

**DECISION
of the Fifth Board of Appeal
of 8 August 2024**

In Case R 63/2024-5

Coscentra B.V.

Wenckebach Street 12

6466 NC Kerkrade

Netherlands

Applicant/Appellante

represented by Bureau M.F.J. Bockstael NV, Arenbergstraat 13, 2000 Antwerp, Belgium —

Action relating to EU trade mark application No 18 829 948

THE FIFTH BOARD OF APPEAL

composed of V. Melgar (President), R. Ocquet (Rapporteur) and A. Pohlmann (Member)

Registrar: H. Dijkema

gives the following

decision

Summary of the facts

- 1 By application, lodged on 30 January 2023, Coscentra B.V., applied ('the applicant') for registration of the three-dimensional mark No 18 829 948.



as an EU trade mark in respect of the following goods:

Class 3: *Perfumes*.

- 2 On 31 March 2023, the examiner informed the applicant that, under Article 7 (1) (b) of the UMW, the mark applied for was devoid of any distinctive character in relation to the goods applied for. The examiner's reasoning was as follows:
 - The relevant public does not necessarily perceive a shape mark consisting of the appearance of the product itself or its packaging in the same way as a word mark, a figurative mark or a shape mark which does not have that appearance. While the public is used to recognising the latter marks instantly as signs identifying a product, it will not necessarily do so where the sign is indistinguishable from the appearance of the product itself or its packaging.
 - It does not differ significantly from standards and practices in the sector concerned. End users will usually pay more attention to the label or name of the product than to its shape or packaging.
 - The sign consists merely of a combination of features in terms of presentation, the body of a woman, which will be perceived by the relevant consumer as characteristic of the packaging of the goods. This packaging does not differ significantly from a number of basic forms of packaging that are often used in trade for the goods; this is merely a variation.
 - This fact is supported by the following internet search (es):



<https://www.jeanpaulgaultier.com/ww/en/fragrances>



(<https://www.fragrantica.es/perfume/KKW-Fragrance/Body-49757.html>)

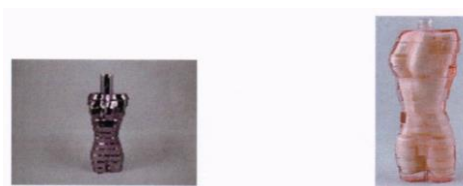


(https://carperstore.com/?s=kimberly+nude&product_cat=0&post_type=product)

- Consequently, the sign is devoid of any distinctive character within the meaning of Article 7 (1) (b) EUTMR.
- 3 On 5 July 2023, the applicant lodged a defence, which can be summarised as follows:
- The perfume bottle in the form of a manntorso was designed in France and registered in 1994 as a French design ‘Buste Homme’ in the name of Didier Calvo under Nos 942 371-001 and 942 371-002. In 1995 and 1997 Mr Calvo deposited other French designs of the ‘Buste Homme’ bottle. A copy of these French designs is attached.
 - At that time, Beauté Prestige International (Jean-Paul Gaultier) was already protected by Beauté Prestige International (Jean-Paul Gaultier) for a women’s body perfume bottle.
 - This concerns IR No 600 167 of 3 May 1993. In 1997, IR No 675 106 followed by the deposit of the known perfume bottle. In 2009 Didier Calvo filed French trade mark registration No 3 689 362. That mark was subsequently transferred to Coscentra BV, which claimed seniority in EU trade mark No 9 701 186 of 2011.
 - LN 2009, on the basis of his French design rights, Mr Calvo initiated legal proceedings against the use by BEAUTE Prestigé International (Jean- Paul Gaultier)

of a perfume bottle of a similar shape. This legal case was lost by Mr Calvo as the French court ruled that the bottles in question were sufficiently different and each had their individual character. Both bottles were therefore distinctive by virtue of their own specific design and character. In addition, Beauté Prestige International was already able to present large turnovers at that time and the perfume bottle of Jean-Paul Gaultier was certainly known, which makes the French court's ruling all the more remarkable.

- The applicant is currently the titular holder of the following registrations of a perfume bottle in the form of a male or female tube: French registration No 3 689 362 of 2009; EU trade marks No 9 701 186 of 2011, No 11 530 433 of 2013 and No 12 017 067 of 2014.
- With the current trade mark application, the applicant seeks to secure her trade mark rights because of a number of minor adjustments which have been made. However, it remains an exclusive creation that cannot be confused with any other model, where exclusivity and creativity lie in the discs and facets that make up the bottle.
- That design is so exclusive and different from all other existing forms that even Jean-Paul Gaultier, as titular holder of the famous perfume bottle 'Classique', has not filed an opposition to EU trade mark No 11 530 433, which has the same shape as the current European trade mark application. For the sake of completeness, we will show you side by side:



- The applicant sold many tens of thousands of perfume, namely: 27.362 pieces in 2016; 42.169 pieces in 2017; 20.532 pieces in 2018; 14.532 pieces in 2019; 10.837 pieces in 2020; 21.368 pieces in 2021; 71.333 pieces in 2022; 19.918 pieces in 2023 to date. That means, therefore, a total of 228.051 items sold of the shape mark in question from 2016 to date. Together with the 431.350 items of the male version (EU trade mark No 18 829 863) sold, this therefore means 659.401 items sold from 2016 to date.
- We believe that it is possible to infer from these numbers that the design in question is known to a broad public and therefore has distinctive force.
- In the provisional refusal, you give a number of examples of perfume bottles that would have a similar shape, i.e. the shape of a manntorso. However, apart from Jean-Paul Gaultier's perfume bottle 'Le Classique', there is no bottle that is somewhat eligible for a brand depot. In addition, the examples you cited are infringing bottles, some of which have been the subject of legal proceedings and which were also convicted of plagiarism.
- For example, the bottles of 'perfume Mirage' in India are slave copies of Jean-Paul Gaultier's 'Le Classique'. On the other hand, Kim Kardashian's trade mark 'Body kkw' is completely different, in the sense that the backyard is over-proportional, the

waist was reduced to a wespentaille and the arms are detached, with the clear aim of displaying Kim Kardashian's figure itself.

- It is clear from the foregoing that the applicant has had valid trade mark rights in a perfume bottle in the shape of a male buste since 2009. Since 2013, there has also been the European trade mark registration of the female bust. Moreover, in view of the quantities sold by the applicant in recent years of the bottle in question, and taking into account the fact that the examples of existing similar bottles cited by you are infringing and sometimes even slavish imitation, we consider that the present application for a trade mark does have distinctive character and must therefore be registrable.
- 4 On 16 November 2023, the examiner adopted a decision ('the contested decision') refusing the mark applied for in its entirety pursuant to Article 7 (1) EUTMR. This decision was based mainly on the following findings:
- The defence is based mainly on earlier registrations of similar shapes and on French design registrations, and the exclusivity and creativity of the application would lie in the discs and facets of which the bottle consists.
 - The goods applied for are everyday consumer goods which are generally aimed at the average consumer who is reasonably well informed and reasonably observant and circumspect. Since the sign consists of a shape without (legible) word elements, the examination of the possibility of registration must be based on the perception of consumers throughout the European Union.
 - Since a liquid product must be in packaging in order to be sold, the average consumer will particularly perceive the packaging as a form of packaging or presentation. A shape mark consisting of such packaging is distinctive only if it enables the average consumer of such a product, who is reasonably well informed and reasonably observant and circumspect, to distinguish the product from that of other undertakings, without carrying out an analysis or comparison and without paying particular attention. Only a mark which deviates significantly from the standards or customs of the sector and thus fulfils its essential function of indicating origin is devoid of any distinctive character.
 - It cannot be ruled out that consumers may be able to identify more easily the shape and appearance of a perfume bottle itself, as an indication of origin, than, for example, packaging containing food or cleaning products. However, contrary to the applicant's claims, the fact that some perfumery houses attach great importance to the shape and appearance of a perfume bottle, which they regard as an essential element of differentiation and communication, does not necessarily mean that the relevant average consumers automatically regard each container or bottle on the market as an indication of the commercial origin of the perfumery product. It is true that the relevant consumer may perceive as a trade mark a bottle or packaging the shape of which, as a whole, is clearly distinguishable or even appears revolutionary when it is launched, taking into account the 'standards and customs of the sector', that is to say, in the light of all the shapes that consumers are accustomed to on the market.

- Because of a higher level of attention in the field of perfumery, consumers would have a better assessment and knowledge of the wide range of forms of bottles and containers for perfumes on the market, and would then be better placed to perceive the common character, or indeed the unusual nature, of the characteristics of the shape of a particular bottle in comparison with other bottles or containers containing perfumes.
- The mere novelty of the shape and the quality of its design does not necessarily mean that a trade mark consisting of that shape may serve, *ab initio*, to distinguish the origin of the goods in question. It is necessary to examine, in the light of all the relevant circumstances, whether the shape of the goods or its holder offered for registration would be perceived by the relevant public as a mere variant of shapes normally found on the market or whether, in the eyes of that relevant public, the aesthetic aspect produced by the design of the shape at issue is capable of generating an objective and unusual visual effect in relation to the ‘norms and customs’ of the relevant sector. However, the fact that a sector is characterised by a wide variety of product shapes does not mean that any new shape will necessarily be perceived as a variant of the usual shapes.
- The mark applied for is therefore merely a variant of the shape and packaging of the goods in question, which makes it impossible for the average consumer to distinguish the goods in question from those of other undertakings.
- Moreover, the overall complexity of the design and the fact that it is applied to the external surface of the product does not make it possible to record the individual design details in the memory or to capture the design without simultaneously observing the inherent qualities of the product. The claimed design cannot therefore easily and immediately be superseded by the target market as a distinctive sign.
- In that regard, it should be noted that the fact that the design applied for is fanciful, aesthetic and not everyday is not sufficient to establish its distinctive character. Those characteristics are attributable to the ornamental and decorative nature of the finishing of the design rather than to the commercial origin of the goods.
- The applicant has not convincingly demonstrated how consumers would perceive the bottle in question as a distinctive sign.
- In order for a shape mark to be refused as non-distinctive, it is sufficient that the elements of the mark applied for are present on the market for odours, inc. perfumes, or that they do not differ significantly from those already existing on that market. The perfumery sector is highly competitive and new products are constantly being launched. Consumers are accustomed to innovative, prominent perfume bottles. Notwithstanding the above, with the exception of shapes which are clearly different from those normally used in the sector, these different forms are perceived by consumers as purely decorative elements rather than elements indicating their business origin.
- Since the mark applied for does not differ from customary commercial practices, the packaging and the goods are closely related and the average consumer in the European Union will perceive the mark as a mere variant of a bottle/bottle for

perfumes (or other fragrances such as eau de toilette) to which decorative characteristics have been added, it is not in a position to identify or distinguish the goods from those having a different commercial origin.

- If the shape of the bottle is to function autonomously as a trade mark, the bottle must, at least theoretically, be able to indicate the commercial origin of the liquid in the bottle without the use of attributes such as logos, word marks and figurative signs. Without prior education, it seems very unlikely that the consumer would perceive the bottle as a badge of commercial origin in the absence of any other indications.
 - As regards other existing trade mark registrations, it should be recalled that the legality of EUIPO decisions is assessed only on the basis of the EUTMR, as interpreted by the Courts of the European Union, and not on the basis of a previous practice of the Office.
 - As regards EU trade mark No 11 530 433, the letters ‘OSO’ appear in shell. On that basis, it was accepted by the Office at the time because that name distinguishes the commercial origin of the product from that of others.
 - As regards the applicant’s observations on design rights, the requirements for registration of a design differ from those for the registration of a shape mark. Novelty or originality are not relevant criteria for assessing the distinctive character of a trade mark. Thus, the fact that a design can meet the requirements for registration as a RCD does not automatically mean that the same design can be registered as a trade mark.
 - The alleged imitation and/or plagiarism of the examples provided by the Office is not relevant for establishing the distinctive character of the shape claimed. Imitations are an indication of commercial success, whereas an inherent distinctive character must be assessed by reference to the representation of the mark, irrespective of use, marketing or the like.
 - Without expressly invoking Article 7 (3) EUTMR and without providing any supporting evidence, the applicant seems to imply that its trade mark would have been established. Thus, it claims that, of the shape mark applied for, 431.350 pieces have been sold from 2016 to the present date (that is to say, 5 July 2023). This unsubstantiated figure is insufficient to establish whether the application has acquired distinctive character in the European Union as a whole for the goods for which it has been applied for. Should the applicant have already wished to rely on Article 7 (3) EUTMR, it should be noted that sales figures alone do not make it possible to determine whether a trade mark is established.
 - The characteristics presented in the representation of the shape do not meet the threshold to be considered as significantly different from the standards and used in the perfumes and other odours sector.
- 5 On 9 January 2024, the applicant brought an action against the contested decision and requested that it be annulled in its entirety. The statement setting out the grounds of appeal was received on 12 March 2024. Together with its defence, the applicant submitted the following supporting documents:

- Annex 1: Copy of the French models in the name of Didier Calvo;
- Annex 2: Copy of international trade marks Nos 600 167 and 675 106 in the name of Antonio Puig SA (formerly Beauté Prestige International);
- Annex 3: Copy of the registrations in the name of Coscentra BV of a perfume bottle in the form of a male or female tube.

Grounds of Appeal

- 6 The arguments raised in the statement of grounds may be summarised as follows:
 - The examiner concluded that the shape mark applied for falls within the scope of Article 7 (1) (b) EUTMR, since the sign does not immediately and undoubtedly enable the target public to distinguish the applicant's goods from other goods of different commercial origin. The examiner refers, inter alia, to the wide variety of bottle shapes on the market.
 - According to the examiner, the characteristics of the shape mark would not reach the threshold to be regarded as significantly different from the standards and practices in the perfumes sector.
 - We cannot accept this for the following reasons: in her conclusion, the examiner did not take into account the history of the creation of the shape in question for a perfume bottle, which makes it possible to regard the shape as recognisable and distinctive.
 - The applicant then sets out again all its arguments in its defence of 5 July 2023, as summarised above.

Justification

- 7 All references made in this Decision should be understood as references to Regulation (EU) 2017/1001 (EUTMR, OJ 2017 L 154, p. 1), which codifies Regulation (EC) No 207/2009 as amended, unless explicitly provided otherwise in this Decision.
 - 8 The appeal complies with Articles 66, 67 and Article 68 (1) EUTMR. It is admissible.
- Article 7 (1) (b) EUTMR*
- 9 Under Article 7 (1) (b) EUTMR, 'trade marks which are devoid of any distinctive character' are not to be registered.
 - 10 Furthermore, Article 7 (2) EUTMR provides that 'paragraph 1 shall apply even if the grounds of non-registrability obtain in only part of the [European] Union'.
 - 11 The idea underlying Article 7 (1) (b) EUTMR coincides with the essential function of the trade mark, which is to guarantee to consumers the identity of the origin of the goods and

services covered by the mark(08/05/2008, C-304/06 P, Eurohypo, EU:C:2008:261, §56; 15/09/2005, C-37/03 P, BioID, EU:C:2005:547, § 60).

- 12 That absolute ground for refusal is thus intended to ensure that the consumer or end user is able, without any possibility of confusion, to distinguish the product or service in question from goods or services which have another origin. A trade mark which enables the product or service in respect of which registration is sought to be identified as originating from a particular undertaking and thus to distinguish that product or service from those of other undertakings is distinctive within the meaning of that provision (13/09/2018, T-495/17, Gratis (fig.), EU:T:2018:260, § 15; 12/05/2016, T-32/15, MARK1 (fig.), EU:T:2016:287, § § 25-2605/12/2002,-130/01, Real People, Real Solutions, EU:T:2002:301, § § 19 to 20).
- 13 On the other hand, signs which are incapable of fulfilling the essential function of a trade mark, namely to indicate the origin of the goods or services, are devoid of any distinctive character within the meaning of that provision, so that, in the event of a subsequent purchase or contract, the consumer who acquired the product covered by that mark or to whom the service covered by that mark has been provided may, if the experience is positive, repeat that choice or, in the event of negative experience, make a different choice (12/05/2016, T-32/15, Mark1 (fig.), EU:T:2016:287, § 28; 04/07/2017, T-81/16, a pair of curved strips on the side of a Tire, EU:T:2017:463, § 80).
- 14 The Court of Justice and the General Court noted that, although the criteria for assessing the distinctive character of the different categories of trade mark are the same, the application of those criteria may show that the perception of the relevant public is not necessarily the same for each of those categories of trade marks, and that it may be more difficult for certain categories to establish distinctive character (08/04/2003, C-53/01, - C55/01, Linde, EU:C:2003:206, § 48; 12/02/2004,-218/01, Henkel, C-218/01, EU:C:2004:88, § 52; 06/05/2003, C-104/01, Libertel, EU:C:2003:244, § 65; 01/02/2023, T-253/22, Sustainability through Quality, EU:T:2023:29, § 23-24).
- 15 The distinctive character of a trade mark must be assessed, first, by reference to the goods or services in respect of which registration is sought and, on the other hand, by reference to the perception of the relevant public (08/11/2022, T-232/22, catlover, not published, § 20;13/09/2018, T-495/17, Gratis (fig.), EU:T:2018:260, § 16; 29/04/2004, C-456/01 P, Standards of washing or dishwasher tablets (3D), EU:C:2004:258, § 35)

The public concerned and the level of attention

- 16 The shape mark without word elements is addressed to the public throughout the European Union.
- 17 The goods applied for are *perfumes* in Klasse 3.
- 18 Although, in the contested decision, the examiner states, first, that the goods applied for are everyday consumer goods which are generally aimed at the average consumer, who is reasonably well informed and reasonably observant and circumspect, it then takes the opposite view, namely that the consumer's level of attention in the field of perfumery is higher, thus having a better assessment and knowledge of the wide range of forms of bottles and containers for perfumes on the market, and then more likely to perceive the

common character, or indeed the unusual nature, of the characteristics of the shape of a particular bottle in comparison with other bottles or containers containing perfumes.

- 19 However, according to the case-law, *perfumes* are largely targeted at the general public, and the level of attention is not higher than that which the public would perceive in everyday consumer goods (13/05/2016, T-62/15, MITOCHRON, EU:T:2016:304, § 22; 14/04/2011, t-466/08, ACNO Focus, EU:T:2011:182, § 49). Even if *perfumes* may fall into a higher price category, the examiner's assertion that the consumer would have a higher level of attention cannot be accepted.

Description of the mark

- 20 In order to assess whether or not a trade mark has distinctive character, the overall impression which that mark makes must be considered. This does not mean, however, that one may not first examine each of the individual features of the get-up of that mark in turn. It may be useful to examine each component of the mark at issue during the global assessment (25/10/2007, C-238/06 P, Plastikflaschenform, EU:C:2007:635, § 82).
- 21 The mark applied for is a 3D or shape mark consisting exclusively of the shape of a perfume bottle.



- 22 It is a female torso which has a relief along the whole line by means of horizontal discs of the same width. The whole torso appears to be shaped by discs which have been separated.

Distinctive character

- 23 It is true that, in the case of trade marks consisting of the appearance of the product itself, the perception of the average consumer is not necessarily the same as in the case of a word or figurative mark consisting of a sign which is independent of the appearance of the products it designates, since the average consumer does not have the habit of making assumptions about the origin of products based on their shape, the shape of their packaging or their colour, in the absence of graphic or word elements (24/06/2024, T-260/23, forme de phares d'automobile, EU:T:2024:421, § 17; 09/11/2016, T-579/14, device of a pattern (fig.), EU:T:2016:650, § 24; 11/09/2014, C-521/13 P, Rote Schnürsenkelenden, EU:C:2014:2222, § 48; 19/9/2001, T-30/00, washing tablet, EU:T:2001:223, § 49; 07/10/2004, C-136/02 P, three-dimensional Torch shapes, EU:C:2004:592, § 30).
- 24 In that case, the trade mark applied for represents a perfume bottle. Although it is true, as the examiner points out, that since a liquid product must be contained in a package in order to be sold, the average consumer will perceive the packaging primarily as a form of packaging or presentation, such confirmation must be made with nuances in the case of *perfumes*.

- 25 The shape of perfume bottles has become an essential part of perfume appearance. It is true that, in addition to word and figurative marks, the shapes of bottles are intrinsically useful for the visual individualisation of perfumes on the market of different producers.
- 26 The more the shape or other elements of the mark in respect of which registration is sought resembles those most likely to be taken over by the product in question, the greater the likelihood that the shape is devoid of distinctive character (24/06/2024, T-260/23, forme de phares d'automobile, EU:T:2024:421, § 33; 24/11/2016, T-578/15, device of a solar cell, EU:T:2016:674, § 16; 07/10/2004, C-136/02 P, three-dimensional Torch shapes, EU:C:2004:592, § 31; 29/4/2004, C-456-457/01, tabs, EU:C:2004:258, § 39; 12/1/2006, C-173/04, Standbeutel, EU:C:2006:20, § 30).
- 27 Only a mark which deviates significantly from the rules or customs of the sector and thereby fulfils its essential function of indicating origin is devoid of any distinctive character within the meaning of Article 7 (1) (b) EUTMR (09/11/2016-, 579/14, Device of a pattern, EU:T:2016:650, § 25; 12/01/2006, 173/04-P, Standbeutel, EU:C:2006:20, § 31; 22/06/2006, C-25/05 P, Bonbonverpackung, EU:C:2006:422, § 28).
- 28 It should also be borne in mind that novelty or originality are not relevant criteria for assessing the distinctive character of a trade mark, so that it is not sufficient for a trade mark to be registered that it is original, but that it must be substantially different from the basic shapes of the product in question, which are commonly used in trade, and must not appear as a simple variant of those shapes (24/06/2024, T-260/23, forme de phares d'automobile, EU:T:2024:421, § 34; 26/11/2015, t-390/14, KJ Kangoo Jumps XR, EU:T:2015:897, § 25).
- 29 Furthermore, it is not sufficient that the shape of the mark applied for differs, as regards certain physical characteristics of the product, from other shapes available on the market for the same product, but it is also necessary that those characteristics be sufficiently marked to enable consumers to distinguish the product presented under the intended sign from those of other undertakings solely on the basis of its shape (24/06/2024, T-260/23, forme de phares d'automobile, EU:T:2024:421, § 35; 08/11/2023, t-114/23, forme d'un sac, EU:T:2023:703, § 47).
- 30 Even though the existence of special or original characteristics is not a condition *sine qua non* for registration, the fact remains that its presence is capable of conferring the requisite degree of distinctiveness on a trade mark which would otherwise be absent (24/06/2024, T-260/23, forme de phares d'automobile, EU:T:2024:421, § 36; 10/10/2007, t-460/05, forme d'un haut-parleur, EU:T:2007:304, § 43).
- 31 The examiner did not specify the standard in force in the relevant market segment and the extent to which the sign applied for would not deviate from it. It merely stated that the mark applied for is merely a variant of the shape and packaging of the goods in question, so that the average consumer cannot distinguish the goods in question from those of other undertakings.
- 32 First of all, the Chamber disagrees with the examiner's view that a bottle in the form of a woman's body will be perceived by the relevant consumer as a characteristic of the packaging of the goods and that that packaging would not be significantly different from a number of basic forms of packaging which are frequently used in trade for the goods and would merely be a variation in them.

- 33 To support this, the researcher gives three examples of perfume bottles present on the market, in the form of a woman's torso. One of them is indeed a perfume bottle of one of the main players on the perfume market ('Le Classique' by Jean-Paul Gaultier). However, the three examples do not allow the Chamber to conclude that the shape of a women's body would be a basic shape commonly used in trade for a perfume bottle.
- 34 It does not seem obvious that a women's torso has elements similar to those most likely to be taken over by a perfume bottle. Therefore, the use of a women's body as a perfume bottle in itself appears to deviate sufficiently from the standards or practices in the perfume sector.
- 35 Moreover, the shape of the perfume bottle at issue, with the relief resulting from the use of horizontal discs of the same width which are aligned, has specific characteristics which make the bottle distinctive and unusual (21/06/2017, T-20/16, figurative mark representing chevrons between two parallel lines, EU:T:2017:410, § 43 to 45).
- 36 Moreover, it is clear from the wording of Article 7 (1) (b) EUTMR that a minimum degree of distinctiveness is sufficient to render inapplicable the ground for refusal set out in that article (27/02/2001, T-79/00, *Lite*, EU:T:2002:42, § 28; 15/09/2005, T-320/03, *live richly*, EU:T:2005:325, § 68), and in the opinion of the Chamber this minimum limit has been exceeded.
- 37 The mark applied for cannot be regarded as simple or banal (29/09/2009, T-139/08, representation of a half smiley smile, EU:T:2009:364, § 27-31).
- 38 Although special or original characteristics are not criteria for the distinctive character of a trade mark, the mark must enable the public to distinguish the goods and services in question from those of other undertakings or persons (04/07/2017, T-81/16, a pair of curved strips on the side of a Tire, EU:T:2017:463, § 49). The mark applied for complies with both: it has both special and original characteristics and also enables the public to distinguish *perfumes* from those of third parties.
- 39 The history of the shape in question, with details of the designs and trade marks, indicated by the applicant in its defence and in its grounds of appeal, is irrelevant in that regard. Moreover, for the purposes of determining whether a particular mark is distinctive, it is irrelevant whether it may give rise to a likelihood of confusion with other earlier marks, in this case, for example, with the 'Le Classique' perfume bottle commercialised by Jean-Paul Gaultier. Such considerations are relevant only if an opposition is filed.
- 40 Finally, the Chamber notes that the examiner criticises the applicant for invoking arguments relating to design rights, stating that the requirements for registration of a design are different from those for the registration of a shape mark, but that at the same time she does refer, in its decision, to 'the design' and the 'claimed design', which seems to confuse the terminology of the various intellectual rights.
- 41 The Board concludes that the shape mark in question, with its specific characteristics, is capable of fulfilling the essential function of a trade mark for the purposes of distinguishing the *perfumes* applied for in Klasse 3 of those of a different origin.

- 42 Since the mark applied for is not contrary to the absolute ground for refusal set out in Article 7 (1) (b) EUTMR, the appeal is considered well founded and the contested decision is annulled.

Judgment

On those grounds,

THE CHAMBER

as follows:

- 1. The contested decision is set aside;**
- 2. The application will be admitted to publication.**

Signed

V. Melgar

Signed

R. Ocquet

Signed

A. Pohlmann

Registrar:

Signed

H. Dijkema



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Registrar: H. Dijkema

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Summary of the facts

- 1 By application, lodged on 30 January 2023, Coscentra B.V., applied ('the applicant') for registration of the three-dimensional mark No 18 829 863



as an EU trade mark in respect of the following goods:

Class 3: *Perfumes*.

- 2 On 31 March 2023, the examiner informed the applicant that, pursuant to Article 7 (1) (b) of the UMW, the mark applied for was devoid of any distinctive character in respect of the goods applied for. The examiner's reasoning was as follows:
 - The relevant public does not necessarily perceive a shape mark consisting of the appearance of the product itself or its packaging in the same way as a word mark, a figurative mark or a shape mark which does not have that appearance. While the public is used to recognising the latter marks instantly as signs identifying a product, it will not necessarily do so where the sign is indistinguishable from the appearance of the product itself or its packaging.
 - The appearance of the sign does not differ significantly from the standards and customs of the sector concerned. End users will usually pay more attention to the label or name of the product than to its shape or packaging.
 - The sign consists merely of a combination of features in terms of presentation, the body of a man, which will be perceived by the relevant consumer as characteristic of the packaging of the goods. This packaging does not differ significantly from a number of basic forms of packaging that are often used in trade for the goods; this is merely a variation.
 - This fact is supported by the following internet search (es):



<https://www.druni.es/le-male-jean-paul-gaultier-eau-toilette-hombre>



https://www.etsy.com/listing/1264398121/man-torso-empty-clear-shape-glass-bottle?ga_order=most_relevant&Italgasearch_type=all&Switgaview_type=gallery, the following: torso + bottle, ref = sr_gallery-1-2 kins = 1



https://www.joom.com/es/products/5f27d086b5aceb01069c8066?variant_id=5f27d086b5aceb04069c806b

- Consequently, the sign is devoid of any distinctive character within the meaning of Article 7 (1) (b) EUTMR.
- 3 On 5 July 2023, the applicant lodged a defence, which can be summarised as follows:
- The perfume bottle in the form of a manntorso was designed in France and registered in 1994 as a French design ‘Buste Homme’ in the name of Didier Calvo under Nos 942 371-001 and 942 371-002. In 1995 and 1997 Mr Calvo deposited other French designs of the ‘Buste Homme’ bottle. A copy of these French designs is attached.
 - At that time, Beauté Prestige International (Jean-Paul Gaultier) was already protected by Beauté Prestige International (Jean-Paul Gaultier) for a women’s body perfume bottle. This concerns IR No 600 167 of 3 May 1993. In 1997, IR No 675 106 followed with the deposit of the known perfume bottle. In 2009 Didier Calvo filed French trade mark registration No 3 689 362. That mark was subsequently transferred to Coscentra BV, which claimed seniority in EU trade mark No 9 701 186 of 2011.
 - In 2009, on the basis of his French design rights, Mr Calvo launched a lawsuit against Beauté Prestige International (Jean- Paul Gaultier) of a perfume bottle of a similar shape. This legal case was lost by Mr Calvo as the French court ruled that the bottles in question were sufficiently different and each had their individual character. Both bottles were therefore distinctive by virtue of their own specific design and character. In addition, Beauté Prestige International was already able to present large turnovers at that time and the perfume bottle of Jean-Paul Gaultier was certainly known, which makes the French court’s ruling all the more remarkable.

- The applicant is currently the titular holder of the following registrations of a perfume bottle in the form of a male or female tube: French registration No 3 689 362 of 2009; EU trade marks No 9 701 186 of 2011, No 11 530 433 of 2013 and No 12 017 067 of 2014.
- With the current trade mark application, the applicant seeks to secure her trade mark rights because of a number of minor adjustments which have been made. However, it remains an exclusive creation that cannot be confused with any other model, where exclusivity and creativity lie in the discs and facets that make up the bottle.
- That design is so exclusive and different from all other existing forms that even Jean-Paul Gaultier, as titular holder of the famous perfume bottle ‘Le Male’, has not filed an opposition to EU trade mark No 012 017 067, which has the same shape as the current trade mark application. For the sake of completeness, the two brands are shown side by side:



- The applicant sold many tens of thousands of perfume, namely: 65.546 pieces in 2016; 66.931 pieces in 2017; 37.032 pieces in 2018; 37.056 pieces in 2019; 930.811 in 2020; 53.835 pieces in 2021; 116.311 pieces in 2022; 23.828 pieces in 2023 to date. That means, therefore, a total of 431.350 items sold of the shape mark in question from 2016 to date. Together with the 228.051 items of the female version sold (EU trade mark application No 18 829 948), this therefore means 659.401 items sold from 2016 to date.
- We believe that it is possible to infer from these numbers that the design in question is known to a broad public and therefore has distinctive force.
- In the provisional refusal, you give a number of examples of perfume bottles that would have a similar shape, i.e. the shape of a manntorso. However, apart from Jean-Paul Gaultier’s ‘Le Male’ perfume bottle, there is no bottle that is somewhat eligible for a brand depot. In addition, the examples you cited are infringing bottles, some of which have been the subject of legal proceedings and which were also convicted of plagiarism.
- Among other things, the bottle ‘somebody’ was sentenced to cassation in France. We can therefore say that the bottles you apparently just searched for on the internet are bottles of low quality which, without any form of development or trade mark protection, are merely imitations of the known bottle ‘Le Male’ Van Jean-Paul Gaultier.
- It is clear from the foregoing that the applicant has had valid trade mark rights in a perfume bottle in the shape of a male buste since 2009. Moreover, in view of the quantities sold by the applicant in recent years of the bottle in question, and taking into account the fact that the examples of existing similar bottles cited by you are infringing and sometimes even slavish imitation, we consider that the present

application for a trade mark does have distinctive character and must therefore be registrable.

4 On 16 November 2023, the examiner adopted a decision ('the contested decision') refusing the mark applied for in its entirety pursuant to Article 7 (1) (b) EUTMR. This decision was based mainly on the following findings:

- The defence is based mainly on earlier registrations of similar shapes and on French design registrations, and the exclusivity and creativity of the application would lie in the discs and facets of which the bottle consists.
- The goods applied for are everyday consumer goods which are generally aimed at the average consumer who is reasonably well informed and reasonably observant and circumspect. Since the sign consists of a shape without (legible) word elements, the examination of the possibility of registration must be based on the perception of consumers throughout the European Union.
- Since a liquid product must be in packaging in order to be sold, the average consumer will particularly perceive the packaging as a form of packaging or presentation. A shape mark consisting of such packaging is distinctive only if it enables the average consumer of such a product, who is reasonably well informed and reasonably observant and circumspect, to distinguish the product from that of other undertakings, without carrying out an analysis or comparison and without paying particular attention. Only a mark which deviates significantly from the standards or customs of the sector and thus fulfils its essential function of indicating origin is devoid of any distinctive character.
- It cannot be ruled out that consumers may be able to identify more easily the shape and appearance of a perfume bottle itself, as an indication of origin, than, for example, packaging containing food or cleaning products. However, contrary to the applicant's claims, the fact that some perfumery houses attach great importance to the shape and appearance of a perfume bottle, which they regard as an essential element of differentiation and communication, does not necessarily mean that the relevant average consumers automatically regard each container or bottle on the market as an indication of the commercial origin of the perfumery product. It is true that the relevant consumer may perceive as a trade mark a bottle or packaging the shape of which, as a whole, is clearly distinguishable or even appears revolutionary when it is launched, taking into account the 'standards and customs of the sector', that is to say, in the light of all the shapes that consumers are accustomed to on the market.
- Because of a higher level of attention in the field of perfumery, consumers have a better assessment and knowledge of the wide range of forms of bottles and containers for perfumes on the market, and it is then better to perceive the common character, or indeed the unusual nature, of the characteristics of the shape of a particular bottle in comparison with other bottles or containers containing perfumes.
- The mere novelty of the shape and quality of its design does not necessarily mean that a trade mark consisting of that shape may, *ab initio*, serve to distinguish the origin of the goods in question. It is necessary to examine, in the light of all the relevant circumstances, whether the shape would be perceived by the relevant public as a mere variant of shapes normally found on the market or whether the aesthetic aspect created

by the design of the shape in question may, in the eyes of that relevant public, produce an objective and unusual visual effect in relation to the ‘norms and customs’ of the relevant sector. However, the fact that a sector is characterised by a wide variety of product shapes does not mean that any new shape will necessarily be perceived as a variant of the usual shapes.

- The mark applied for is therefore merely a variant of the shape and packaging of the goods in question, which makes it impossible for the average consumer to distinguish the goods in question from those of other undertakings.
- Moreover, the overall complexity of the design and the fact that it is applied to the external surface of the product does not make it possible to record the individual design details in the memory or to capture the design without simultaneously observing the inherent qualities of the product. The claimed design cannot therefore easily and immediately be superseded by the target market as a distinctive sign.
- In that regard, it should be noted that the fact that the design applied for is fanciful, aesthetic and not everyday is not sufficient to establish its distinctive character. Those characteristics are attributable to the ornamental and decorative nature of the finishing of the design rather than to the commercial origin of the goods.
- The applicant has not convincingly demonstrated how consumers would perceive the bottle in question as a distinctive sign.
- In order for a shape mark to be refused as non-distinctive, it is sufficient that the elements of the mark applied for are present on the market for odours, inc. perfumes, or that they do not differ significantly from those already existing on that market. The perfumery sector is highly competitive and new products are constantly being launched. Consumers are accustomed to innovative, prominent perfume bottles. Notwithstanding the above, with the exception of shapes which are clearly different from those normally used in the sector, these different forms are perceived by consumers as purely decorative elements rather than elements indicating their business origin.
- Since the mark applied for does not differ from customary commercial practices, the packaging and the goods are closely related and the average consumer in the European Union will perceive the mark as a mere variant of a bottle/bottle for perfumes (or other fragrances such as eau de toilette) to which decorative characteristics have been added, it is not in a position to identify or distinguish goods from those with a different commercial origin.
- If the shape of the bottle is to function autonomously as a trade mark, the bottle must, at least theoretically, be able to indicate the commercial origin of the liquid in the bottle without the use of attributes such as logos, word marks and figurative signs. Without prior education, it seems very unlikely that the consumer would perceive the bottle as a badge of commercial origin in the absence of any other indications.
- As regards other existing trade mark registrations, it should be recalled that the legality of EUIPO decisions is assessed only on the basis of the EUTMR, as interpreted by the Courts of the European Union, and not on the basis of a previous practice of the Office.

- As regards EU trade mark No 12 017 067, the letters ‘OSO’ appear in shell. On that basis, it was accepted by the Office at the time because that name distinguishes the commercial origin of the product from that of others.
 - As regards the applicant’s observations on design rights, the requirements for registration of a design differ from those for the registration of a shape mark. Novelty or originality are not relevant criteria for assessing the distinctive character of a trade mark. Thus, the fact that a design can meet the requirements for registration as a RCD does not automatically mean that the same design can be registered as a trade mark.
 - The alleged imitation and/or plagiarism of the examples provided by the Office is not relevant for establishing the distinctive character of the shape claimed. Imitations are an indication of commercial success, whereas an inherent distinctive character must be assessed by reference to the representation of the mark, irrespective of use, marketing or the like.
 - Without expressly invoking Article 7 (3) EUTMR and without providing any supporting evidence, the applicant seems to imply that its trade mark would have been established. Thus, it claims that, of the shape mark applied for, 431.350 pieces have been sold from 2016 to the present date (that is to say, 5 July 2023). This unsubstantiated figure is insufficient to establish whether the application has acquired distinctive character in the European Union as a whole for the goods for which it has been applied for. Should the applicant have already wished to rely on Article 7 (3) EUTMR, it should be noted that sales figures alone do not make it possible to determine whether a trade mark is established.
 - The characteristics presented in the representation of the shape do not meet the threshold to be considered as significantly different from the standards and used in the perfumes and other odours sector.
- 5 On 9 January 2024, the applicant brought an action against the contested decision and requested that it be annulled in its entirety. The statement setting out the grounds of appeal was received on 12 March 2024. Together with its defence, the applicant submitted the following supporting documents:
- Annex 1: Copy of the French models in the name of Didier Calvo;
 - Annex 2: Copy of IR No 600 167 and IR No 675 106 in the name of Antonio Puig SA (formerly Beauté Prestige International);
 - Annex 3: Copy of the registrations in the name of Coscentra BV of a perfume bottle in the form of a male or female tube.

Grounds of Appeal

- 6 The arguments put forward by the applicant in the statement of grounds may be summarised as follows:
- The examiner concluded that the shape mark applied for falls within the scope of Article 7 (1) (b) EUTMR, since the sign does not immediately and undoubtedly enable

the targeted public to distinguish the applicant's goods from other goods of different commercial origin. The examiner refers, *inter alia*, to the wide variety of bottle shapes on the market.

- According to the examiner, the characteristics of the shape mark would not reach the threshold to be regarded as significantly different from the standards and practices in the perfumes sector.
- We cannot accept this for the following reasons: in her conclusion, the examiner did not take into account the history of the creation of the shape in question for a perfume bottle, which makes it possible to regard the shape as recognisable and distinctive.
- The applicant then sets out again all its arguments in its defence of 5 July 2023, as summarised above.

Justification

7 All references made in this Decision should be understood as references to Regulation (EU) 2017/1001 (EUTMR, OJ 2017 L 154, p. 1), which codifies Regulation (EC) No 207/2009 as amended, unless explicitly provided otherwise in this Decision.

8 The appeal complies with Articles 66, 67 and Article 68 (1) EUTMR. It is admissible.

Article 7 (1) (b) EUTMR

9 Under Article 7 (1) (b) EUTMR, 'trade marks which are devoid of any distinctive character' are not to be registered.

10 Furthermore, Article 7 (2) EUTMR provides that 'paragraph 1 shall apply even if the grounds of non-registrability obtain in only part of the [European] Union'.

11 The idea underlying Article 7 (1) (b) EUTMR coincides with the essential function of the trade mark, which is to guarantee to consumers the identity of the origin of the goods and services covered by the mark (08/05/2008, C-304/06 P, Eurohypo, EU:C:2008:261, §56; 15/09/2005, C-37/03 P, BioID, EU:C:2005:547, § 60).

12 That absolute ground for refusal is thus intended to ensure that the consumer or end user is able, without any possibility of confusion, to distinguish the product or service in question from goods or services which have another origin. A trade mark which enables the product or service in respect of which registration is sought to be identified as originating from a particular undertaking and thus to distinguish that product or service from those of other undertakings is distinctive within the meaning of that provision (13/09/2018, T-495/17, Gratis (fig.), EU:T:2018:260, § 15; 12/05/2016, T-32/15, MARK1 (fig.), EU:T:2016:287, § § 25-2605/12/2002,-130/01, Real People, Real Solutions, EU:T:2002:301, § § 19 to 20).

13 On the other hand, signs which are incapable of fulfilling the essential function of a trade mark, namely to indicate the origin of the goods or services, are devoid of any distinctive character within the meaning of that provision, so that, in the event of a subsequent purchase or contract, the consumer who acquired the product covered by that mark or to

whom the service covered by that mark has been provided may, if the experience is positive, repeat that choice or, in the event of negative experience, make a different choice (12/05/2016, T-32/15, Mark1 (fig.), EU:T:2016:287, § 28; 04/07/2017, T-81/16, a pair of curved strips on the side of a Tire, EU:T:2017:463, § 80).

- 14 The Court of Justice and the General Court noted that, although the criteria for assessing the distinctive character of the different categories of trade mark are the same, the application of those criteria may show that the perception of the relevant public is not necessarily the same for each of those categories of trade marks, and that it may be more difficult for certain categories to establish distinctive character (08/04/2003, C-53/01, - C55/01, Linde, EU:C:2003:206, § 48; 12/02/2004, -218/01, Henkel, C-218/01, EU:C:2004:88, § 52; 06/05/2003, C-104/01, Libertel, EU:C:2003:244, § 65; 01/02/2023, T-253/22, Sustainability through Quality, EU:T:2023:29, § 23-24).
- 15 The distinctive character of a trade mark must be assessed, first, by reference to the goods or services in respect of which registration is sought and, on the other hand, by reference to the perception of the relevant public (08/11/2022, T-232/22, catlover, not published, § 20; 13/09/2018, T-495/17, Gratis (fig.), EU:T:2018:260, § 16; 29/04/2004, C-456/01 P, Standards of washing or dishwasher tablets (3D), EU:C:2004:258, § 35)

The public concerned and the level of attention

- 16 The shape mark without word elements is addressed to the public throughout the European Union.
- 17 The goods applied for are *perfumes* in Klasse 3.
- 18 Although, in the contested decision, the examiner states, first, that the goods applied for are everyday consumer goods which are generally aimed at the average consumer, who is reasonably well informed and reasonably observant and circumspect, it then takes the opposite view, namely that the consumer's level of attention in the field of perfumery is higher, thus having a better assessment and knowledge of the wide range of forms of bottles and containers for perfumes on the market, and then more likely to perceive the common character, or indeed the unusual nature, of the characteristics of the shape of a particular bottle in comparison with other bottles or containers containing perfumes.
- 19 However, according to the case-law, *perfumes* are largely targeted at the general public, and the level of attention is not higher than that which the public would perceive in everyday consumer goods (13/05/2016, T-62/15, MITOCHRON, EU:T:2016:304, § 22; 14/04/2011, t-466/08, ACNO Focus, EU:T:2011:182, § 49). Even if *perfumes* may fall into a higher price category, the examiner's assertion that the consumer would have a higher level of attention cannot be accepted.

Description of the mark

- 20 In order to assess whether or not a trade mark has distinctive character, the overall impression which that mark makes must be considered. This does not mean, however, that one may not first examine each of the individual features of the get-up of that mark in turn. It may be useful to examine each component of the mark at issue during the global assessment (25/10/2007, C-238/06 P, Plastikflaschenform, EU:C:2007:635, § 82).

- 21 The mark applied for is a 3D or shape mark consisting exclusively of the shape of a perfume bottle.



- 22 It is a male torso which has a relief throughout the line by means of horizontal discs of the same width. The whole torso appears to be shaped by discs which have been separated.

Distinctive character

- 23 It is true that, in the case of trade marks consisting of the appearance of the product itself, the perception of the average consumer is not necessarily the same as in the case of a word or figurative mark consisting of a sign which is independent of the appearance of the products it designates, since the average consumer does not have the habit of making assumptions about the origin of products based on their shape, the shape of their packaging or their colour, in the absence of graphic or word elements (24/06/2024, T-260/23, *forme de phares d'automobile*, EU:T:2024:421, § 17; 09/11/2016, T-579/14, *device of a pattern (fig.)*, EU:T:2016:650, § 24; 11/09/2014, C-521/13 P, *Rote Schnürsenkelenden*, EU:C:2014:2222, § 48; 19/9/2001, T-30/00, *washing tablet*, EU:T:2001:223, § 49; 07/10/2004, C-136/02 P, *three-dimensional Torch shapes*, EU:C:2004:592, § 30).
- 24 In that case, the trade mark applied for represents a perfume bottle. Although it is true, as the examiner points out, that since a liquid product must be contained in a package in order to be sold, the average consumer will perceive the packaging primarily as a form of packaging or presentation, such confirmation must be made with nuance in the case of *perfumes*.
- 25 The shape of perfume bottles has become an essential part of perfume appearance. It is true that, in addition to word and figurative marks, the shapes of bottles are intrinsically useful for the visual individualisation of perfumes on the market of different producers.
- 26 The more the shape or other elements of the mark in respect of which registration is sought resembles those most likely to be taken over by the product in question, the greater the likelihood that the shape is devoid of distinctive character (24/06/2024, T-260/23, *forme de phares d'automobile*, EU:T:2024:421, § 33; 24/11/2016, T-578/15, *device of a solar cell*, EU:T:2016:674, § 16; 07/10/2004, C-136/02 P, *three-dimensional Torch shapes*, EU:C:2004:592, § 31; 29/4/2004, C-456-457/01, *tabs*, EU:C:2004:258, § 39; 12/1/2006, C-173/04, *Standbeutel*, EU:C:2006:20, § 30).
- 27 Only a mark which deviates significantly from the rules or customs of the sector and thereby fulfils its essential function of indicating origin is devoid of any distinctive character within the meaning of Article 7 (1) (b) EUTMR (09/11/2016-, 579/14, *Device of a pattern*, EU:T:2016:650, § 25; 12/01/2006, 173/04-P, *Standbeutel*, EU:C:2006:20, § 31; 22/06/2006, C-25/05 P, *Bonbonverpackung*, EU:C:2006:422, § 28).

- 28 It should also be borne in mind that novelty or originality are not relevant criteria for assessing the distinctive character of a trade mark, so that it is not sufficient for a trade mark to be registered that it is original, but that it must be substantially different from the basic shapes of the product in question, which are commonly used in trade, and must not appear as a simple variant of those shapes (24/06/2024, T-260/23, *forme de phares d'automobile*, EU:T:2024:421, § 34; 26/11/2015, t-390/14, *KJ Kangoo Jumps XR*, EU:T:2015:897, § 25).
- 29 Furthermore, it is not sufficient that the shape of the mark applied for differs, as regards certain physical characteristics of the product, from other shapes available on the market for the same product, but it is also necessary that those characteristics be sufficiently marked to enable consumers to distinguish the product presented under the intended sign from those of other undertakings solely on the basis of its shape (24/06/2024, T-260/23, *forme de phares d'automobile*, EU:T:2024:421, § 35; 08/11/2023, t-114/23, *forme d'un sac*, EU:T:2023:703, § 47).
- 30 Even though the existence of special or original characteristics is not a condition *sine qua non* for registration, the fact remains that its presence is capable of conferring the requisite degree of distinctiveness on a trade mark which would otherwise be absent (24/06/2024, T-260/23, *forme de phares d'automobile*, EU:T:2024:421, § 36; 10/10/2007, t-460/05, *forme d'un haut-parleur*, EU:T:2007:304, § 43).
- 31 The examiner did not specify the standard in force in the relevant market segment and the extent to which the sign applied for would not deviate from it. It merely stated that the mark applied for is merely a variant of the shape and packaging of the goods in question, so that the average consumer cannot distinguish the goods in question from those of other undertakings.
- 32 First of all, the Chamber disagrees with the examiner's view that a bottle in the form of a man's body will be perceived by the relevant consumer as a characteristic of the packaging of the goods and that that packaging would not be significantly different from a number of forms of packaging that are frequently used in trade for the goods and would merely be a variation in them.
- 33 To support this, the researcher gives three examples of perfume bottles present on the market, in the form of a man's torso. One of them is indeed a perfume bottle of one of the main players on the perfume market ('Le Male' by Jean-Paul Gaultier). However, the three examples do not allow the Court to conclude that the shape of a man's body would be a basic shape commonly used in trade for a perfume bottle.
- 34 It does not seem obvious that a man's torso has elements similar to those most likely to be taken over by a perfume bottle. Therefore, the use of a man's body as a perfume bottle in itself appears to deviate sufficiently from the standards or practices in the perfume sector.
- 35 Moreover, the shape of the perfume bottle at issue, with the relief resulting from the use of horizontal discs of the same width which are aligned, has specific characteristics which make the bottle distinctive and unusual (21/06/2017, T-20/16, *figurative mark representing chevrons between two parallel lines*, EU:T:2017:410, § § 43 to 45).

- 36 Moreover, it is clear from the wording of Article 7 (1) (b) EUTMR that a minimum degree of distinctiveness is sufficient to render inapplicable the ground for refusal set out in that article (27/02/2001, T-79/00, Lite, EU:T:2002:42, § 28; 15/09/2005, T-320/03, live richly, EU:T:2005:325, § 68), and in the opinion of the Chamber this minimum limit has been exceeded.
- 37 The mark applied for cannot be regarded as simple or banal (29/09/2009, T-139/08, representation of a half smiley smile, EU:T:2009:364, § 27-31).
- 38 Although special or original characteristics are not criteria for the distinctive character of a trade mark, the mark must enable the public to distinguish the goods and services in question from those of other undertakings or persons (04/07/2017, T-81/16, a pair of curved strips on the side of a Tire, EU:T:2017:463, § 49). The mark applied for complies with both: it has both special and original characteristics and also enables the public to distinguish *perfumes* from those of third parties.
- 39 The history of the shape in question, with details of the designs and trade marks, indicated by the applicant in its defence and in its grounds of appeal, is irrelevant in that regard. Moreover, for the purposes of determining whether a particular mark is distinctive, it is irrelevant whether it may give rise to a likelihood of confusion with other marks, in this case, for example, with the ‘Le Male’ perfume bottle commercialised by Jean-Paul Gaultier. Such considerations are relevant only if an opposition is filed.
- 40 Finally, the Chamber notes that the examiner criticises the applicant for invoking arguments relating to design rights, stating that the requirements for registration of a design are different from those for the registration of a shape mark, but that at the same time she does refer, in its decision, to ‘the design’ and the ‘claimed design’, which seems to confuse the terminology of the various intellectual rights.
- 41 The Board concludes that the shape mark in question, with its specific characteristics, is capable of fulfilling the essential function of a trade mark for the purposes of distinguishing the *perfumes* applied for in Klasse 3 of those of a different origin.
- 42 Since the mark applied for is not contrary to the absolute ground for refusal set out in Article 7 (1) (b) EUTMR, the appeal is considered well founded and the contested decision is annulled.

Judgment

On those grounds,

THE CHAMBER

as follows:

- 1. The contested decision is set aside;**
- 2. The application will be admitted to publication.**

Signed

V. Melgar

Signed

R. Ocquet

Signed

A. Pohlmann

Registrar:

Signed

H. Dijkema

