

**DECISION**  
**of the Fifth Board of Appeal**  
**of 20 March 2025**

In case R 1603/2024-5

**Chanel**

135, avenue Charles de Gaulle  
92200 Neuilly sur Seine  
France

Opponent / Appellant

represented by Jérôme Passa, 32 rue Fortuny, 75017 Paris, France

v

**Simb d.o.o.**

Šentvid pri Stični 14  
1296 Šentvid pri Stični  
SI - Slovenia

Applicant / Defendant

APPEAL relating to Opposition Proceedings No B 3 203 223 (European Union trade mark application No 18 872 562)

**THE FIFTH BOARD OF APPEAL**

composed of V. Melgar (Chairperson and Rapporteur), Ph. von Kapff (Member) and R. Ocquet (Member)

Registrar: H. Dijkema

gives the following

## Decision

### Summary of the facts

- 1 By an application filed on 9 May 2023, Simb d.o.o. ('the applicant') sought to register the figurative sign



as a European Union trade mark ('EUTM') for the following list of goods:

Class 3: *Nail strengtheners; Nail polish base coat; Nail conditioners; Nail varnish; Nail glitter; Nail polish top coat; Nail art stickers; Fingernail tips; Gel nail removers; Nail base coat [cosmetics]; Shower creams; Moisturising creams; Cosmetic creams; Anti-freckle creams; Perfumed creams; Conditioning creams; Suntan creams; Depilatory creams; Creams for cellulite reduction; Microdermabrasion polish; Foams for use in the shower; Cleansing mousse; Cleansing foam; Bath foam; Cuticle conditioners; Cuticle removers; Cuticle softeners; Nail whiteners; Glue for strengthening nails; Lotions for strengthening the nails; Fingernail sculpturing overlays; Preparations for reinforcing the nails; Adhesives for affixing artificial fingernails; Cosmetic preparations for nail drying; Pedicure preparations; Skin care creams, other than for medical use; Deodorants for the feet; Suncare lotions; Cleaning sprays; Scouring substances; Exfoliants; Grains for buffing; Gel scrub; Exfoliant creams; Foot scrubs; Face scrubs (Non-medicated -); Facial scrubs [cosmetic]; Body scrub; Facial peel preparations for cosmetic use; Exfoliants for the cleansing of the skin; Moisturising creams, lotions and gels; Cosmetics in the form of gels; Shampoo-conditioners; Smoothing emulsions for the skin; Facial emulsions; Eyebrow cosmetics; Colour cosmetics; Self tanning creams [cosmetic]; Cosmetic creams and lotions; Colour cosmetics for children; Tonics [cosmetic]; Toning creams [cosmetic]; Cosmetic nourishing creams; Cosmetic preparations for eyelashes; Self tanning lotions [cosmetic]; Powder compacts [cosmetics]; Cosmetic rouges; Cosmetics; Hand lotions; Hand cleansers; Hand powders; Cleaning agents for the hands; Beauty serums; Serums for cosmetic purposes; Anti-ageing serum for cosmetic use; Facial serum for cosmetic use; Skin relief serum [cosmetic]; Skin calming serum; Non-medicated skin serums; Tissues impregnated with essential oils, for cosmetic use; Cosmetic oils for the epidermis; Ethereal oils; Bath fizzies; Bath soak for cosmetic use; Bath oils for cosmetic purposes; Bubble bath; Bath flakes; Body splash; Body lotions; Body emulsions; Body glitters; Sparkling fluid for the body; Scented body lotions; Body moisturisers; Hand creams; Cosmetic hand creams; Hand lotion (Non-medicated -); Anti-ageing serum.*

- 2 The application was published on 14 June 2023.

- 3 On 13 September 2023, Chanel ('the opponent') filed an opposition against the registration of the published trade mark application for all the above goods.
- 4 The grounds of opposition were those laid down in Article 8(1)(b) EUTMR.
- 5 The opposition was based on the following two earlier rights:
  - a) French trade mark registration No 98 755 754 (**earlier mark 1**)

**5**

filed and registered on 22 October 1998 for goods in Classes 3, 18 and 25. The opposition is based on the following goods:

Class 3: *Soaps; perfumery; essential oils; cosmetics; hair lotions; dentifrices.*

- b) French trade mark registration No 1 293 767 (**earlier mark 2**)

**N° 5**

filed and registered on 27 December 1984 for goods in Classes 1, 2, 3, 5, 7, 9, 14, 16, 17, 18, 20, 21, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34 and 44. The opposition is based on the following goods:

Class 3: *Bleaching preparations and other substances for laundry use; cleaning, polishing, scouring and abrasive preparations; perfumery; extracts (perfumes); perfumed toilet waters; colognes; scented lotions; powders; bath powder; talcum powders; sun-tanning preparations; soaps; bath oils; beauty products; soaps; make-up; essential oils; cosmetics; hair products; dentifrices.*

- 6 By decision of 17 June 2024 ('the contested decision'), the Opposition Division rejected the opposition in its entirety on the grounds that there was no likelihood of confusion. It gave, in particular, the following grounds for its decision:
  - For reasons of procedural economy, the examination of the opposition will proceed as if all the contested goods were identical to those of the earlier marks.
  - The goods target the public at large whose degree of attention will be average.
  - Although earlier mark 1 is a figurative mark, its only digit is depicted in standard typeface, without any additional graphic elements. Therefore, the principles developed in relation to word marks should be applied in respect of this mark (09/09/2010, C-265/09 P, *α* (fig.), EU:C:2010:508, § 25).
  - Earlier mark 2 is a word mark, the protection of which extends to the word indicated in its application, regardless of whether the letter 'N' is depicted in upper or lower case. Either way, the combination of the verbal element 'N' and the degree sign, '°', represents a common typographic abbreviation of the word 'number' (information extracted on 7 June 2024 at [www.larousse.fr/dictionnaires/francais/no/53664](http://www.larousse.fr/dictionnaires/francais/no/53664)).

Therefore, earlier mark 2 will convey the meaning ‘number 5’ to the relevant consumers.

- The contested sign depicts the number ‘5’ with a top line that deviates from standard fonts in that it depicts an additional component. This merging of components is unusual and will be noticed by consumers. They will remember it as the sign’s defining feature. Therefore, it is distinctive.
- Consumers will interpret the contested sign as depicting either the letter ‘m’ or the letter ‘n’. Considering that the letter ‘n’ is also present in earlier mark 2, the Opposition Division found it appropriate to focus its analysis of the signs’ similarity on the non-negligible part of the public that will perceive the letter ‘n’. Even though this scenario is far less likely, it cannot be completely discarded, and it represents the best-case scenario for the opponent as the resulting coincidence in this letter will increase the likelihood of confusion.
- Unlike earlier mark 2, the contested sign’s letter ‘n’ will not be taken to mean ‘number’. This is because it lacks the degree sign ‘°’ and is unusually graphically merged with the number ‘5’.
- All the signs contain numbers. Some of them also contain letters. The concept of a number is the number it identifies, unless it suggests another concept such as a specific year. Indeed, signs consisting of single letters have the ability to evoke and represent a particular idea, namely that of a specific letter. Therefore, in principle, signs perceived as a letter of the alphabet are only capable of conveying the ‘generic concept’ of the specific letter (26/03/2021, R 551/2018 G, Device (fig.) / Device (fig.), § 78, 85).
- However, the mere fact that there is a generic term that includes the terms used to describe the semantic content of the signs at issue is not a relevant factor in the context of the conceptual comparison (31/01/2019, T-215/17, PEAR (fig.) / APPLE BITE (fig.) et al., EU:T:2019:45, § 69). The same rules apply to numbers.
- Here, the signs under comparison convey the generic concept of the number ‘5’, to which the contested sign adds the generic concept of the letter ‘n’.
- Neither of these concepts bears any relation with respect to the relevant goods. Therefore, the signs are distinctive.
- The number ‘5’ is not dominant in the contested sign. Indeed, both components are merged into one single graphical element so that one cannot overshadow the other. Moreover, the part of that single element that represents the letter ‘n’ is above the part depicting the number ‘5’.
- None of the signs has an element that could be considered clearly more dominant than other elements.
- Visually, all the signs coincide in the number ‘5’. Earlier mark 1 and the contested sign differ in the latter’s verbal component ‘n’. Earlier mark 2 and the contested sign coincide in the verbal component ‘n’ and the number ‘5’. They differ in the former’s symbol ‘°’. The contested sign differs from both earlier marks in its distinctive

graphical depiction, produced by the merging of its elements. Therefore, visually earlier marks 1 and 2 are similar to the contested sign, at most, to a below-average degree.

- Aurally, all the signs coincide in the pronunciation of the number ‘5’. Earlier mark 1 and the contested sign differ in the pronunciation of the letter ‘n’. Each of these elements will be pronounced as one syllable. Earlier mark 2 and the contested sign also differ in the verbal element ‘n°’ which will be pronounced as the French three-syllable word ‘*numéro*’. Its pronunciation will be substantially longer than that of the contested sign’s counterpart ‘n’ and will have a different rhythm. It will only coincide with the pronunciation of the contested sign’s element ‘n’ in the sound of its first letter. Therefore, earlier mark 1 and the contested sign are aurally similar at most to a below-average degree, whereas aurally earlier mark 2 is similar to a low degree to the contested sign.
- Conceptually, all the signs convey generic concepts of numbers and/or letters. As explained above, if the signs coincide only in the ‘generic concept’ of the specific letter of the alphabet, and there are no other (relevant) concepts to be taken into account, the mere fact that the same letter could serve to describe the signs under comparison is not, in itself, sufficient to establish a conceptual identity or even similarity between those signs (26/03/2021, R 551/2018G, Device (fig.) / Device (fig.), § 79, 85). In such a case, the conceptual aspect will not influence the similarity of the signs, which is the case here.
- According to the opponent, the earlier marks have a reputation and enjoy a high degree of distinctiveness as result of their long standing and intensive use in France in connection with all the goods for which they are registered.
- In the present case, the contested sign was filed on 9 May 2023. Therefore, the opponent was required to prove that the trade marks on which the opposition is based enjoyed a high degree of distinctiveness as a result of long standing and intensive use prior to that date.
- The evidence submitted by the opponent is limited to the following:
  - A printout from the Wikipedia page of a perfume called ‘Chanel N° 5’.
  - A brochure in English indicating the opponent’s name and showing the earlier marks in relation to a perfume.
  - Photographs (included in the opponent’s submission) of further advertising materials showing the earlier trade marks in relation to perfumes and various celebrities. The photographs indicate the celebrities’ names and the respective year. The earliest advertisement dates back to 1957 and the latest is from 2014, which is nine years before the contested sign’s filing date. There is no information as to who added the annotations and when.
  - A photograph (included in the opponent’s submission) of a physical store indicating the opponent’s name and showing the number ‘5’ in red on one of its windows.

- However, according to settled case-law, an extract from Wikipedia lacks certainty as a source of information, since it is drawn from a collective encyclopaedia established on the internet, the content of which may be amended at any time and, in certain cases, by any visitor, even anonymously.
- It is true that some of the advertising material can be used as evidence of the earlier marks' longevity and that the appearance of various celebrities in said materials speaks to the financial means absorbed by the advertising campaigns. However, there is no evidence as to how, when and where the advertising materials were distributed; in particular, if they ever reached consumers in the relevant territory, or if the marketing campaigns were limited to other geographical areas of the world. Notably, the brochure attached as an annex to the opponent's submission is in English. While the annotations to photographs included in that submission are indeed in French, they are all in the same style, which means that they were added retrospectively, after the respective marketing campaigns. Therefore, they cannot serve as evidence that the promotional materials were distributed in France.
- Moreover, most of the evidence dates back to previous decades. There is no indication as to whether the earlier marks were still in use and being promoted on the date of the contested sign's application. The opponent has not provided any information as to the market share held by the earlier trade marks. In fact, no evidence was submitted to show that perfumes using these marks have been purchased, let alone in sufficient quantities to justify enhanced distinctiveness being attributed to the earlier marks.
- Therefore, the Opposition Division cannot draw conclusions as to how many consumers were actually exposed to the earlier trade marks, whether the advertising materials were presented to consumers in the relevant territory and to what extent the consumers in the relevant territory recognise the earlier marks and associate them with the relevant goods.
- The photograph of the physical shop does not allow any conclusions as to its location and does not show any of the relevant goods.
- Finally, the opponent's observations refer to further marketing efforts such as film-like commercials for which the opponent has not provided any evidence at all.
- Reputation or enhanced distinctiveness of a mark cannot be considered to be a well-known fact. In other words, the Opposition Division must disregard any private knowledge it might have of the enhanced distinctiveness of the earlier trade marks and limit its assessment solely to the evidence on file. However, the evidence on file does not suffice to prove any level of distinctiveness exceeding the earlier marks' inherent normal degree of distinctiveness.
- Consequently, the assessment of the distinctiveness of the earlier mark will rest on its distinctiveness *per se*. In the present case, the earlier trade marks as a whole have no meaning for any of the goods in question from the perspective of the public in the relevant territory. Therefore, their distinctiveness must be seen as normal.
- Overall, the differences between the signs are striking and will be remembered. The effect of this difference is further reinforced by the fact that the signs are short. Small differences in short words frequently lead to a different overall impression. The

contested sign is, to a great extent, characterised by the merging of its verbal component 'n' with the number '5' into a single graphical element. Its depiction is unusual and will immediately affect the perception of consumers, who will retain it in their memories and look for it when they are looking for the contested sign and the goods whose commercial origin it marks. They will not find it in the earlier marks and will conclude that they designate goods of a different commercial origin.

- It remains necessary to consider the opponent's argument that the earlier trade marks, all characterised by the presence of the same component, '5', constitute a family of marks or marks in a series.
- The opponent failed to prove that it uses a family of '5' marks, and moreover that it uses such a family in the same fields as those covered by the contested sign. The evidence filed by the opponent, as seen above, shows just two marks, namely the earlier marks on which its opposition is based. However, the evidence submitted by the opponent does not suffice to prove that these marks are indeed in use as it is limited to outdated promotional materials with no reference to the relevant territory and does not show any evidence of actual purchases of the goods. The opponent's observations state that it owns a third mark without providing any evidence that it is in use.
- Considering all the above, even assuming that the goods are identical, there is no likelihood of confusion. Therefore, the opposition must be rejected.
- This absence of a likelihood of confusion equally applies to the part of the public for which the contested sign's verbal element is perceived as including the letter 'm', and not 'n'. This is because, for that part of the public, the signs will not coincide in the letter 'n' at all. Consequently, they will perceive the contested sign as being even less similar to earlier mark 2.

7 On 8 August 2024, the opponent, filed an appeal against the contested decision, requesting that the decision be entirely set aside. The statement of grounds of the appeal was received on 16 October 2024 and it included the following evidence:

- Appendix 1: Exhibit 3 before the Opposition Division. Parfums N° 5 on the commercial website [www.chanel.com](http://www.chanel.com).
- Appendix 2: Exhibit 2 before the Opposition Division. Wikipedia.org pages about 'Chanel N° 5'.
- Appendix 3: Advertising films for 'N° 5', now available on YouTube (in particular from France).
- Appendix 4: Advertising campaigns for 'N° 5' involving famous models, actresses and actors.
- Appendix 5: French national press about the perfume 'N° 5'.
- Appendix 6: Outdoor campaigns for 'N° 5' featuring the famous actress Marion Cotillard in France in 2021 and 2022.
- Appendix 7: French national press about the perfume 'N° 5'.

- Appendix 8: French national press on the occasion of the 100th anniversary of the ‘N° 5’ perfume in 2021.
  - Appendix 9: Exclusive stamp collection for the 100th anniversary of ‘N° 5’.
  - Appendix 10: Exhibitions in museums in Paris in 2013 and 2022/2023.
  - Appendix 11: Books published in France dedicated to ‘N° 5’.
  - Appendix 12: Perfume rankings published by the press in France.
  - Appendix 13: Evidence of use of trade mark ‘N°5’ for cosmetics other than perfumes.
  - Appendix 14: Advertising campaigns in France for a new range of cosmetics launched under the ‘N° 5’ on the occasion of the 100th anniversary of the ‘N° 5’ perfume.
  - Appendix 15: 2014 advertising campaign featuring famous model Gisele Bündchen.
  - Appendix 16: French national press referring to ‘5’.
  - Appendix 17: Exhibition organised in 2022 at the Grand Palais Éphémère in Paris.
  - Appendix 18: Advertisements for ‘N° 5’ perfume in national weekly newspapers and magazines in France (*Elle Décoration*, *F l’art de vivre du Figaro*, *Figaro Madame*, *Le Point*, *M. le magazine du Monde*, *Point de vue*).
  - Appendix 19: Extracts from Chanel’s Instagram account.
  - Appendix 20: Examples of CHANEL’s use of number ‘5’ alone.
- 8 In its response received on 19 October 2024, the applicant requested that the appeal be dismissed.

### **Submissions and arguments of the parties**

- 9 The arguments raised in the statement of grounds may be summarised as follows:
- The Opposition Division conducted a questionable analysis and made several errors of law, notably: (i) after admitting the existence of a similarity between the signs, and not only to a low degree, the contested decision then proceeded to the overall assessment without taking account of its previous conclusion but appearing, on the contrary, to regard the signs as not similar, or only similar to a very low degree, holding in particular that ‘the differences between the signs are striking’; (ii) in the overall assessment, the Opposition Division carried out a new, different and clearly stricter comparison of the signs, focusing much more on the differences between the signs than on their similarities; (iii) although the goods were considered to be identical and the signs similar, at no time did the Opposition Division seek compensation.

- The opponent submits new facts and evidence before the Board of Appeal (Appendixes 3 to 20) seeking to further demonstrate the reputation of the earlier marks of Chanel in relation to *perfumes* and *cosmetics* in France.
- The contested application covers goods in Class 3 that are all *cosmetics*.
- Regulation (EC) No°1223/2009 on cosmetics products defines a ‘cosmetic product’ (Article 2.1 a)) as ‘any substance or mixture intended to be placed in contact with the external parts of the human body (epidermis, hair system, nails, lips and external genital organs) or with the teeth and the mucous membranes of the oral cavity with a view exclusively or mainly to cleaning them, perfuming them, changing their appearance, protecting them, keeping them in good condition or correcting body odours’.
- All the contested products fall within this definition and are then *cosmetics* and the two earlier marks cover *cosmetics*. The goods are therefore strictly identical.
- In addition, the two earlier marks cover *perfumery*.
- According to the aforementioned definition in Regulation No 1223/2009, a cosmetic product is ‘any substance or mixture intended to be placed in contact with the external parts of the human body (...) with a view exclusively or mainly to (...) perfuming them (...)’. Thus, *perfumery products* belong to the category of *cosmetics*.
- As all the contested products are cosmetics, the conflicting goods all belong to the category of *cosmetics* and are therefore similar to a high degree.
- The goods target the public at large, whose degree of attention will be average. The relevant territory is France.
- Overall, there is a higher than average degree of similarity between the signs. Although there are certain differences between the signs, the distinctive character of the common and central element ‘5’ means that the impact of these differences must be considered as limited and, in any case, not exaggerated.

### Comparison of the signs **5** and **5**

- Visually, both signs consist of one and the same number: the number ‘5’. The contested sign’s additional element, merging with the top-line of the number ‘5’, is admittedly unusual in representing the number ‘5’. However, in the overall impression produced by that sign, that additional element does not stand out in the eyes of the relevant public as having a specific meaning. This additional element is likely to be perceived: (i) either as purely graphic or ornamental, with no meaning whatsoever, (ii) as the graphic representation of real elements such as the bristles of a brush (for powder or varnish) or an eyelash brush - which seems likely since the sign is intended to be affixed to cosmetic products, (iii) or as the representation of a letter, such as an ‘m’ or an ‘n’.
- There is no way of knowing which representation is more likely to be perceived by the relevant public and, in any event, to state that the public will necessarily or

primarily perceive the additional element as a representation of the letter ‘m’ or ‘n’. The applicant has not provided any evidence to that effect, and the application for registration does not provide any description of the sign.

- Said additional element, while not insignificant in the overall impression produced by the contested sign, is of limited importance because of its secondary place in the overall impression and its merger with the top-line of the number ‘5’, that element being incapable, in itself, of diverting the attention of the relevant public concerned from the admittedly stylised but clear representation of the number ‘5’.
- The signs must be regarded as visually similar to a high degree, and at least to a degree between high and average. The distinctive and prominent character of the common and central element ‘5’ means that the visual impact of their differences must be considered as limited. In holding that the signs are visually similar only to a below-average degree, the Opposition Division gave excessive visual prominence to the additional graphic element of the contested sign.

#### *Aural similarity*

- The earlier mark is pronounced as the number ‘5’. The contested sign necessarily also includes the pronunciation of the number ‘5’. Because its additional element, constituting the top-line of the number ‘5’, has no mandatory or pre-determined meaning for the relevant public, as has been said, its aural significance is indeterminate.
- If the public perceives it as a purely graphic element, perfectly arbitrary, or as the graphic representation of a part of a product, such as the bristles of a brush of a cosmetic product, this element is not pronounced, and its aural position is non-existent.
- If it is perceived as representing the letter ‘m’ or ‘n’, the question arises as to whether, in view of its secondary position in the overall impression produced by the sign, the public will actually pronounce [5-M] or [5-N]. However, there is nothing to suggest that this is the case.
- In any event, that could be the case only in the event, among others, that the public perceives the additional element as a representation of the letter ‘m’ or ‘n’, which is not necessarily the most likely hypothesis.
- If the relevant public perceives this additional element as a graphic element which is not pronounced, the signs being compared are aurally identical. If the relevant public perceives it as the representation of a letter ‘m’ or ‘n’ and is led to pronounce that letter despite its secondary position in the sign at issue, the signs compared are similar to an average degree.
- A median position between these two hypotheses leads to the conclusion that the signs are aurally similar to a degree between average and high.
- The distinctive and prominent character of the common and central element ‘5’ means that the aural impact of the differences must, in any case, be considered as limited.

- The Opposition Division gave an excessive aural weight to the additional graphic element of the contested sign.

### *Conceptual similarity*

- It may be assumed that the signs directly and clearly evoke the number ‘5’ and the meaning which the public attaches to it as a means of attributing order, rank or identification to a thing.
- Whatever perception the relevant public attaches to the additional graphic element of the contested sign, that element is, in association with the number ‘5’, devoid in itself of any particular meaning and is therefore conceptually neutral. The sign is therefore understood to refer to the number ‘5’.
- It follows that the signs are conceptually identical.
- It follows from the foregoing that the signs **5** and **5<sup>^</sup>** are visually similar to a high degree (at least between high and average), aurally similar to a degree between high and average and conceptually identical.
- The signs must, overall, be regarded as similar to a high degree, and in any event to a higher-than-average degree.

### *Comparison of the signs N°5 and 5<sup>^</sup>*


#### *Visual similarity*

- The combination of the elements ‘N°’ and ‘5’ in the earlier mark is logical and will appear to the public as a single whole, within which the first is only a determinant.
- The contested sign consists of the number ‘5’ with a top line ‘that deviates from standard fonts in that it depicts an additional element’. This additional element, merging with the top-line of the number ‘5’, is unusual in representing the number ‘5’. However, this additional element is not, in the overall impression produced by the sign, intended to be perceived by the relevant public as having a predetermined meaning. It may be perceived as a graphic element devoid of meaning, or as the graphic representation of product parts, such as the bristles of a brush (for powder or varnish) or an eyelash brush, or as the representation of a letter, such as an ‘m’ or an ‘n’.
- It cannot be assumed that one or other of these perceptions is more binding on the relevant public. The applicant has provided no evidence on this point, and the application for registration does not include any description of the sign.
- That additional element, although not negligible in the overall impression produced by the contested sign, nevertheless remains secondary and is not capable, in itself, of diverting the attention of the consumer concerned from the clear representation of the number ‘5’.



- Regardless of the meaning attached to that additional element, the relevant public perceives the sign as a stylised but clear representation of the number ‘5’.
- The visual importance of the earlier mark’s element consisting of the abbreviation ‘N°’, for the word ‘number’, must not be exaggerated. Indeed, this abbreviation is necessarily followed by a figure or number, which is the essential element since it is the figure or number that designates or characterises a thing.
- The French Larousse dictionary defines the word ‘number’ (*‘numéro’*) as: *‘Suivi d’un chiffre, d’un nombre, après un nom, désigne une chose, une entité par le nombre qu’on leur a attribué (s’abrège en n°): Chambre numéro 2’* ([www.larousse.fr/dictionnaires](http://www.larousse.fr/dictionnaires)) (*‘Followed by a number, after a name, designates a thing, an entity by the number assigned to it (abbreviated to n°): Room number 2’*).
- Thus, in the sign ‘N° 5’, the ‘N°’ element refers directly to the number ‘5’ and emphasises its importance by specifying the number assigned. Consequently, without being dominant, given the non-negligible nature of the ‘N°’ element, the number ‘5’ is, within the earlier mark, the element that most attracts the public’s visual attention.
- To take the example of the online Larousse dictionary mentioned above, it is perfectly equivalent in French to say *‘Chambre n° 2’* or *‘Chambre 2’* (*‘Room n° 2’* or *‘Room 2’*); the point being to specify the number of the room, which is ‘2’.
- If it were considered that the graphic element, constituting the horizontal part of the ‘5’ in the contested mark, were likely to be perceived as the letter ‘N’, this would visually create, due to the similarity with the ‘N°’ element in the earlier mark, an additional factor of global similarity between the marks.
- For these reasons, the signs must be regarded as visually similar to an average degree.
- The distinctive and prominent character of the common and central element ‘5’ in the conflicting signs means that the visual impact of their differences must be regarded as limited and, in any case, not be exaggerated.

#### *Aural similarity*

- The signs coincide in the pronunciation of the number ‘5’.
- In the earlier mark ‘N° 5’, admittedly made up of two elements, the aural emphasis in French is necessarily placed more on the number ‘5’, which provides the information expected following the use of the abbreviation ‘N°’, which is not used on its own.
- When a consumer orders a perfume or cosmetic with the brand name ‘N° 5’ or tells the hotel receptionist that his room is ‘N° 2’, in both cases it is the number that is the important term and on which the tonic accentuation is placed.
- Without being dominant, the pronunciation of the number ‘5’ is phonetically prominent.

- In the contested sign , the arbitrary graphic element integrated into the top-line of the number ‘5’ has no pre-determined meaning for the relevant public, who may perceive it in different ways.
- If the public perceives it as an arbitrary graphic element, or as the graphic representation of a part of a product, such as the bristles of a brush for a cosmetic product, that element is not pronounced, and its aural place is non-existent. The signs are therefore highly similar.
- If it is perceived as a representation of the letter ‘m’ or ‘n’, there is no reason to believe that, given the overall impression produced by the sign, the public will actually pronounce [M-5] or [N-5]. If that were nevertheless the case, although it is not the most likely hypothesis given the secondary position of the element perceived as a letter, the signs should be regarded as similar to an average degree, or at least to a below-average degree.
- A median position between these two hypotheses leads to the conclusion that the signs are aurally similar to an average degree.
- The distinctive and prominent character of the common and central element ‘5’ means that the aural impact of the differences must be regarded as limited and, in any case, not be exaggerated.

#### *Conceptual similarity*

- It must be considered that the signs are very similar in that they convey the same meaning through the means of attributing an order, rank or identification to a thing.
- On the one hand, in the earlier mark N°5, the element ‘N°’ has no autonomy; its sole purpose is to indicate that it is followed by a number or figure, in this case the number ‘5’, which constitutes the essential information conveyed by the sign and the means of identifying the thing.
- To quote the example of the online Larousse dictionary again, it is perfectly equivalent in French to say ‘Chambre n° 2’ or ‘Chambre 2’. The essential thing is to indicate the number ‘2’ of the room: the presence or absence of the sign ‘n°’ is conceptually neutral. Thus, in the earlier mark, the meaning is conveyed by the number ‘5’, used as a means of designating a thing or identifying it by the number assigned to it.
- On the other hand, whatever the perception the relevant public attaches to the additional graphic element of the contested sign, that element is, in association with the number ‘5’ devoid in itself of any particular meaning and therefore neutral in conceptual terms. The sign is thus perceived as a stylised number ‘5’.
- It follows that, conceptually, the signs are identical or highly similar.
- It follows from the foregoing that the signs N°  and  are visually similar to an average degree, aurally similar to an average degree, conceptually identical, or similar to a high degree. Overall, the signs are, globally, similar at least to an average degree.

- In the global assessment, the Opposition Division did not consider whether the identity of the goods, as accepted, could compensate for the similarity of the signs at issue, which it found to be insufficient.
- The strict identity of the goods necessarily offsets a similarity of the signs which, despite what has been demonstrated, would be considered only average or below average between the signs **5** and **5**, or between the signs N° 5 and **5**.

*Enhanced distinctiveness of the earlier trade marks*

- It is not disputed that the distinctiveness per se of the earlier marks is, at least, normal.
- Chanel argued that, at the time of filing of the contested EUTM application (9 May 2023), the earlier marks had acquired enhanced distinctiveness as a result of their reputation due to a long standing and intensive use in France in connection with the goods for which they are registered, especially cosmetics and perfumery, and to Chanel's advertising efforts to promote them.
- In particular, at that time, the earlier marks were known in France to a significant proportion of cosmetics and perfumery customers.

*Reputation of earlier trade mark 'N° 5'*

*Perfumes*

- Launched in 1921, the perfume 'N° 5' by Chanel is still unanimously considered to be the world's most famous perfume. The French press has been pointing this out for decades and reminded it again on the occasion of the perfume's 100<sup>th</sup> anniversary, celebrated in 2021.
- Popularised by Marilyn Monroe in 1954, entered into the permanent collections of the New York museum MoMA in 1959, the 'N° 5' perfume has never ceased to enjoy an extraordinary reputation, throughout the world, and especially in France where it has been marketed and known for more than 100 years (Appendixes 1 to 2 also submitted before the Opposition Division).
- Over and above the intrinsic quality of the product and its prestige linked to its origins, this considerable reputation has been supported by numerous advertising campaigns in France, in the press, outdoor and on television, featuring world-famous actresses and models: Catherine Deneuve (1973), Carole Bouquet (1993 and 1994), Estella Warren (1998), Nicole Kidman (2005), Audrey Tautou (2009), Brad Pitt (2012), Gisele Bündchen (2014), Lily-Rose Depp (2016), Marion Cotillard (2020 to 2022), Margot Robbie (2024) (See Appendices 3, 4 and 5).
- In 2021 and 2022, poster outdoor campaigns featuring the famous actress Marion Cotillard resulted in significant billposting in Paris and other French cities, in the streets (near department stores) and in airports (Appendix 6).

- Between December 2020 and January 2023, large-circulation national weekly newspapers in France (*Elle Décoration*, *F l'art de vivre du Figaro*, *Figaro Madame*, *Le Point*, *M. le magazine du Monde*, *Point de vue*) ran single or double-page advertisements for 'N° 5' perfume featuring the actress Marion Cotillard (Appendix 18).
- On Chanel's Instagram account, which has 60 million followers, posts about the 'N° 5' perfume are liked by between 50 000 and 80 000 people (Appendix 19).
- The 'N° 5' perfume advertising films were broadcasted on television between 2011 and 2020, and uploaded on YouTube at the same time, and are available on YouTube since then. In 2023, they had between 4 and 20 million views on YouTube depending on the film (Appendix 3, reference is made to 10 films).
- The French national press has always pointed out that the perfume 'N° 5', often described as mythical, has been the best-selling perfume in the world for decades and enjoys exceptional prestige and reputation throughout the world, and particularly in France (Appendix 7, reference is made to eight articles in French dated 2004-2024).
- On the occasion of the 100th anniversary of the 'N° 5' perfume in 2021, the French national press once again highlighted the exceptional reputation of this iconic perfume (Appendix 8, reference is made to three articles dated 2021).
- For this 100th anniversary of the 'N° 5' of Chanel, an exclusive stamp collection has even been created in collaboration with La Poste (2021): available in 2 500 000 units (20 g), 1 200 000 units (100 g) or 550 000 units (stamps block) (Appendix 9).
- The reputation of the 'N° 5' perfume is such that exhibitions have been dedicated to this mythical product in famous museums in Paris in 2013 (*Palais de Tokyo*) and late 2022-early 2023 (*Grand Palais Ephémère*) with press coverage (Appendix 10).
- In France, books have also been specifically dedicated to the 'N° 5' perfume (Appendix 11).
- 'N° 5' always appears at the top of the rankings published by the press in France (Appendix 12, two articles dated 2011 and 2024).
- It follows from all of these facts and evidence that the 'N° 5' trade mark enjoys an exceptional reputation for perfumery products in France for decades. This reputation clearly existed at the time the contested sign application was filed in May 2023.

### *Cosmetics*

- The 'N° 5' trade mark also enjoys a very high reputation in France for *cosmetics - other than perfumes*.
- On the one hand, this mark has long been used extensively in France and around the world to designate cosmetics such as creams, shower gels, lipsticks and powders (Appendix 13).

- On the occasion of the 100th anniversary of the ‘N° 5’ perfume, a new range of cosmetic creams was launched under the ‘N° 5’ trade mark and gave rise to extensive advertising campaigns in France, notably through billboards (Appendix 14).
- Consequently, the exceptional reputation in France of the ‘N° 5’ trade mark for a perfume applies to the category of cosmetics to which this product belongs.

### *Reputation of earlier trade mark **5***

- Earlier mark **5** also benefits from a strong reputation for perfumes and cosmetics. The ‘N° 5’ trade mark itself is so well known that Chanel often uses the trade mark **5**, alone or in isolation, to refer to or evoke this mythical mark (Appendix 20). This is the case in national advertisements, such as the 2014 campaign with famous model Gisele Bündchen (Appendix 15).
- As a result, the press refers to mark **5** for example, on the cover of the magazine *NUMERO* with the model Lilly-Rose Depp; the newspaper *Le Monde* headlines, in 2021, ‘5, chiffre de légende’ - ‘5, legend number’. The famous Chanel N°5 fragrance celebrates its 100<sup>th</sup> anniversary. To pay tribute to it, the House has imagined a high jewelry collection composed of 123 pieces.’ (See Appendix 16).
- The sign **5** is also used on the stamps specially issued for the mark’s 100th anniversary (Appendix 9) and has been widely reproduced for the exhibition organised in 2022 at the *Grand Palais Éphémère* in Paris (Appendix 17).

### *Reputation acquired through use of trade mark ‘N° 5’*

- In earlier mark ‘N° 5’, the ‘N°’ element refers directly to the number ‘5’ and emphasises its importance by specifying the number assigned. This number ‘5’ is therefore the element that attracts the public’s visual attention the most. That is why Chanel and the press regularly use the sign **5** alone.
- Consequently, the reputation of trade mark ‘N° 5’ for perfumes and cosmetics must also be recognised.

### *Conclusion on the overall assessment of the relevant factors*

- Overall, the contested mark creates a likelihood of confusion with both earlier marks.
- Subsidiarily, it is important to stress that the conclusion would not be different if the distinctiveness of the earlier marks were seen as normal and as having a normal protection. Nor would any factor justify excluding the likelihood of confusion.

10 The arguments raised in response to the appeal may be summarised as follows:

- The various products, symbols, and arguments presented by the opponent, which suggest that there will be a replacement of the logos or symbols of Chanel N° 5 (n°5)

and m5, are fundamentally absurd. Their comparisons of the m5 symbol are excessively generalised and lack precision. Such a comparison is akin to equating one automobile with another simply because both have tires, a steering wheel, and so forth.

- All Chanel products, banners and pictures mentioned have the following sign:



- Customers who wish to purchase the product N° 5 are well aware of what they are buying and know the brand. A customer comparing the m5 symbol with N° 5 will immediately recognise that these do not represent the same brand. Those who are unfamiliar with either product will base their decision solely on factors such as fragrance and application, rather than brand recognition.

### **Reasons**

- 11 All references made in this decision should be seen as references to the EUTMR (EU)No 2017/1001 (OJ 2017 L 154, p. 1), codifying Regulation (EC) No 207/2009 as amended, unless specifically stated otherwise in this decision.
- 12 The appeal complies with Articles 66, 67 and Article 68(1) EUTMR. It is admissible.

#### *Scope of the appeal*

- 13 The opponent appealed the contested decision in its entirety, as the opposition was rejected for all the contested goods (Article 67, first sentence EUTMR).
- 14 Therefore, the Board will assess the contested decision in full.

#### *Admissibility of the evidence submitted before the Board of Appeal*

- 15 According to Article 95(2) EUTMR, the Office may disregard evidence that is not submitted in due time by the party concerned.
- 16 Pursuant to Article 27(3)(b) EUTMDR, the examination of the appeal shall include the following claims or requests provided that they have been raised in the statement of grounds of the appeal or, as the case may be, in the cross appeal and provided that they were raised in due time in the proceedings before the instance of the Office which adopted the decision subject to appeal: [...] (b) recognition of the earlier trade mark on the market acquired through use for the purposes of Article 8(1)(b) of Regulation (EU) 2017/1001.
- 17 Pursuant to Article 27(4) EUTMDR, the Board of Appeal may accept facts or evidence submitted for the first time before it only where those facts or evidence meet the following requirements: (a) they are, on the face of it, likely to be relevant for the outcome of the case and (b) they have not been produced in due time for valid reasons, in particular where they are merely supplementing relevant facts and evidence which had already been submitted in due time, or are submitted to contest findings made or examined by the first instance of its own motion in the decision subject to appeal.

- 18 At the appeal stage, the opponent repeated the claim on recognition of both earlier marks on the market acquired through use and submitted evidence to support this claim (Appendixes 1 to 2 submitted before the Opposition Division and Appendixes 3 to 20 submitted with the statement of grounds, all listed in paragraph 7).
- 19 The applicant did not contest the admissibility of the relevant claim and evidence.
- 20 In the present case, the conditions for accepting the belated evidence submitted by both parties at the appeal stage have been met. The documents submitted before the Boards of Appeal refer to the requirements of Article 8(1)(b) EUTMR. The information and evidence produced at the appeal stage by the opponent are supplementary to the arguments and documents presented before the Opposition Division and the Board in relation to the claimed enhanced distinctiveness of the earlier marks, which was examined and rejected by the contested decision. The additional evidence, is also, *prima facie*, relevant for the outcome of the present case, as, among others, the Opposition Division stated that the applicant failed to provide evidence to support the relevant claim. Finally, there is nothing to suggest negligence or delaying tactics in the present case (18/07/2013, C-621/11 P, Fishbone / FISHBONE BEACHWEAR (fig.), EU:C:2013:484, § 36).
- 21 It follows that the applicable criteria for accepting the belated evidence under Article 95(2) EUTMR in conjunction with Article 27(3)(b) EUTMDR and Article 27(4) EUTMDR have been fulfilled. Therefore, all facts and evidence submitted in relation to the present opposition will be considered as being admissible by the Board.

*Article 8(1)(b) EUTMR (likelihood of confusion)*

- 22 Pursuant to Article 8(1)(b) EUTMR, a European Union trade mark application shall be rejected upon opposition where there is an earlier trade mark as referred to in Article 8(2) EUTMR and if, because of the identity with, or similarity to, the earlier sign and the identity or similarity between the goods or services covered by the trade marks there exists a likelihood of confusion on the part of the public in the territory in which the earlier mark is protected. A likelihood of confusion includes a likelihood of association with the earlier mark.
- 23 According to settled case-law, the risk that the public might believe that the goods or services in question come from the same undertaking or, as the case may be, from economically linked undertakings, constitutes a likelihood of confusion (11/11/1997, C-251/95, Sabèl, EU:C:1997:528, § 16-18; 29/09/1998, C-39/97, Canon, EU:C:1998:442, § 17). For the purposes of applying Article 8(1)(b) EUTMR, a likelihood of confusion presupposes both that the marks at issue are identical or similar and that the goods or services which they cover are identical or similar. Those conditions are cumulative (22/01/2009, T-316/07, easyHotel / EASYHOTEL, EU:T:2009:14, § 42 and the case-law cited).
- 24 In line with the same case-law, a likelihood of confusion must be assessed globally, based on how the relevant public would perceive the marks and the goods and services in question and taking into account all factors relevant to the circumstances of the case (11/11/1997, C-251/95, Sabèl, EU:C:1997:528, § 22; 29/09/1998, C-39/97, Canon, EU:C:1998:442, § 16; 22/06/1999, C-342/97, Lloyd Schuhfabrik, EU:C:1999:323, § 18).

*The relevant public and territory*

- 25 Account should be taken of the average consumer of the goods and services at issue, who is reasonably well informed and reasonably observant and circumspect. The consumer's level of attention is likely to vary according to the category of goods and services in question (22/06/1999, C-342/97, Lloyd Schuhfabrik, EU:C:1999:323, § 26; 13/02/2007, T-256/04, Respicur, EU:T:2007:46, § 42).
- 26 The relevant public is made up of consumers liable to use both the goods and services of the earlier mark and the goods covered by the mark applied for (13/05/2015, T-169/14, Koragel / CHORAGON, EU:T:2015:280, § 25 and the case-law cited).
- 27 When a section of the relevant public consists of professionals with a higher level of attention and another section of the relevant public consists of reasonably observant and circumspect average consumers, the public with the lowest level of attention must be taken into consideration for assessing the likelihood of confusion (25/06/2020, T-114/19, B (fig.) / b (fig.), EU:T:2020:286, § 36).
- 28 All the goods in question are *cosmetics* in Class 3. Cosmetics target the public at large, whose level of attention is at least average. Even though in its 'Caldea' judgment, the Court stated that consumers tend to be attentive in the acquisition of body care products, on the grounds of aesthetic considerations or personal preferences, sensitivity, allergies, type of skin and hair and so forth, as well as the expected effect of the products, and that it is probable that considerable care will be taken in acquiring the goods in question (18/10/2011, T-304/10, CALDEA, EU:T:2011:602, § 58), the majority of the Court's case-law establishes that these goods are considered everyday products that target the public at large who will generally have an average level of attention (08/07/2009, T-240/08, Oli, EU:T:2009:258, § 27; 11/11/2009, T-150/08, Clina, EU:T:2009:431, § 69; 13/09/2010, T-366/07, P&G Prestige beauté, EU:T:2010:394, § 51; 02/02/2011, T-437/09, Oyster cosmetics, EU:T:2011:23, § 23; 14/04/2011, T-466/08, Acno focus, EU:T:2011:182, § 49; 21/02/2013, T-427/11, Bioderma, EU:T:2013:92, § 38; 13/05/2016, T-62/15, MITOCHRON / mito (fig.) et al., EU:T:2016:304, § 22; 07/03/2019, T-106/18, VERA GREEN / Lavera et al., EU:T:2019:143, § 26; 30/06/2021, T-501/20, Panta rhei / Panta rhei, EU:T:2021:402, § 23; 15/09/2021, T-852/19, ALBÉA (fig.) / Balea, EU:T:2021:569, § 35; 02/03/2022, T-715/20, Skinovea / Skinoren et al., EU:T:2022:101, § 22, and the case-law cited).
- 29 Therefore, it seems appropriate to follow the majority of the case-law as regards the goods in Class 3 and to consider that the level of attention of the relevant public at large is at least average (13/09/2023, T-328/22, EST. KORRES 1996 HYDRA-BIOME (fig.) / Hydrabio et al., EU:T:2023:533, § 42-46).
- 30 The earlier marks are two French registrations. Therefore, the relevant territory is France.
- 31 The Board considers it appropriate to first examine the opposition on the basis of earlier mark 2 'N° 5' (which enjoys enhanced distinctiveness for *perfumery* in Class 3, as will be demonstrated below).

*Comparison of the goods*

32 The goods to be compared are the following:

Earlier mark	Contested sign
<p><i>Class 3: Bleaching preparations and other substances for laundry use; cleaning, polishing, scouring and abrasive preparations; perfumery; extracts (perfumes); perfumed toilet waters; colognes; scented lotions; powders; bath powder; talcum powders; sun-tanning preparations; soaps; bath oils; beauty products; soaps; make-up; essential oils; cosmetics; hair products; dentifrices.</i></p>	<p><i>Class 3: Nail strengtheners; nail polish base coat; nail conditioners; nail varnish; nail glitter; nail polish top coat; nail art stickers; fingernail tips; gel nail removers; nail base coat [cosmetics]; shower creams; moisturising creams; cosmetic creams; anti-freckle creams; perfumed creams; conditioning creams; suntan creams; depilatory creams; creams for cellulite reduction; microdermabrasion polish; foams for use in the shower; cleansing mousse; cleansing foam; bath foam; cuticle conditioners; cuticle removers; cuticle softeners; nail whiteners; glue for strengthening nails; lotions for strengthening the nails; fingernail sculpturing overlays; preparations for reinforcing the nails; adhesives for affixing artificial fingernails; cosmetic preparations for nail drying; pedicure preparations; skin care creams, other than for medical use; deodorants for the feet; suncare lotions; cleaning sprays; scouring substances; exfoliants; grains for buffing; gel scrub; exfoliant creams; foot scrubs; face scrubs (non-medicated -); facial scrubs [cosmetic]; body scrub; facial peel preparations for cosmetic use; exfoliants for the cleansing of the skin; moisturising creams, lotions and gels; cosmetics in the form of gels; shampoo-conditioners; smoothing emulsions for the skin; facial emulsions; eyebrow cosmetics; colour cosmetics; self-tanning creams [cosmetic]; cosmetic creams and lotions; colour cosmetics for children; tonics [cosmetic]; toning creams [cosmetic]; cosmetic nourishing creams; cosmetic preparations for eyelashes; self-tanning lotions [cosmetic]; powder compacts [cosmetics]; cosmetic rouges; cosmetics; hand lotions; hand cleansers; hand powders; cleaning agents for the hands; beauty serums; serums for cosmetic purposes; anti-aging serum for cosmetic use; facial serum for cosmetic use; skin relief serum [cosmetic]; skin calming serum; non-medicated skin serums; tissues impregnated with essential oils, for cosmetic use; cosmetic oils for the epidermis; ethereal oils; bath fizzies; bath soak for cosmetic use; bath oils for cosmetic purposes; bubble bath; bath flakes; body splash; body lotions; body emulsions; body glitters; sparkling fluid for the body; scented body lotions; body moisturisers; hand creams; cosmetic hand creams; hand lotion (non-medicated -); anti-ageing serum.</i></p>


33 In assessing the similarity of the goods and services, all the relevant factors relating to those goods and services should be taken into account, including, inter alia, their nature, intended purpose, method of use, and whether they are in competition or complementary

(29/09/1998, C-39/97, Canon, EU:C:1998:442, § 23). Other factors may also be taken into account such as their usual origin and relevant public.

- 34 Goods or services are identical when they are included in a more general category designated by the other mark (13/09/2018, T-94/17, tigha / TAIGA, EU:T:2018:539, § 46; 05/02/2020, T-44/19, TC Touring Club (fig.) / TOURING CLUB ITALIANO et al., EU:T:2020:31, § 91).
- 35 For reasons of procedural economy, the Opposition Division did not undertake a full comparison of the relevant goods and proceeded with the examination of the opposition as if all the goods under comparison were identical.
- 36 The contested *nail strengtheners; nail polish base coat; nail conditioners; nail varnish; nail glitter; nail polish top coat; nail art stickers; fingernail tips; gel nail removers; nail base coat [cosmetics]; shower creams; moisturising creams; cosmetic creams; anti-freckle creams; perfumed creams; conditioning creams; suntan creams; depilatory creams; creams for cellulite reduction; microdermabrasion polish; foams for use in the shower; cleansing mousse; cleansing foam; bath foam; cuticle conditioners; cuticle removers; cuticle softeners; nail whiteners; glue for strengthening nails; lotions for strengthening the nails; fingernail sculpturing overlays; preparations for reinforcing the nails; adhesives for affixing artificial fingernails; cosmetic preparations for nail drying; pedicure preparations; skin care creams, other than for medical use; deodorants for the feet; suncare lotions; cleaning sprays; scouring substances; exfoliants; grains for buffing; gel scrub; exfoliant creams; foot scrubs; face scrubs (non-medicated -); facial scrubs [cosmetic]; body scrub; facial peel preparations for cosmetic use; exfoliants for the cleansing of the skin; moisturising creams, lotions and gels; cosmetics in the form of gels; shampoo-conditioners; smoothing emulsions for the skin; facial emulsions; eyebrow cosmetics; colour cosmetics; self-tanning creams [cosmetic]; cosmetic creams and lotions; colour cosmetics for children; tonics [cosmetic]; toning creams [cosmetic]; cosmetic nourishing creams; cosmetic preparations for eyelashes; self-tanning lotions [cosmetic]; powder compacts [cosmetics]; cosmetic rouges; cosmetics; hand lotions; hand cleansers; hand powders; cleaning agents for the hands; beauty serums; serums for cosmetic purposes; anti-aging serum for cosmetic use; facial serum for cosmetic use; skin relief serum [cosmetic]; skin calming serum; non-medicated skin serums; tissues impregnated with essential oils, for cosmetic use; cosmetic oils for the epidermis; ethereal oils; bath fizzies; bath soak for cosmetic use; bath oils for cosmetic purposes; bubble bath; bath flakes; body splash; body lotions; body emulsions; body glitters; sparkling fluid for the body; scented body lotions; body moisturisers; hand creams; cosmetic hand creams; hand lotion (non-medicated -); anti-ageing serum* fall all in the broader category of cosmetics. Cosmetics in Class 3 are similar to *perfumery* in Class 3 as they have the same purpose (to beautify the human body). They usually coincide in producer, relevant public and distribution channels. They may also be combined in a daily or weekly beauty care routine (compare 20/11/2024, T-482/23, CLEOPATRA / CLEOPATRA, EU:T:2024:838, § 48-56).
- 37 Consequently, the opponent's *perfumery* in Class 3 is similar to an average degree with all the contested goods.

*Comparison of the marks*

- 38 The marks in conflict have to be compared visually, phonetically and conceptually. This comparison must be based on the overall impression given by the marks, bearing in mind, in particular, their distinctive and dominant components (11/11/1997, C-251/95, Sabèl, EU:C:1997:528, § 23; 22/06/1999, C-342/97, Lloyd Schuhfabrik, EU:C:1999:323, § 25; 06/10/2005, C-120/04, Thomson Life, EU:C:2005:594, § 28).
- 39 The perception of the marks by the average consumer of the goods and services in question plays a decisive role in the global assessment of the likelihood of confusion. In this regard, the average consumer normally perceives a mark as a whole and does not engage in an analysis of its various details (12/06/2007, C-334/05 P, Limoncello della Costiera Amalfitana shaker (fig.) / LIMONCHELO, EU:C:2007:333, § 35 and the case-law cited; 25/10/2023, T-458/21, Q (fig.) / Q (fig.), EU:T:2023:671, § 26).
- 40 Although the comparison must be based on the overall impression made by the signs on the relevant public, account must nevertheless be taken of the intrinsic qualities of the signs at issue (04/03/2020, C-328/18 P, BLACK LABEL BY EQUIVALENZA (fig.) / LABELL (fig.) et al., EU:C:2020:156, § 71).
- 41 For the purpose of assessing the distinctive character of an element of a mark, an assessment must be made of the greater or lesser capacity of that element to identify the goods or services as coming from a particular undertaking, and therefore to distinguish them from those of other undertakings. In making that assessment, it is necessary to take into account, in particular, the inherent characteristics of that element and to ascertain whether it is at all descriptive of the goods or services in question (03/09/2010, T-472/08, 61 A NOSSA ALEGRIA / CACHAÇA 51 et al., EU:T:2010:347, § 47; 05/10/2020, T-602/19, Naturanove / Naturalium et al., EU:T:2020:463, § 27; 17/03/2021, T-186/20, The time / Timehouse, EU:T:2021:147, § 32).
- 42 The consumer will not artificially dissect a sign into various elements (06/03/2015, T-257/14, BLACK JACK TM, EU:T:2015:141, § 39); signs can only be dissected if there are clear indications on how to dissect them (26/03/2021, R 551/2018-G, Device (fig.) / Device (fig.) § 46). A sign will be broken down into elements if they suggest a concrete meaning or resemble words known to the relevant public (13/02/2007, T-256/04, Respicur, EU:T:2007:46, § 57; 26/03/2021, R 551/2018-G, Device (fig.) / Device (fig.) § 45).
- 43 The signs to be compared are:

N° 5	
<i>Earlier mark</i>	<i>Contested sign</i>

- 44 Earlier mark ‘N° 5’ is a word mark. The protection that results from registration of a word mark concerns the word mentioned and not the specific graphic or stylistic elements accompanying that mark (13/02/2007, T-353/04, CURON / EURON, EU:T:2007:47, § 74; 18/11/2020, T-21/20, K7 / K7, EU:T:2020:550, § 40). It follows that a word mark may be used in any form, in any colour or font type (23/03/2022, T-146/21, Deltatic / Delta, EU:T:2022:159, § 56). The combination of the verbal element ‘N’ and the degree sign, ‘°’, represents a common typographic abbreviation of the word ‘number’ (see [www.larousse.fr/dictionnaires/francais/no/53664](http://www.larousse.fr/dictionnaires/francais/no/53664), accessed on 28/01/2025). Therefore, earlier mark 2 will convey the meaning ‘number 5’ to the relevant consumers.
- 45 The element ‘5’ conveys the meaning of that numeral, which, in relation to the relevant goods in Class 3 (cosmetics and perfumery) may be perceived as a serial number or as the number of a product line rather than as an indicator of commercial origin. Therefore, the element ‘5’ is inherently weak.
- 46 Single numbers, as single letters, should not be given extensive and broad protection. Consumers will, in general, not attribute commercial origin to numerals due to the omnipresence of numerals in trade to designate the number of items, volume, weight, size, edition, time, etc. General experience shows that consumers are exposed to a multitude of stylisations of the same single number, so that they are accustomed to identifying commercial origin by the particular figurative arrangement.
- 47 Due to the usual perception of single-number signs by the relevant public, even if the particular number has no meaning in relation to the goods and services, it has, in principle, a low degree of distinctiveness where it is not stylised or is only slightly stylised.
- 48 Accordingly, in the present case, earlier mark ‘N° 5’, not being stylised at all and directly depicting a numeral as such (‘number 5’) is of a low distinctive character per se.
- 49 The contested sign depicts the number ‘5’ with a top line that depicts an additional component. This merging of components, although slightly stylised, does not prevent the consumers from clearly recognising the number ‘5’. Consumers will interpret the contested sign as depicting ‘m5’ or ‘n5’. It follows that the contested sign as a whole is also inherently weakly distinctive.
- 50 It is in the light of those considerations that the similarities between the signs under comparison must be assessed.
- 51 **Visually**, the signs are highly similar. The signs are similar insofar as they consist of the same single numeral, namely the number 5, which is clearly identifiable in both signs, and the earlier mark additionally coincides in the verbal element ‘n’ with the contested sign. The signs slightly differ in their graphic stylisation, i.e. the earlier mark also contains the symbol ‘°’, and the contested sign has a slight graphical depiction, produced by the merging of its elements.
- 52 **Phonetically**, the signs are similar to an average degree overall, because the earlier mark and the contested sign will be pronounced in the same way as representations of the number 5, and the ‘N°’ (pronounced as *numéro*) will bring the signs closer phonetically for the non-negligible part of the public that will perceive an ‘n’ in the contested sign. The signs will have a different rhythm in their pronunciation (*numéro cinq* / *n cinq*).

- 53 **Conceptually**, the signs are identical, because the coinciding number 5 has a specific meaning in relation to the goods in Class 3 (cosmetics), being perceived as a serial number or as the number of a product line goods.
- 54 In light of the above, the conflicting signs are visually highly similar, phonetically similar to an average degree and conceptually identical.

*Distinctiveness of earlier mark 'N° 5' - Enhanced distinctiveness acquired through use*

- 55 Account should be taken of the inherent characteristics of the mark, including whether or not it contains an element that is descriptive of the goods and services for which it has been registered, and other criteria – in particular, how intensive, geographically widespread and long-standing the use of the mark has been (22/06/1999, C-342/97, Lloyd Schuhfabrik, EU:C:1999:323, § 22-23).
- 56 In determining the degree of distinctive character of a trade mark, an overall assessment must be made of the greater or lesser capacity it has to identify the goods or services for which it has been registered as coming from a particular undertaking.
- 57 As such, the distinctive character of a trade mark can only be appraised, firstly, by reference to the goods or services in respect of which registration is sought and, secondly, by reference to the way it is perceived by the relevant public.
- 58 The legislature expressly included signs consisting of one numeral in the list of signs that may constitute an EU trade mark, set out in Article 4 EUTMR, and Articles 7 and 8 EUTMR, relating to refusal of registration, do not lay down any specific rules with regard to signs consisting of one numeral. Thus, one numeral is, in itself, capable of conferring distinctive character on a trade mark (25/10/2023, T-458/21, Q (fig.) / Q (fig.), EU:T:2023:671, § 65 and the case-law cited).
- 59 In the present case, the opponent expressly claimed that earlier mark 'N° 5' is particularly distinctive by virtue of intensive use or reputation. As already stated above, the Opposition Division rejected this claim due to lack of sufficient evidence, and therefore the opponent filed supplementary evidence at the appeal stage (referred to in paragraph 7).
- 60 It is recalled that the existence of a higher-than-normal level of distinctiveness as a result of the public's recognition of a mark on the market necessarily presupposes that at least a significant part of the relevant public is familiar with it, but not necessarily that it has a reputation within the meaning of Article 8(5) EUTMR. It is not possible to state in general terms, for example by referring to specific percentages relating to the degree of recognition attained by the mark within the relevant section of the public, that a mark has a highly distinctive character. Nevertheless, it must be acknowledged that there is a certain interdependence between the public's recognition of a mark and its distinctive character in that the more the mark is recognised by the target public, the more the distinctive character is strengthened.
- 61 In order to assess whether a mark has a highly distinctive character as a result of the public's recognition of it, all the relevant facts of the case must be taken into consideration, in particular the market share held by the mark; how intensive, geographically widespread and long-standing use of the mark has been; the amount invested by the undertaking in promoting the mark; the proportion of the relevant section of the public who, because of

the mark, identifies the goods or services as originating from a particular undertaking; and statements from the chambers of commerce and industry or other trade and professional associations (22/06/1999, C-342/97, Lloyd Schuhfabrik, EU:C:1999:323, § 23; 06/10/2017, T-184/16, SKY ENERGY / NRJ, EU:T:2017:703, § 59-60 and case-law cited; 07/06/2018, T-807/16, N & NF TRADING / NF ENVIRONNEMENT (fig.) et al., EU:T:2018:337, § 61, and the case-law cited; 06/11/2024, T-561/22, CCA CHARTERED CONTROLLER ANALYST CERTIFICATE (fig.) / CFA institute (fig.) et al., EU:T:2024:777, § 146, and the case-law cited).

- 62 It is a matter of assessing the capacity of that mark to identify the goods or services for which it has been registered as originating from a particular undertaking, and thus to distinguish those goods or services from those of other undertakings (06/11/2024, T-561/22, CCA CHARTERED CONTROLLER ANALYST CERTIFICATE (fig.) / CFA institute (fig.) et al., EU:T:2024:777, § 147, and the case-law cited).
- 63 The evidence of enhanced distinctiveness must refer to both the relevant geographical area (France) and the relevant goods in Class 3 (*bleaching preparations and other substances for laundry use; cleaning, polishing, scouring and abrasive preparations; perfumery; extracts (perfumes); perfumed toilet waters; colognes; scented lotions; powders; bath powder; talcum powders; sun-tanning preparations; soaps; bath oils; beauty products; soaps; make-up; essential oils; cosmetics; hair products; dentifrices*).
- 64 Furthermore, the opponent must show that the earlier marks enjoyed enhanced distinctiveness at the filing date of the contested application (9 May 2023).
- 65 The evidence on file dates between 2004-2024 and contains publications in the French national press (e.g. Cosmopolitan, Le Figaro, Le Monde, Le Nouvel Observateur), as well as advertising films (on the opponent's website and on its YouTube channel) and advertising campaigns addressed to the French public and to the public worldwide related to the goods covered in Class 3 (mainly *perfumery*).
- 66 Even though no sales figures or figures relating to market share have been submitted, it is clear from the evidence on file that earlier mark 'N° 5' has been subject to long-standing and intensive use and is generally known in the relevant market, where it enjoys a consolidated position among the leading brands, as has been attested by diverse independent sources. This can be inferred from the many examples of advertising campaigns, some of them featuring French and international celebrities such as Nicole Kidman, Audrey Tautou, Marion Cotillard, Gisele Bündchen, which are a clear indication that the opponent has spent a considerable amount of money in advertising their trade mark and has a consolidated position in the French market (e.g. Appendixes 3, 4, 6, 15, 18). Likewise, the multiple references in the press to the trade mark's success unequivocally show that the mark enjoys a high degree of recognition among the relevant public for *perfumes* in Class 3 (e.g. Appendixes 5, 7, 8, 12, 16).
- 67 Below, in order to better explain how it reached its conclusions, the Board shall provide a few non-exhaustive examples of pieces of evidence which give information on the use of the earlier marks in respect of the goods in Class 3:



N°5, the Film with Gisele Bündchen, Michiel Huisman and Lo-Fang – CHANEL Fragrance



CHANEL N°5, the Film with Marion Cotillard – CHANEL Fragrance

## Le fabuleux destin du N°5

Le parfum le plus vendu au monde change d'égérie. L'occasion de revenir sur le destin d'un monument...

**E**st-ce qu'une nouvelle égérie pour le N°5? Nicole Kidman, son égérie depuis 2004, cède la place à Audrey Tautou. Un acteur de taille pour ce numéro un mondial. Le choix de Tautou pour ce numéro un mondial, porté par les hommes au Moyen-Orient, qui a même enregistré une hausse de 2% en 2008 sur un marché en perte de vitesse. Appelé par Chanel pour réaliser la nouvelle campagne, c'est Jean-Pierre Jeunet qui imagine sa mise. Une vraie stratégie pour la marque qui prend soin de conserver son image mythique tout en restant accessible. Alors la brune chasse la blonde, et l'herosine populaire remplace la beauté hétéroclite. En échantil l'histoire qui a choqué le monde entier avec son rôle de *girl next door* (elle d'a côté dans « Amélie from Montmartre », Chanel agit pour la première fois. Audrey Tautou est une icône moderne dont la fraîcheur juvénile devrait permettre d'attirer dans les petits de vente une génération de jeunes femmes... dont certaines croiseront peut-être au détour d'un coin la nouvelle histoire parfumée du N°5, l'Eau Première, dédiée à celles qui approchent le mythe pour la première fois. Il n'y a pas vraiment de hasard dans le monde de la parfumerie...

Paris, 1921. D'ég, Mademoiselle Chanel crée son style au Tout-Paris. Mais à l'époque, les parfums sont l'apanage des parfumeurs. Forte de ses convictions, « une femme sans parfum est une femme sans avenir », Coco offre les services d'Ernest Beaux, le parfumeur de la cour des tsars, qui imagine le premier Chanel, le N°5.





## CONTE DE FÉES

Il était une fois...  
LE N°5 DE CHANEL

PAR MATHILDE EFFOSSE



**1907** : Gabrielle Chanel, déjà au sommet de sa notoriété, est la première femme à incarner son propre parfum, le N°5. Dans un appartement du Ritz, elle pose face à l'objectif de François Kollar pour une publicité publiée dans Harper's Bazaar.

**1952** : Marilyn Monroe confie ne porter que « quelques gouttes de N°5 » pour dormir. Cet aveu, enregistré quelques années plus tard lors d'une interview accordée au magazine Marie Claire, atteste la légende.



**1910** : Une créatrice de chapeaux de 27 ans ouvre une boutique dans un appartement parisien, Chanel Modes. C'est Gabrielle Chanel, qu'on appelle déjà Coco. La légende est née.

**1921** : Création du parfum N°5 avec le parfumeur Ernest Beaux.

**1934** : Lancement de l'Eau de toilette N°5, « une signature plus légère » selon Olivier Polge, nez actuel de Chanel.



**MoMA 1999** : Consacré par le monde de l'art, la flacon rejoint la collection permanente du Musée d'art moderne de New York.

**À partir des années 1960** : Les plus grandes actrices incarnent le parfum : Catherine Deneuve, Carole Bouquet, Nicole Kidman... Les photographes et réalisateurs qui les shootent sont tout aussi célèbres : Richard Avedon, Patrick Demarchelier, Dominique Issermann, Helmut Newton, Ridley Scott, Baz Luhrmann...



**1980** : Andy Warhol consacre au flacon une déclinaison de neuf sérigraphies, qui confirment son statut d'icône de la pop culture.



**1987** : Totalelement inédit à l'époque, Chanel signe un partenariat avec le plus grand producteur de fleurs local : la famille Mul, basée à Pigonnes. Une histoire d'amitié, mais aussi la sécurisation de la qualité olfactive et de la quantité de fleurs nécessaire au parfum - le jasmin de Grasse, cueilli tous les ans en septembre et octobre.

**2016** : Olivier Polge, parfumeur-créateur de la Maison Chanel, invente une variation guidée par un idéal de fraîcheur.



**2020** : Marion Cotillard incarne à son tour le parfum, sous l'œil créatif de Johan Renck.

## COSMOPOLITAN

BEAUTÉ MODE SEXO PEOPLE PSYCHO LIFESTYLE FORME CULTURE

Accueil &gt; Beauté &gt; Parfum &gt; Les grands noms du parfum

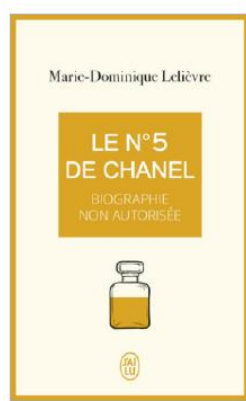
DOSSIER 16 articles

## LES GRANDS PARFUMS



Autrefois utilisé à des fins thérapeutiques ou au cours de rites religieux, le parfum était constitué de fleurs, plantes aromatiques et diverses résines. Au fil des siècles, les parfums ont subi des innovations en lien avec le domaine de l'élégance et du désir. En effet, ce nouveau virage a été marqué par l'association entre la parfumerie et le secteur de la mode au début du XXe siècle. C'est à cette époque-là que de nouvelles fragrances très élaborées et à base de multiples senteurs et ingrédients

synthétiques apparaissent. Dès lors, certains nez ont réussi l'exploit d'élaborer des créations qui sont devenues de grands parfums.





CHRISTMAS 2023 CAMPAIGN - N°5 AT THE HEART OF BOUTIQUES FROM OCTOBER TO DECEMBER



Champs Elysées showcase



Champs Elysées Perfumes



BHV Sales demonstration



Marilyn et N°5 – Inside CHANEL

CHANEL  
2.68M subscribers

Subscribe

21K

Share

Save

...

3,975,473 views 16 Nov 2012 #InsideCHANEL #CHANEL

À la question "Que portez-vous pour dormir?" Marilyn répond "CHANEL N°5". Pourquoi Marilyn a-t-elle prononcé cette phrase qui a fait le tour du monde ? Réponse dans le Chapitre 2 de Inside CHANEL, "Marilyn et N°5" !

<http://inside-chanel.com/fr>



#### Sommaire

- Le top des parfums qui traversent le temps
- Les parfums pour femmes récents les plus populaires

Les marques de parfums lancent régulièrement de nouveaux produits sucrés ou acidulés pour séduire la gent féminine et se démarquer de la concurrence. Valeurs sûres et nouveautés se disputent les premières places du podium.

#### Le top des parfums qui traversent le temps

Certains parfums sont cultes. Tellement cultes qu'ils traversent le temps et se transmettent de génération en génération. Résultat, ils font partis des meilleures ventes en parfumerie.

##### • N°5 de Chanel

Impossible de faire plus mythique. Et même s'il ne domine plus le marché, ce parfum reste indétrônable dans les esprits !

Créé en 1921, il est aujourd'hui en décalage avec **les senteurs plus sucrées** qui inondent le marché. Faudra-t-il changer sa composition pour le remettre au goût du jour ? Pas si sûr, car le Chanel N°5 reste le plus cultissime des parfums.

##### • Shalimar de Guerlain

- 68 Considering the above, the opponent has proven that the relevant general public in France recognises earlier mark 'N° 5' as having an enhanced ability or a high capacity to identify at least part of the goods for which it is registered as coming from a particular undertaking, namely *perfumery* in Class 3 (compare also 22/07/2020, R 2688/2019-2, N° 5 (fig.) / N° 5 (fig.) et al., § 23, recognising the reputation of the same earlier mark in France for *perfumery products* in Class 3).
- 69 Accordingly, the evidence on file suffices to prove an enhanced level of distinctiveness of the earlier mark 'N° 5' from low to average for *perfumery* in Class 3.
- 70 Consequently, the Board concludes that earlier mark 'N° 5' enjoys an average degree of distinctiveness for *perfumery* in Class 3 by virtue of intensive use and recognition in the French market.

#### *Overall assessment of the likelihood of confusion*

- 71 The appreciation of likelihood of confusion on the part of the public depends on numerous elements and, in particular, on the recognition of the earlier mark on the market, the association which can be made with the registered mark, the degree of similarity between the marks and between the goods or services identified. It must be appreciated globally, taking into account all factors relevant to the circumstances of the case (22/06/1999, C-342/97, Lloyd Schuhfabrik, EU:C:1999:323, § 18; 11/11/1997, C-251/95, Sabèl, EU:C:1997:528, § 22).
- 72 Such a global assessment of a likelihood of confusion implies some interdependence between the relevant factors, and in particular, the similarity between the trade marks and between the goods or services. Accordingly, a greater degree of similarity between the goods or services may be offset by a lower degree of similarity between the marks, and vice versa (22/06/1999, C-342/97, Lloyd Schuhfabrik, EU:C:1999:323, § 20; 11/11/1997, C-251/95, Sabèl, EU:C:1997:528, § 24; 29/09/1998, C-39/97, Canon, EU:C:1998:442, § 17). The more distinctive the earlier mark, the greater the risk of confusion, and marks with a highly distinctive character, either per se or because of the reputation they possess on the market, enjoy broader protection than marks with a less distinctive character (29/09/1998, C-39/97, Canon, EU:C:1998:442, § 18).

- 73 Furthermore, it needs to be taken into account that the consumer rarely has the opportunity to make a direct comparison between the different marks, but must place his or her trust in the imperfect recollection of them that he or she has kept in his or her mind (11/11/1997, C-251/95, Sabèl, EU:C:1997:528, § 23; 03/03/2004, T-355/02, Zirh, EU:T:2004:62, § 41; 18/04/2007, T-333/04 & T-334/04, House of Donuts / DONUTS et al., EU:T:2007:105, § 44).
- 74 The goods at issue in Class 3 (perfumery in comparison with various cosmetics) are similar to an average degree. The conflicting signs are visually highly similar, phonetically similar to an average degree and conceptually identical. Earlier mark ‘N° 5’ enjoys an average degree of distinctiveness for *perfumery* in Class 3 by virtue of intensive use and recognition in the French market.
- 75 Overall, given the similarity between the goods, the strong visual and phonetical similarities and the conceptual identity between the signs at issue, as well as the average degree of distinctiveness for *perfumery* in Class 3 by virtue of intensive use and recognition in the French market of the earlier mark, the existence of a likelihood of confusion within the meaning of Article 8(1)(b) EUTMR cannot be ruled out in the present case. It is highly conceivable that the contested sign may be perceived by the relevant public as a sub-brand or a stylised variant of the earlier mark for another (new) line of the relevant goods in Class 3 (23/10/2002, T-104/01, Miss Fifties (fig.) / Fifties, EU:T:2002:262, § 49).

### *Conclusion*

- 76 The Board concludes that there is likelihood of confusion between the contested sign and earlier mark ‘N° 5’ (earlier mark 2) in relation to the goods in Class 3 (perfumery and cosmetics) for the relevant French-speaking public at large.
- 77 Since the opposition is successful for all the contested goods subject to the present appeal, there is no need to examine the other earlier right invoked by the opponent (earlier mark 1).
- 78 In light of the above, the appeal is upheld, the contested decision is annulled, the opposition is upheld, and the contested mark is refused registration in its entirety.

### **Costs**

- 79 Pursuant to Article 109(1) EUTMR and Article 18 EUTMIR, the applicant, as the losing party, must bear the opponent’s costs of the opposition and appeal proceedings.
- 80 As to the appeal proceedings, these consist of the appeal fee of EUR 720 and the opponent’s costs of professional representation of EUR 550.
- 81 As to the opposition proceedings, the applicant must reimburse the opposition fee of EUR 320 and the opponent’s cost of professional representation of EUR 300. The total amount is fixed at EUR 1 890.

**Order**

On those grounds,

**THE BOARD**

hereby:

- 1. Annuls the contested decision.**
- 2. Rejects the application in its entirety.**
- 3. Orders the applicant to bear the opponent's costs incurred in the appeal and opposition proceedings in the amount of EUR 1 890.**

Signed

V. Melgar

Signed

Ph. von Kapff

In accordance with Article  
39 (5) of Commission  
Delegated Regulation (EU)  
2018/625

Signed

V. Melgar

On behalf of

R. Ocquet

Registrar:

Signed

H. Dijkema

