

**DECISION  
of the Fifth Board of Appeal  
of 18 October 2023**

In case R 1349/2022-5

**GM Cruise Holdings LLC**

1201 Bryant Street,  
San Francisco, California 94103  
United States

Opponent / Appellant

represented by Kunze Rechtsanwälte - Solicitor (England & Wales) PartG mbB,  
Maximiliansplatz 12 b, 80333 München, Germany

v

**Candid Group B.V.**

Johan van Hasseltweg 27,  
1021 KN Amsterdam,  
Netherlands

IR Holder / Defendant

represented by Boekx Trademarks B.V., Leidsegracht 9, 1017 NA, Amsterdam, Netherlands

APPEAL relating to Opposition Proceedings No B 3 134 442 (International registration designating the European Union No 1 538 478)

**THE FIFTH BOARD OF APPEAL**

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

Registrar: H. Dijkema

gives the following

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Language of proceedings: English

## Decision

### Summary of the facts

- 1 On 28 May 2020, Candid Group B.V ('the IR holder'), designated the European Union in its international registration ('IR') for the figurative mark



for the following services:

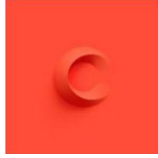
*Class 35: Advisory services relating to public relations; assistance to management in commercial enterprises in respect of public relations; consultancy regarding public relations communication strategies; corporate communications services; media relations services; public relations consultancy; public relations studies; organisation of exhibitions and events for commercial or advertising purposes; administration of loyalty programs involving discounts or incentives; loyalty scheme services; customer relationship management; provision of advertising space; arranging for the provision of advertising space in newspapers; providing advertising space; provision of advertising space on electronic media; provision of computerised advertising services; provision of space on web-sites for advertising goods and services; provision of space on websites for advertising goods and services; provision of advertising space on a global computer network; provision of advertising space by electronic means and global information networks; providing and rental of advertising space on the internet; providing advertising space in periodicals, newspapers and magazines; advertising by mail order; advertising flyer distribution; advertising flyer distribution for others; arranging the distribution of advertising samples; direct mail advertising; dissemination of advertising matter; dissemination of advertising for others; dissemination of advertisements; dissemination of advertising for others via an on-line communications network on the internet; dissemination of advertising material [leaflets, brochures and printed matter]; dissemination of advertising for others via the internet; direct mail advertising services provided by letter shops; direct mail advertising services; dissemination of advertising material; dissemination of advertising materials; dissemination of advertising, marketing and publicity materials; dissemination of advertising and promotional materials; dissemination of advertising matter online; dissemination of advertising via online communications networks; dissemination services of advertisement matter; distribution of advertising announcements; distribution of advertising matter; distribution of advertising materials; distribution of advertising brochures; advertising consultation; advertising and marketing consultancy; advisory services relating to marketing; advisory services relating to corporate identity; advisory services relating to sales promotion; analysis of marketing trends; advisory services relating to advertising; business advice relating to advertising; business advice relating to marketing; business advice relating to strategic marketing; business consultation relating to advertising; business marketing consultation services; business marketing consultancy; consultancy relating to marketing; consultancy relating to business advertising; consulting services in the field of internet marketing; consulting services relating to publicity; direct marketing consulting; market segmentation consultation; marketing advice; press advertising consultancy; compilation of data;*

*acquisitions (business -) consulting services; advice in the field of business management and marketing; advice and information concerning commercial business management; advice relating to business management; advisory services relating to business analysis; advisory services relating to business organization; advisory services relating to business management; advisory services relating to business acquisitions; advertising analysis; advertising research; advertising research services; advisory services relating to market research; analysis of advertising response; analysis of advertising response and market research; analysis of markets; analysis of market research data; analysis of market research statistics; analysis of market research data and statistics; audience rating determination for radio and television broadcasts; analysis relating to marketing; analysis of the public awareness of advertising; business and market research; conducting market surveys; conducting public opinion polls; conducting of market research; conducting of marketing studies; consumer research; consumer response analysis; market analysis services; market research consultancy; market research for advertising; market research services; marketing analysis; acquisition of business information relating to company activities; acquisition of business information relating to company status; acquisition of commercial information; collection of statistics for business; collection of commercial information; compilation of business data; compilation of business statistics; compiling of statistics.*

*Class 42: Compression of data for electronic storage; data conversion of electronic information; advice and development services relating to computer software; advisory and information services relating to computer software; advisory services relating to computer programming; computer programming; computer software development; computer software engineering; consultancy relating to software design and development; consultancy relating to the creation and design of websites; consultancy relating to the creation and design of websites for e-commerce; consultancy with regard to webpage design; creating and designing web pages for others; creating, maintaining and hosting the websites of others; creating websites; creating web pages for others; creation and maintenance of websites; creation and maintenance of software for blogs; creation of internet web sites; database design; design and development of operating software for cloud computing networks; digital asset management; digital distributed storage; electronic storage of data; enterprise content management; infrastructure as a service [iaas]; platform as a service [paas]; consultancy (computer software -); information technology consultancy; conversion of texts to digital format; advisory services relating to design engineering; surveying; analysis of product development; analysis of product design; animation design for others; animation and special-effects design for others; art work design; brand design services; commercial design services; computer website design; computer graphics design services; database design and development; design and development of multimedia products; design consultancy; design (graphic arts -); design of home pages and web sites; design of packaging; design services for art-work; design services for architecture; design services (packaging -); design services relating to shop displays; design services relating to shop interiors; design services relating to data processing systems; designing and developing web pages; graphic design; graphic design services; retail design services; shop design; visual design; website design and development.*

2 The application was republished by the Office on 6 July 2020.

- 3 On 6 November 2020, GM Cruise Holdings LLC ('the opponent') filed an opposition against the application ('the contested sign') for all the above services.
- 4 The grounds of opposition were those laid down in Article 8(1)(b) EUTMR and the opposition was based on the earlier IR designating the European Union No 1 505 748



filed and registered on 31 October 2019 and duly renewed for the following goods and services:

*Class 9: Computer software for the autonomous driving of motor vehicles; computer software for autonomous vehicle navigation, steering, calibration, and management; computer software for providing and managing transportation services, namely, software for scheduling and dispatching autonomous vehicles to passengers; computer software for management of transportation rideshare and ride hailing services; computer software for providing and managing delivery services; computer software for providing and managing delivery of consumer goods, food, and groceries; downloadable mobile applications for scheduling and booking transportation and delivery services; downloadable mobile applications for scheduling and booking delivery of consumer goods, food, and groceries; computer software for visualization, manipulation, and integration of digital graphics and images in the field of ride sharing and autonomous vehicles; computer software for artificial intelligence, machine learning, and deep learning in the field of ride sharing and autonomous vehicles; computer software for vehicle fleet management and operations; computer software for use in operating and calibrating LiDAR; downloadable open source software for use in data management in the field of ride sharing and autonomous vehicles; LiDAR apparatus; laser object detectors for use on vehicles; laser device for sensing distance to objects; laser measuring systems; lasers for measuring purposes; vehicle sensors in the nature of sensors for measuring the presence of objects in the environment and the speed, trajectory, and heading of objects; sensors for determining position, velocity, direction, and acceleration of land vehicles; navigation apparatus for vehicles; navigational instruments for vehicles; vehicle detection equipment in the nature of monitoring devices for vehicles, namely, global positioning system (GPS) receivers and devices for monitoring vehicle functions, the presence of objects in the environment, and the speed, trajectory, and heading of objects.*

*Class 12: Autonomous and semi-autonomous vehicles and structural parts thereof.*

*Class 35: Business data analysis obtained through ride sharing and autonomous vehicles; business data analysis services in the field of transportation, energy and vehicles insurance; compiling and analyzing statistics, data and other sources of information obtained through ride sharing and autonomous vehicles for business purposes; business analysis and business strategic planning services related to statistics, data and other sources of information obtained through ride sharing and autonomous vehicles for business purposes; providing business intelligence services related to statistics, data and other sources of information obtained through ride sharing and autonomous vehicles; business advisory and consulting services relating to data analytics obtained through ride*

*sharing and autonomous vehicles; fleet management services in the nature of tracking, locating, and monitoring of fleet vehicles for commercial purposes.*

*Class 39: Providing transportation, ride sharing, ride hailing, and delivery services by autonomous vehicles; providing data for use in the fields of transportation and energy; transportation services and bookings for transportation services, transportation by autonomous vehicles; transportation of passengers by autonomous vehicles; delivery of goods; delivery of goods by autonomous vehicles; food, grocery, and package delivery services; supply chain logistics and reverse logistics services, namely, storage, transportation, and delivery of goods for others; car rental.*

*Class 42: Providing online non-downloadable software for the autonomous driving of motor vehicles; providing online non-downloadable software for autonomous vehicle navigation, steering, calibration, and management; providing online non-downloadable software for providing and managing transportation services, namely, software for scheduling and dispatching autonomous vehicles to passengers; providing online non-downloadable software for management of transportation rideshare and ride hailing services; providing online non-downloadable software for providing and managing delivery services via autonomous vehicles; providing online non-downloadable software for providing and managing delivery of consumer goods, food, and groceries via autonomous vehicles; providing online non-downloadable software for visualization, manipulation, and integration of digital graphics and images in the field of ride sharing and autonomous vehicles; providing online non-downloadable software for artificial intelligence, machine learning, and deep learning in the field of ride sharing and autonomous vehicles; providing online non-downloadable software for vehicle fleet management and operations; providing online non-downloadable software for use in operating and calibrating LiDAR; providing online non-downloadable software used for data analytics in the fields of transportation, energy and vehicle insurance; providing online non-downloadable software used for data analytics in the field of transportation fleet management in the field of ride sharing and autonomous vehicles; providing online non-downloadable open source software for use in data management; land and road surveying; surveying ride sharing data collection and analysis in connection therewith; mapping services; research and development into autonomous vehicles.*

- 5 By decision of 25 May 2022 ('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:
- The examination of the opposition will proceed as if all the services were identical.
  - The services presumed identical target the public at large and business customers with specific professional knowledge or expertise. The degree of attention may vary from average to high.
  - Both signs are fanciful representations of the letter 'C'. In the earlier mark, the letter 'C' is depicted providing the perception of depth, in dark orange. In contrast, in the contested sign, this letter is represented in an orange thick line surrounded by another thick line in the same colour, broken at the bottom left, which part of the public may perceive as another letter 'C'. The letter 'C' neither describes the goods and services in question nor alludes to their characteristics and is, therefore, distinctive.

- The signs do not have any element that could be considered clearly more dominant.
  - The orange colour in the signs plays a merely decorative role and does not add any distinctive character.
  - **Visually**, notwithstanding the fact that both signs consist of the representation of the same letter ‘C’, the difference in how they are depicted will be clearly noticed by consumers, since the signs have very different graphical representation. In the earlier mark, the letter is highly stylised and depicted in a 3D shape, placed on a dark orange background; in the contested sign, it is depicted in orange surrounded by another thick line in the same color, broken at the bottom left which could also be perceived by a part of the public as a second and bigger letter ‘C’. The shorter the signs, the more easily the public perceives all their individual elements. In the present case, the public will not fail to perceive in detail the characteristics of the graphical depiction of both signs. Moreover, the similarities in the orange colour, although in different shades, are not sufficient to find any degree of similarity.
  - Therefore, the signs are visually dissimilar.
  - **Phonetically**, the pronunciation is identical. However, for the part of the public that may pronounce a double ‘C’ in the contested sign, they are similar to an average degree.
  - **Conceptually**, even if a stylised representation of a letter ‘C’ will be perceived in both signs, which may serve to describe the semantic content of the signs at issue, this is not sufficient to establish their conceptual similarity, as this letter carries no meaning in respect of the goods and services in question (26/03/2021, R 551/2018-G, Device (fig.) / Device (fig.), § 79, 85). Therefore, the conceptual aspect will not influence the comparison of the signs.
  - The earlier trade mark as a whole has no meaning for any of the goods and services. Therefore, the inherent distinctiveness of the earlier mark must be seen as normal.
  - The similarities between the signs are limited to the pronunciation of the letter ‘C’. The way the letter appears in each sign is determinant. The letter is depicted in a very different manner in the two signs. The signs are visually dissimilar and, in spite of the presumed identity of the services, this is not sufficient to find a likelihood of confusion. The phonetical identity/similarity is solely caused by the presence of the letter ‘C’ in both signs; the distinctive character of the marks at stake mainly lies in their graphic features which are very different overall.
- 6 On 25 July 2022, 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 26 September 2022.
- 7 In its response received on 23 December 2022, the IR holder requested that the appeal be dismissed.
- 8 On 17 January 2023, the opponent requested a second round, which was granted by the Rapporteur.

- 9 On 18 April 2023, within the extended time limit, the opponent filed its observations in reply.
- 10 On 19 May 2023, the IR holder filed its rejoinder.

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

- 11 The arguments raised by the opponent in the statement of grounds may be summarised as follows:
  - The services have been presumed to be identical. This conclusion is not contested.
  - The visual comparison is flawed. The visual comparison is based on the overall impression given by the signs. As part of the overall impression, the stylisation is one of the elements that contributes to the degree of similarity of single-letter marks. The latter can be stylised in various ways. The general principle that the relevant public relies on their imperfect recollection and do not adapt a meticulous approach has been regularly acknowledged (11/10/2016, T-350/15, P (fig.), EU:T:2016:602, § 40, 45). Had the Opposition Division taken account of case-law in relation to the visual comparison of signs consisting of a single letter, it should have allowed the opposition in its entirety. The Board of Appeal is reminded of the comprehensive case-law in relation to single-letter marks (20/05/2011, R 1508/2010-2, A (fig.) / A, § 23, 25; 24/02/2015, R 2358/2013-1, e (fig.) / e (fig.), § 82).
  - While the Opposition Division held that the ‘difference in how they are depicted’ would be clearly noted by consumers, as the signs have different graphical representations, it emphasised that the signs are clearly perceived as having the letter ‘C’ embedded in the graphical representation. The conclusion that the public would not fail to perceive in detail the characteristics of the graphical depiction of both signs is contrary to what has been and is still widely acknowledged when assessing the similarity of the signs, namely that even consumers with a high degree of attention need to rely on their imperfect recollection of trade marks.
  - Hence, the Opposition Division’s finding that the orange colour does not contribute to such an overall recollection of the signs is without foundation. The orange colour cannot merely serve as being of a ‘decorative nature’ bearing in mind that the colour as such rather contributes to having the relevant public remember the signs.
  - Moreover, the Office issued a notification to the opponent’s representatives drawing their attention to the publication of the contested sign in the European search report. Accordingly, the Office had ex officio identified it as being similar to the earlier mark.
  - The Opposition Division also failed to acknowledge that there exists a similarity of the trade marks when, from the point of view of the relevant public, they are at least partially identical as regards one or more relevant aspect, namely the visual, phonetic or conceptual aspects. The finding that there is no likelihood of confusion contradicts the finding that the signs are phonetically identical.
  - The Opposition Division should have concluded that there exists a likelihood of confusion as the services to be compared are deemed to be identical, the

distinctiveness of the earlier mark is considered normal, the relevant public's degree of attention is normal and the signs are phonetically identical.

- Had the Opposition Division applied the facts correctly to the applicable law, it would have concluded that the opposition was well founded. By not dealing with the arguments advocated by the opponent, the Opposition Division not only violated Article 8(1) EUTMR but was also in breach of Article 94 EUTMR. The Opposition Division's findings constitute an error that prevented the opponent from receiving a fair decision on the merits. Had the Office dealt diligently with the arguments exchanged between the parties, it would have concluded that a likelihood of confusion existed. In that regard, it must be recalled that trade marks come with the protection of Article 1 of Protocol No.1 of the Convention for the Protection of Human Rights and Fundamental Freedom. The European Court of Justice has developed a tradition of confirming fundamental rights as being an integral part of European Union law.
  - Moreover, it was confirmed in the 'Rutili' judgment (28/10/1975, C-36/75, Rutili, EU:C:1975:137) as well as in the 'Hauer v. Rheinland-Pfalz' judgment (13/12/1979, C-44/79, Hauer v. Rheinland-Pfalz, EU:C:1979:290) that the rights protected by the European Court of Human Rights form part of Community law and that fundamental rights form part of the EU law wherein the European Convention of Human Rights has 'special significance' (see the opinion on the accession by the Community to the ECHR, 28/03/1996, 2/94, EU:C:1996:140).
  - In view of the foregoing, particular weight has to be given to the proprietary character of an existing EUTM registration that has been in the Register and in which extensive investments have been made. The commercial value associated therewith cannot be easily removed, i.e., without justification, from the Register. Had the Opposition Division taken account of the aforesaid general principles of EU law, it would have had to conclude that a likelihood of confusion existed.
  - Furthermore, it is requested that for the submission of further facts and for the exchange of additional arguments, oral proceedings be held before the Board of Appeal pursuant to Article 96 EUTMR, if the Board of Appeal does not intend to grant the appeal as requested in written proceedings. In light of the comprehensive assertions made as well as the ignorance shown by the Opposition Division, oral proceedings would be expedient.
  - Finally, reference is made to all preceding submissions made by the opponent.
- 12 The arguments raised by the IR holder in response to the appeal may be summarised as follows:
- The Opposition Division, for reasons of procedural economy, proceeded as if all the services were identical. This does not mean that the identity of the services is accepted as a fact and could not be at issue in the appeal. The conflicting services are not similar, as the earlier services are destined for services in the field of ride sharing and autonomous vehicles, which is not the case of the contested services.
  - The Opposition Division found that the services target the public at large and business customers with specific professional knowledge or expertise, with a degree of attention that may vary from average to high. The IR holder agrees, even though it



could be argued that software for autonomously riding vehicles is not a product for the general public.

- The signs are visually and conceptually dissimilar, which was also the contested decision’s view. However, the IR holder disagrees with the Opposition Division with regard to the phonetic similarity. There is no similarity as they consist of figurative elements that will not, or are unlikely to, be perceived by the relevant public as a letter of the alphabet and pronounced as such.
- Visually, the earlier mark consists of a dark orange square from which a three-dimensional sign emerges that could be seen as the letter ‘C’ (or the letter ‘O’ where part of the letter has not yet emerged from the square). The letter ‘C’ (or ‘O’) is not a reference to the name of the opponent or its services.
- The contested sign consists of three circles of different sizes put together, which are interrupted on the right side. The outer circle is in light orange and is also interrupted in the left lower corner. The middle circle is in white, which may or may not be interrupted on the right side as the interruption is in white and therefore is not visible. The inner circle is again in light orange and is interrupted on the right side. As the three circles are interrupted on the right side, they can be perceived as twice, or three times, the letter ‘C’. The letter could be seen as a reference to its name Candid Group. It could also be perceived by the relevant public as a stylised iris shape or radar.
- Visually, the signs are very different; the only similarity would be the different colour orange and a part of the sign, which could be perceived as differently-shaped letters ‘C’. The appearance of this ‘letter’ is completely different in both signs.
- The case-law presented by the opponent relates to nearly identical letters. Moreover, if the signs were both to be perceived as a single letter ‘C’, it follows from 26/03/2021, R 551/2018-G, Device (fig.) / Device (fig.) that the visual, phonetical and conceptual similarity between signs consisting of a single letter is not easily accepted.
- The IR holder disputes the Opposition Division’s finding that there is some degree of phonetic similarity between the signs as they could both be referred to with the letter ‘C’. If these two figurative marks were to be ‘pronounced’ or be referred to, there is no word to describe these marks. Unlike other marks that only consist of one single letter, the signs in question are not adequately described by referring to them as the letter ‘C’. Regarding the earlier mark, ‘orange square’ would be more appropriate, while for the contested sign ‘interrupted circles’ or ‘iris’ would be better suited than simply ‘the C mark’. Therefore, the IR holder disagrees that the signs are phonetically similar. In any case, such similarity will be very limited because the likelihood that both signs will be referred to using the letter ‘C’ is smaller than the likelihood that one of them be indicated in that way.
- Conceptually, the earlier sign has no meaning. The contested sign could either be perceived as a stylised version of the letter ‘C’ or as a stylised iris or radar consisting of three letters ‘C’. This creates a conceptual dissimilarity. In either case, it is unclear how the marks can be deemed conceptually similar (26/03/2021, R 551/2018-G, Device (fig.) / Device (fig.), § 85).

- The earlier mark is not very distinctive as it consists merely of an orange square. The ‘emerging’ letter ‘C’ (or ‘O’), which arguably forms the only special feature of the sign, is in the same colour as the background. Therefore, it is not very conspicuous and is likely to be disregarded by the relevant public.
- The opponent complained that the Opposition Division failed to acknowledge the principle of interdependence, where a lack of similarity of the goods and services can be set off against a higher level of similarity of the signs, which is unfounded. By assuming, for reasons of procedural economy, that the services are identical, the Opposition Division made its decision based on the most favourable point of view for the opponent. Therefore, applying the principle of interdependence, if not already applied, would not have resulted in a different outcome.
- The signs are dissimilar, the contested services are not identical and the public’s level of attention may vary from average to high. Since one condition of Article 8(1)(b) EUTMR is not fulfilled, no likelihood of confusion may arise.
- In the event that the Board would follow the Opposition Division in its assessment that the signs are phonetically similar, the IR holder argues that the visual aspect and therefore the perception of the graphic elements, is more important than the phonetic aspect. The services in question are generally rendered in writing and not orally. Any low level of phonetic similarity between the signs, given the visual and conceptual dissimilarity, would therefore not cause a likelihood of confusion.
- The IR holder refers to the Board of Appeal’s decision whether an oral hearing will be held in case at stake.

13 The arguments raised by the opponent in the observations in reply may be summarised as follows:

- Even if the IR holder objects to the fact that the Opposition Division assumed, for reasons of procedural economy, that the goods and services to be compared are identical, there can be little, if any, doubt that the goods and services are identical to a large extent as well as highly similar. For the avoidance of repetition, reference is made to the opponent’s submissions at first instance.
- Visually, the signs share the graphic representation of the letter ‘C’ as well as the colour orange. The very small differences ‘in how they are depicted’ would clearly not be noted by consumers. This is even more so as the signs are clearly perceived as having the letter ‘C’ embedded in their graphical representation. In addition, the relevant public relies on its imperfect recollection.
- The suggestion that the opponent made reference to case-law only in ‘isolation’ is unfounded as the conclusion that the IR holder’s position could be supported by reference (26/03/2021, R 551/2018 G, Device (fig.) / Device (fig.), § 79, 85) is flawed. Contrary to the Grand Board case, the present case must be distinguished, from the outset, in as much as the two signs will and can only be perceived as embedding the letter ‘C’, whereas the Grand Board stated that neither of the signs could be recognised ‘as a letter’.

- The assertion made by the IR holder that the signs will not be referred to phonetically is based on unsubstantiated assertions. The Opposition Division correctly found that the signs are identically pronounced.
- In as much as the IR holder claims that the Opposition Division was correct in concluding that a likelihood of confusion does not exist, it failed to acknowledge the principles established in the case-law.

14 The arguments raised by the IR holder in the rejoinder may be summarised as follows:

- In its second round of submissions, the opponent did not present any new facts or arguments. Therefore, the IR holder does not consider it necessary to respond, as it would only mean it would have to repeat its arguments. The IR holder respectfully refers to its response to the appeal dated 23 December 2022.
- The IR holder only wishes to set one thing straight. The opponent suggests that the IR holder objects to the Opposition Division’s finding, for reasons of procedural economy, that the goods and services to be compared are identical. The latter has only emphasised that this finding was found exactly for reasons of procedural economy only. The IR holder did not object to this assumption as it has no reason to.
- The opponent’s attempt to assume as a matter of fact and to use that as a basis to argue that the signs are similar and that there is a risk of confusion, is clearly an (intentional) misinterpretation of the contested decision.

### **Reasons**

- 15 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.
- 16 The appeal complies with Articles 66, 67 and Article 68(1) EUTMR. It is admissible.

### *Confidentiality request*

- 17 Article 114(4) EUTMR provides that files may contain certain documents which are withheld from inspection, in particular if the party concerned showed a special interest in keeping them confidential.
- 18 In the event that a special interest in keeping a document confidential is invoked in accordance with Article 114(4) EUTMR, the Office must check whether a special interest is sufficiently shown. Such a special interest must exist because of the confidential nature of the document or its status as a trade or business secret.
- 19 In this case, before the Board, the opponent merely marked its statement of grounds as confidential but did not give any reason as to why Article 114(4) EUTMR would be applicable, nor has the Board found any indication that could justify the existence of a special interest, also bearing in mind that no such claim was made with respect to the other submissions filed.

*Article 8(1)(b) EUTMR*

- 20 According to Article 8(1)(b) EUTMR, upon opposition by the proprietor of an earlier trade mark, the trade mark applied for must not be registered if because of its identity with, or similarity to, an earlier trade mark and the identity or similarity of 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 trade mark is protected. The likelihood of confusion includes the likelihood of association with the earlier trade mark.
- 21 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 on the part of the public, in the absence of which Article 8(1) EUTMR does not apply (29/09/1998, C-39/97, Canon, EU:C:1998:442, § 29; 22/06/1999, C-342/97, Lloyd Schuhfabrik, EU:C:1999:323, § 17).
- 22 According to the same line of case-law, the likelihood of confusion must be assessed globally, according to the relevant public's perception of the signs and goods or services in question and taking into account all factors relevant to the circumstances of the case, in particular the interdependence between the similarity of the signs and that of the goods or services covered (21/04/2021, T-44/20, Device of two interlocking elements (fig.) / Device of two bold black overlapping circles (fig.), EU:T:2021:207, § 45).

*Relevant public and territory*

- 23 In the global assessment of the likelihood of confusion, account should be taken of the average consumer of the category of goods or services concerned, who is reasonably well-informed and reasonably observant and circumspect. It should also be borne in mind that the average consumer's level of attention is likely to vary according to the category of goods or services in question (13/02/2007, T-256/04, Respicur, EU:T:2007:46, § 42; 24/11/2021, T 551/20, Riviva, EU:T:2021:816, § 57; 24/02/2021, T-56/20, Vroom, EU:T:2021:103, § 17).
- 24 The public that the goods or services at issue target must be taken into consideration. The relevant public is composed of consumers likely to use both the goods or services covered by the earlier trade mark and those covered by the contested trade mark (19/07/2016, T-742/14, Calcilite, EU:T:2016:418, § 44; 12/07/2019, T-792/17, Mando, EU:T:2019:533, § 29).
- 25 Since, as will be seen below, the Board will assume that the respective services in Classes 35 and 42 are identical, it will define the relevant public of those services.
- 26 The contested services in Class 35 mainly encompass the field of advertising, marketing and public relations, and related advice. These services are used by a large number of professionals whose level of attention is, according to the case-law, high (13/12/2016, T-58/16, Apax, EU:T:2016:724, § 27).
- 27 The earlier services in the same class mainly relate to business analysis, planning and intelligence services in the field of ride sharing and autonomous vehicles, in addition to fleet management services, as well as related advice. Such services are usually rendered by specialised companies, whose main purpose is to gather information and to provide tools and expertise to enable their customers, who are themselves professionals, to carry

on their business activities or to provide businesses with the necessary support to develop (18/10/2011, T-304/10, Caldea, EU:T:2011:602, § 25). According to the case-law, those services are aimed at a specialised group of persons (in the present case, in the autonomous vehicle field). That is, therefore, a user profile which is specialised or well informed (09/06/2021, T-266/20, CCA Chartered Controller Analyst Certificate, EU:T:2021:342, § 40; 11/05/2005, T-390/03, CM, EU:T:2005:170, § 6 and 26).

- 28 The contested services in Class 42 are design and development services in various fields, as well as IT related services. Some of these services target business customers with specific professional experience and knowledge, who are regarded as having a high level (14/03/2017, T-275/15, e, EU:T:2017:163, § 19; 12/02/2015, T-453/13 Klaes, EU:T:2015:98, § 3, 24; 13/03/2018, T-824/16, K, EU:T:2018:133, § 43; 01/03/2016, T-61/15, 1e1, EU:T:2016:115, § 23 & 26). However, some wording, such as *visual design*, is sufficiently widely phrased to be aimed at the general public (21/11/2019, T-527/18, tec.nicum, EU:T:2019:798, § 48). Also the IT related services can target both the public at large and professionals and depending on the specialisation of the service, the level of attention of the public at large may vary from average to higher than normal or high (17/12/2017, T-351/14, Gatewit, EU:T:2017:101, § 54).
- 29 The earlier services in Class 42 relate to the provision of software, mainly in relation to autonomous driving, as well as research and development into autonomous vehicles. Some of these services target a specialised public. Since the software concerned is provided online, it can also target the end user of the autonomous vehicle. In addition, some the provided services are clearly also used by the public at large, such as *online non-downloadable software for providing and managing delivery of consumer goods, food, and groceries via autonomous vehicles*. Therefore, the same considerations apply as in the previous paragraph.
- 30 Since the earlier mark is an EUTM, the relevant territory is the European Union.

#### *Comparison of the services*

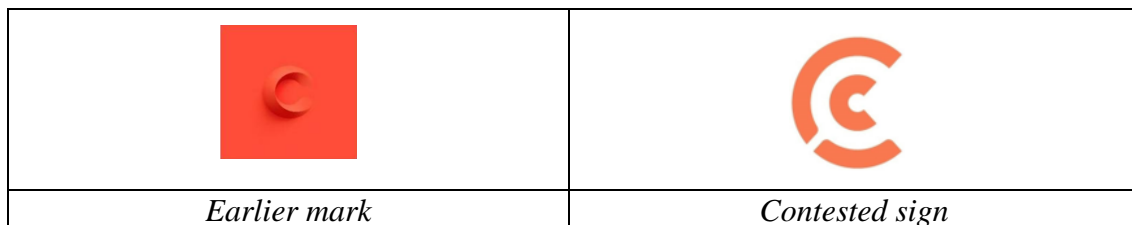
- 31 For reasons of procedural economy, the Board will take the same approach as the Opposition Division and will assume that contested services in Classes 35 and 42 are identical to the earlier services in the same classes.

For the opponent, this is the best light in which the opposition can be considered. It explicitly stated that it does not contest this approach.

#### *Comparison of the signs*

- 32 With regard to the comparison of the signs, the likelihood of confusion must be determined by means of a global appraisal of the visual, phonetic and conceptual similarities between the signs, on the basis of the overall impression given by them, bearing in mind in particular their distinctive and dominant components (11/11/1997, C-251/95, Sabèl, EU:C:1997:528, § 23; 06/10/2005, C-120/04, Thomson Life, EU:C:2005:594, § 28).

- 33 With regard to the assessment of the dominant character of one or more given components of a complex trade mark, account must be taken, in particular, of the intrinsic qualities of each of those components by comparing them with those of other components. In addition and accessorially, account may be taken of the relative position of the various components within the arrangement of the complex mark (23/10/2002, T-6/01, Matratzen + Matratzenmarkt Concord (fig.), EU:T:2002:261, § 35).
- 34 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 thus 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 ask whether it is at all descriptive of the goods or services concerned (17/03/2021, T-186/20, The Time, EU:T:2021:147, § 32; 03/09/2010, T-472/08, 61 a nossa alegria, EU:T:2010:347, § 47).
- 35 Indeed, although the comparison must be based on the overall impression made by those 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, Black Label by Equivalenza, EU:C:2020:156, § 71).
- 36 The higher or lower level of the distinctive character of the elements common to a mark applied for and an earlier mark is one of the relevant factors in the context of the assessment of the similarity of the signs (05/10/2020, T-602/19, Naturanove / Naturalium, EU:T:2020:463, § 26).
- 37 The signs to be compared are the following:



- 38 The earlier mark is a figurative mark which is completely in orange, consisting of a square ('the square device') in the middle of which appears a semi-circular device ('the semi-circular device') with a small opening or gap on its right-hand side. The semi-circular device gives the impression to be three-dimensional (3D) or in relief.
- 39 The contested sign is also a figurative mark formed by orange semi-circular lines of the same thickness: it consists of an outer semi-circular line with a large opening to the right and a small opening on the left bottom-side, and within it, a smaller semi-circular device with a large opening to the right. The width of the space separating the semi-circular outer- and inner-lines is the same as the width of the semi-circular line.
- 40 As correctly pointed out by the Opposition Division, the signs concerned have no elements which could be considered more distinctive or more dominant (visually eye-catching) than other elements, as will be further explained below.
- 41 The Opposition Division stated that both signs consist of the representation of the letter 'C'. However, it is not at all obvious that both signs would be perceived as a highly stylised letter 'C'. In the earlier mark, the 3D representation together with the fact that the gap on

the right is rather small, may possibly lead to the sign being seen as a mere combination of geometrical shapes, namely a square and an incomplete circle. In the contested sign, the fact that there are two concentric semi-circular devices does not make it clear that one of them is a letter 'C'; there is no reason to assume that only one of these semi-circular devices would be perceived as a letter 'C' and the other, as a mere geometric shape.

- 42 The fact that the opponent described its earlier mark as 'a stylised representation of the letter "C" in orange against an orange background' on the application form, does not imply that the relevant public would necessarily perceive it that way. For the assessment of a likelihood of confusion, the way in which the signs concerned are qualified or identified in the trade mark registry is irrelevant. What is pertinent is the signs' overall impression conveyed to the relevant public and, accordingly, whether they are similar from the point of view of the relevant public. According to established case-law, the perception of the signs by the average consumer of the goods or services in question plays a decisive role in the global assessment of the likelihood of confusion (11/03/2016, T-53/15, Curodont, EU:T:2016:136, § 32).
- 43 In addition, whether or not the signs can be perceived as the letter 'C' is not particularly determinant for the outcome of these proceedings. What is of issue, is whether their overall impression, as perceived by the relevant public, is similar.
- 44 First, circles and curved lines are basic geometric shapes, and as a general rule, simple abstract graphic elements consisting of just one or two basic geometrical forms are inherently weak elements (17/05/2013, T-502/11, T-502/11, *représentation de deux faucilles entrelacées*, EU:T:2013:263, § 58).
- 45 Second, even if perceived as the same single stylised letter, thereby assuming the best case scenario for the opponent, although single letters can constitute an EUTM or IR designating the EU (see Article 4 EUTMR; 10/11/2011, T-187/10, G, EU:T:2011:202, § 49) and they are not devoid of any distinctive character (09/09/2010, C-265/09 P, *α*, EU:C:2010:508), the distinctiveness of a single letter without figurative elements is generally low, particularly if it is common to use single letters on the goods and services concerned (22/09/2011, T-174/10, A, EU:T:2011:519, § 37).
- 46 Being a single letter of the Latin alphabet, consumers are confronted with the letter 'C' (or any other letter) several times on a daily basis in a variety of different situations. Single letters are often used in trade and perceived as abbreviations denoting possible characteristics of the goods or services. For this reason, consumers are inclined to pay equal or even more attention to additional elements surrounding the letter, unless (which in the present case has not been claimed) the letter per se has acquired an enhanced distinctiveness. Those other elements can be either the stylisation of the letter itself or the presence of other word or device elements, even if they are weak (12/09/2017, R 2361/2016-4, *Q Fermentation (fig.) / Q chocolate (fig.)*).
- 47 In the present case, it follows that even if both signs were perceived as representing a stylised letter 'C', consumers would pay attention to the particular stylisation of each sign. In the same way, if perceived as simple abstract graphic elements formed by some basic geometric forms, the consumer will pay equally attention to their specific stylisation. Even if the letter 'C' does not seem to have a specific meaning in relation to in particular the relevant services in Classes 35 and 42, nor does it appear common to use this letter in

relation to these services, in view of the above considerations, the specific graphic representation still plays a significant role that cannot be ignored.

- 48 Finally, as to the shared colour orange, consumers are not in the habit of making assumptions about the origin of goods or services based on a colour, in the absence of any graphic or word element, because as a rule a colour per se is not, in current commercial practice, used as a means of identification (13/09/2010, T-97/08, Orange II, EU:T:2010:396, § 42).
- 49 Consumers in general do not associate an individual colour with particular ideas regarding origin (06/05/2003, C-104/01, Libertel, EU:C:2003:244, § 40). Whilst colours are capable of conveying certain associations of ideas, and of arousing feelings, they are unlikely to communicate specific information, especially since they are commonly and widely used, because of their appeal, in order to advertise and market goods or services, without any specific message (13/09/2010, T-97/08, Orange II, EU:T:2010:396, § 31; 24/06/2004, C-49/02, Blau / Gelb, EU:C:2004:384, § 38; 12/11/2008, T-400/07, Farben in Quadraten, EU:T:2008:492, § 35; 03/05/2017, T-36/16, Green stripes on a pin (col.), EU:T:2017:295, § 30).
- 50 The colour ‘orange’, in its various shades and tones, is commonplace in any sector of application due to the eye-catching nature and appeal thereof. It is not unusual and is one of the basic colours. There are no particular reasons why the target consumer should interpret this colour as something other than one colour selected on an arbitrary basis. The judgments in ‘Libertel’ and ‘Orange’ (06/05/2003, C-104/01, Libertel, EU:C:2003:244; 21/10/2004, C-447/02 P, Orange, EU:C:2004:649; 13/09/2010, T-97/08, Orange II, EU:T:2010:396) merely demonstrate the popularity of the colour orange for all types of goods and services.
- 51 **Visually**, for that part of the public that perceives both signs as abstract devices and does not perceive a letter ‘C’ in them, the signs, globally, display significant differences from one another, despite the presence in each of them of the colour orange and of a semi-circular shaped device with an opening to the right, both being, moreover, formed by common geometric elements (21/04/2021, T-44/20, Device of two interlocking elements (fig.) / Device of two bold black overlapping circles (fig.), EU:T:2021:20., § 37; 12/09/2007, T-304/05, Pentagon, EU:T:2007:271, § 22; 20/03/2019, T-762/17, Darstellung einer geometrischen Figur (fig.), EU:T:2019:171, § 19).
- 52 Therefore, the Board considers that the individual differences between the signs combined together are sufficient to outweigh the common elements, which are also not particularly strong due to their limited distinctiveness, in the overall visual impression.
- 53 For that part of the public that perceives in both signs a letter ‘C’, the conclusion is not different, despite the presence of the letter ‘C’ and the colour orange. The differences created by the square device, the 3D impression, and the different representation of the ‘C’ device with a small opening, in the earlier mark, and by the presence of the second semi-circular or ‘C’ device, both of them having a large opening, in the contested sign, are again sufficient to outweigh the alleged common presence of the letter ‘C’.
- 54 The same applies should part of the public perceive a letter ‘C’ in only one of the signs.



- 55 It follows that the signs have significant differences, whether perceived as an abstract figurative element or a letter, and they are visually only similar, at the most, to a very low degree.
- 56 **Phonetically**, for that part of the public that perceives both signs as abstract devices and does not perceive a letter ‘C’ in them, this concerns purely figurative signs, and they are not subject to a phonetic assessment. Established case-law states that a phonetic comparison is not relevant in the examination of the similarity between a figurative mark without word elements and another mark. A figurative mark without word elements cannot, by definition, be pronounced. At the very most, its visual or conceptual content can be described orally. Such a description, however, necessarily coincides with either the visual perception or the conceptual perception of the mark in question. Consequently, it is not necessary to examine separately the phonetic perception of a figurative mark lacking word elements and to compare it with the phonetic perception of other marks (07/02/2012, T-424/10, *Eléphants dans un rectangle*, EU:T:2012:58, § 45-46).
- 57 The same applies in case part of the public would perceive a letter ‘C’ in only one of the signs.
- 58 For that part of the public that perceives in both signs a letter ‘C’, they share that sound and they are, thus, identical. However, this is applying to the extreme the best-case scenario for the opponent, since then it would also have to be assumed that in the contested sign, only one letter ‘C’ and not two are perceived, despite the presence of two semi-circular devices.
- 59 **Conceptually**, the similarity between the signs must be assessed on the basis of the evocative force that may be recognised in each of them taken as a whole (17/03/2004, T-183/02 and T-184/02, *Mundicor*, EU:T:2004:79, § 90).
- 60 For that part of the public that perceives both signs as abstract devices, neither of the figurative signs has a discernible meaning and the comparison remains neutral.
- 61 The same applies in case part of the public would perceive a letter ‘C’ in only one of the signs (see also below).
- 62 For that part of the public that perceives in both signs a letter ‘C’, the Board points out that the General Court has not unambiguously answered the question of whether an individual letter of the alphabet may convey a concept. On several occasions, the Court held that single letters were, as such, capable of conveying a concept. On other occasions, the Court held that single letters conveyed a concept only if they had a meaning in relation to the goods or services in question. A third approach is that single letters do not convey any concept. In a decision also dealt with by the parties in their submissions, the Grand Board gave an overview of the Court’s case-law on the concept of single letters (26/03/2021, R 551/2018-G, *Device (fig.) / Device (fig.)*, § 64-67).
- 63 In this respect, the Court has, for example, found that a clear concept could be associated with the letter ‘X’, owing to the meaning which that letter has in the fields of mathematics and information technology (05/11/2013, T-378/12, X, EU:T:2013:574). However, on the other hand, the Court has found that no concept could be associated with the letters ‘S’, ‘P’, or ‘R’ (09/09/2008, T-363/06, *Magic seat*, EU:T:2008:319, § 42; 20/10/2011, T-189/09, P, EU:T:2011:611, § 83; 27/06/2013, T-89/12, R, EU:T:2013:335, § 42), In the

‘R’ judgment, the Court even asserted – in general terms – that, conceptually, the letters of the alphabet had no semantic meaning and that it was thus impossible to compare them conceptually.

- 64 In view of the above case-law, the Grand Board concluded that a single letter was capable of conveying a generic concept of the corresponding letter, yet it stated that the mere fact that two signs referred to the same letter had a limited impact in the conceptual comparison. The Grand Board, however, found that, if it could be established that the relevant public would perceive the letter concerned as evoking or representing some specific meaning beyond the portrayal of that letter, for example as an abbreviation, such concept had, in contrast, to be taken into account (26/03/2021, R 551/2018-G, Device (fig.) / Device (fig.), § 85-89).
- 65 In this case, the Board does not see any specific meaning in the letter ‘C’ in relation to the relevant services, nor was such meaning claimed or proven by the opponent. Therefore, it can be considered that no concept will be associated with the letter ‘C’ per se.
- 66 Accordingly, for that part of the public perceiving a letter ‘C’ in both signs, the conceptual comparison also remains neutral.

*Distinctiveness of the earlier mark*

- 67 The opponent did not explicitly claim that its mark is particularly distinctive by virtue of intensive use or reputation. Consequently, the assessment of the earlier mark’s distinctiveness will rest on its distinctiveness per se.
- 68 The earlier mark as a whole has no apparent meaning in relation to the relevant earlier services. Taking into account the above considerations regarding abstract signs and single letters (paragraphs 46-49), the earlier mark has inherently an average degree of distinctiveness due to its particular stylisation, despite the IR holder’s arguments to the contrary.

*Overall assessment of the likelihood of confusion*

- 69 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).
- 70 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).

- 71 Furthermore, in accordance with the case-law of the Court, the global assessment of the likelihood of confusion implies that conceptual differences between two signs may counteract phonetic and visual similarities between them, provided that at least one of those signs, has, from the point of view of the relevant public, a clear and specific meaning, so that the public is capable of grasping it immediately (04/03/2020, C-328/18 P, Black Label by Equivalenza, EU:C:2020:156, § 74).
- 72 In the present case, the obvious differences between the signs outweigh their limited similarities. Even if assuming and creating the best-case scenario for the opponent that both signs could be perceived as representing a stylised letter ‘C’, they only have, at most, a very low degree of visual similarity, also bearing in mind that the colour orange is commonly used on a wide variety of goods and services. The particular stylisation of the signs clearly differs. The phonetic identity that would result in the case that both signs would be perceived as the same letter ‘C’ is not sufficient to create a likelihood of confusion since, apart from the colour orange, the signs do not share any of their specific features.
- 73 Notwithstanding the principles of interdependence and imperfect recollection, there is no reason to assume that the relevant public (even those with a normal level of attention) will be misled into thinking that the services concerned, even to the extent that they are identical, bearing the conflicting signs, come from the same undertaking or, as the case may be, from undertakings that are economically linked, also taking into account the normal level of distinctiveness of the earlier mark.
- 74 In the light of the foregoing, a likelihood of confusion between the signs under Article 8(1)(b) EUTMR in the European Union can be excluded, even for identical services, since the differences between the signs will be clearly perceived.
- 75 Finally, as regards the opponent’s further arguments, that the Office would have ex officio identified the contested sign as being similar to the earlier mark due to having included it in the search report, cannot be followed. The inclusion of marks in a search report or in a surveillance letter is purely informative and it should never be deemed to be a finding that a conflict actually exists or that the signs and the goods or services involved are indeed identical or similar. Such finding can only be made through a final decision by the Opposition Division or the Boards of Appeal.
- 76 Moreover, the opponent’s claim that the Opposition Division would not have given reasons for its decision and would have breached Article 94 EUTMR, and that its findings would constitute an error that prevented the opponent from receiving a fair decision on the merits, is clearly unfounded. The Opposition Division thoroughly reasoned why there could be no likelihood of confusion.
- 77 As to the opponent’s conditional request that an oral hearing be held if the Board would not intend to grant the appeal as requested, the Board has all the information on file to be able to come to a decision in these appeal proceedings. The Board therefore does not consider oral proceedings to be expedient, for which the request is denied (Article 96 EUTMR and Article 27(1) RP-BoA).

78 In the light of the above considerations, the appeal is dismissed.

**Costs**

79 Pursuant to Article 109(1) EUTMR and Article 18 EUTMIR, the opponent, as the losing party, must bear the IR holder's costs of representation in the opposition and appeal proceedings.

80 As to the appeal proceedings, these consist of the IR holder's costs of professional representation of EUR 550.

81 As to the opposition proceedings, the Opposition Division ordered the opponent to bear the representation costs of the IR holder in the sum of EUR 300. This decision is unaffected. The total amount for both proceedings is therefore EUR 850.

**Order**

On those grounds,

THE BOARD

hereby:

- 1. Dismisses the appeal.**
- 2. Orders the opponent to bear the costs of the IR holder in the opposition and appeal proceedings of EUR 850.**

Signed

V. Melgar

Signed

R. Ocquet

Signed

P. von Kapff

Registrar:

Signed

H. Dijkema

