfolio in which 90% or more are word and figurative EUTMs and less than 5% are unconventional EUTMs, which belong to two unconventional types – each unconventional type is represented by one or two EUTMs. Hence, it is the exception rather than the rule that one owner has more than two types of unconventional EUTMs (e.g., Deutsche Telekom AG with colour, sound and other EUTMs, or Nokia Corp. with 3D, sound and other EUTMs) or has more than two EUTMs of the same unconventional type (e.g., Kraft Foods Schweiz with nine 3D EUTMs). Manifestly, behind each portfolio is a history and each unconventional

type is different. While 3D EUTMs basically overlap and/or substitute for industrial design (e.g., Kraft Foods Schweiz with its triangularly shaped Toblerone), the remaining unconventional types of EUTMs appear to be very particular and to result from a spontaneous evolution or occurrence. They are signs which are ex-post perceived and protected as trademarks. Therefore, unconventional EUTMs can hardly be the centre or the foundation of EUTM portfolios – either they are not truly trademarks (but rather designs) or at least they were not trademarks initially (originally, they totally lack distinctiveness or the capacity to perform trademark functions). To sum up, unconventional EUTMs are attractive but definitely are neither fundamental nor pivotal elements of trademark portfolios.

3.4. Recommendations for the improvement of the EUTM regime to boost competitiveness

Recommendations for the improvement of the EUTM regime to boost competitiveness, especially the competitiveness of SMEs and start-ups, have to start with clarifications of what exactly and genuinely should be achieved. If this really is the competitiveness of SMEs and start-ups, then a deep discussion needs to be launched, the awareness of these businesses about real and potential EUTMs must be enhanced, and consequently their preferences collected and projected onto the readjustment of the reform.

Unsurprisingly, once businesses opt for trademark protection, they want to have it for all their goods and services, and even slightly beyond, to avoid easy overlaps. Therefore, the one-class applications for EUTMs are not attractive and the EUR 50 price reduction can hardly change that. If the EU and EUIPO want to encourage businesses to obtain EUTMs in this manner, then it would be worth thinking about “three classes for the price of two classes” or “four classes for the price of three classes” instead. This might even reduce unfair competition issues. Nevertheless, this idea is merely preliminary and needs a more robust study, and of course has to be discussed with all stakeholders, especially future EUTM applicants.

Offering new types of EUTMs appears attractive and there is only data available from one year, so it is much too early to present a “final judgment”. Nevertheless, we now already have enough indicators showing that unconventional EUTMs can be split into two groups – (i) 3D shape EUTMs which overlap with design protection and can potentially create confusion in the intellectual property sphere and (ii) colour, hologram, motion, multimedia, position and sound EUTMs which are carefully selected by businesses

and represent exceptional elements of the trademark portfolio which, over time, have attained importance and acquired distinctiveness and the capacity to perform trademark functions. Hence, one recommendation is to change and make the 3D shape EUTM regulations more precise to avoid the confusing duality of protection, while basically leaving intact the regulations for the remaining unconventional EUTMs. Indeed, it seems that, with their availability and at the same time scarcity, they can contribute to competitiveness by being an extra marketing tool for special goods, services and their features.

Further, one can recommend a deeper study of the feasibility and attractiveness of at least one more unconventional type of EUTM – olfactory. This was part of the discussed reform package but was excluded in the end, and no olfactory EUTM has been registered to the present day. Naturally, the product must be different from the label, and thus a perfume smell cannot be a trademark for such perfumes, but if an odour has nothing to do with the product as such, and is merely used for distinguishing and showing that the product is from someone in particular, then the idea of olfactory EUTMs does not seem to be unfounded.

Finally, it appears from individual applications and registrations, as well as entire portfolios, that the distinctiveness test and the capacity test to perform trademark functions are even more important than ever before. Businesses want word EUTMs, but all attractive words and logos (figurative) are already registered and so a second choice of words or other signs are proposed, and they are often weakly distinctive and largely unable to perform the trademark function. Thus, it is a struggle for applicants to pass these tests. If they decide to file applications for unconventional EUTMs, then by the very nature

of these types of EUTMS, the applicants will have to overcome both the abovementioned tests. Logically, this implies great uncertainty. Businesses want to commercialise their products and need to label them in an attractive and informative manner to explain them and increase their competitive advantage. However, the reform did very little, if anything, to increase the predictability of the system and the certainty as to what will pass these tests and receive protection. Perhaps instead of bringing ever newer types, the EU and EU law should make the existing system more predictable and more in touch with the demands of the ultimate stakeholders. So far, the only beneficiaries of the new system of unconventional EUTMs appear to be the largest businesses, which are able to spend vast resources on risky applications for unconventional EUTMs to enrich their already massive portfolios.

Conclusions

The new trademark reform in the EU has significantly changed the prior CTMs/EUTMs regime. It has the ultimate goal of facilitating competitiveness and contributing to the entrepreneurial drive in this respect by reducing registration costs per class and by offering new trademark types. The statistical data generated by the exploration of the EUIPO, along with case studies and a literature review, suggests that the first two years have not provided conclusive confirmation of the fulfilment of this goal. The answers to the three research questions set illustrate that.

Firstly, businesses, at least so far, seem not to be fully responsive to the new financial incentive for a one-class trademark application. One-class EUTMs can hardly be attractive because they dramatically reduce the reach of protection and indirectly cripple future product development. As a matter of fact, they are anti-competitive

in the long term. Academia has made note of it, while businesses are intuitively aware of it and (correctly) often decline to seek to save a mere EUR 50 in the process.

Secondly, new trademark types covering untraditional trademarks, such as colour marks, sound marks, motion marks, multimedia marks and hologram marks, are a nice option, but not relevant to every EUTM applicant. They often demand much more effort and investment than traditional EUTM applications, and their registration is a highly risky business. So they are "something extra for the richest and biggest" businesses and cannot really stimulate competitiveness and vigorous participation in competition by the SMEs and start-ups. Indeed, unconventional EUTMs magnify the differences between businesses and make the large businesses larger and the small businesses smaller and less likely to compete with big businesses.

Thirdly, portfolio trends can be observed. Unconventional EUTMs are very rarely included in trademark portfolios; even if they are, they seldom represent more than 5% of such a portfolio. Even businesses that are most interested in unconventional EUTMs have many more word and figurative EUTMs than unconventional EUTMs. If unconventional EUTMs are presented, then usually only one or two types, and one or two EUTMs of each type, are present. Having a lot of unconventional types of EUTMs or a lot of EUTMs from one unconventional type is extremely rare and is the result of either a very special history or of a mix of various intellectual property assets (3D shape trademark substituting for design, i.e. Toblerone). Further, they indicate that certain industry branches are probably more likely to go for unconventional EUTMs than others, namely telecommunications with their resources and employment of IS/IT.

Data and discussions around these three research questions stimulate recommendations for the improvement of the current system if competitiveness in large businesses, but especially in SMEs and start-ups, is the true goal. The way businesses use the current system indicates that they struggle, i.e. they want to use EUTMs to build and support their competitive advantage and boost their competitiveness but the changes brought by the reform do not help them. Having one class of EUTM and saving EUR 50 is not a viable pro-competitive option due to the high risk of unfair competition and the exclusion of future product expansion and variation. It would be far better to keep prices as they were and add one class for free. Registering unconventional EUTMs is not a viable pro-competitive option due to the uncertain result implied by the highly unpredictable operation of the distinctiveness test and the capacity test to perform trademark functions. It would be better to clarify the regime, setting and application of these tests so that businesses could realistically plan their marketing and build their labeling strategy.

To sum up, so far there have not been longitudinal studies and data pertaining to the operation and impact of the reform; nevertheless one may already propose the hypothesis that the effectiveness and efficiency of the reform in terms of supporting the entrepreneurial drive for competitiveness is questionable, and undermined by the lack of consideration for the genuine preferences and interests of businesses, as well as the reduced awareness of the new regime and the inherent unpredictability related to the registration of EUTMs, especially the newly introduced unconventional EUTMs.

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Dr. Radka MacGregor Pelikánová, MBA, has a strong legal, business management and economic academic background, with professional experience gained in the Czech Republic, France and the United States. She is a lawyer licensed to practice in the Czech Republic and Michigan and an economist with over 20 years' experience as an intellectual property (IP), business, competition and corporate social responsibility (CSR) expert. She has more than 10 years of experience as an academic lecturer, researcher and prolific writer of eight books and over 100 articles, 30 of them published in journals classified in the WoS and/or Scopus database.

Robert MacGregor, MBA, is a graduate of Eastern Michigan University with an MBA in Finance and BA in Accounting. He has extensive business experience in management, retail and real estate. In Michigan, he has published more than 50 articles in various magazines and four books. Over the last five years, he has engaged more intensively in academic lecturing, giving public speeches and publishing articles on international trade, SMEs, IS/IT, sustainability and USA-EU relationships.