

DECISION
of the Second Board of Appeal
of 19 December 2023

In case R 827/2023-2

PRADA S.A.

23, rue Aldringen
1118 Luxembourg
Luxembourg

Applicant / Appellant

represented by Mr Pascal Becker, 41, boulevard Joseph II, 1840 Luxembourg, Luxembourg

APPEAL relating to European Union trade mark application No 18 683 223

THE SECOND BOARD OF APPEAL

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

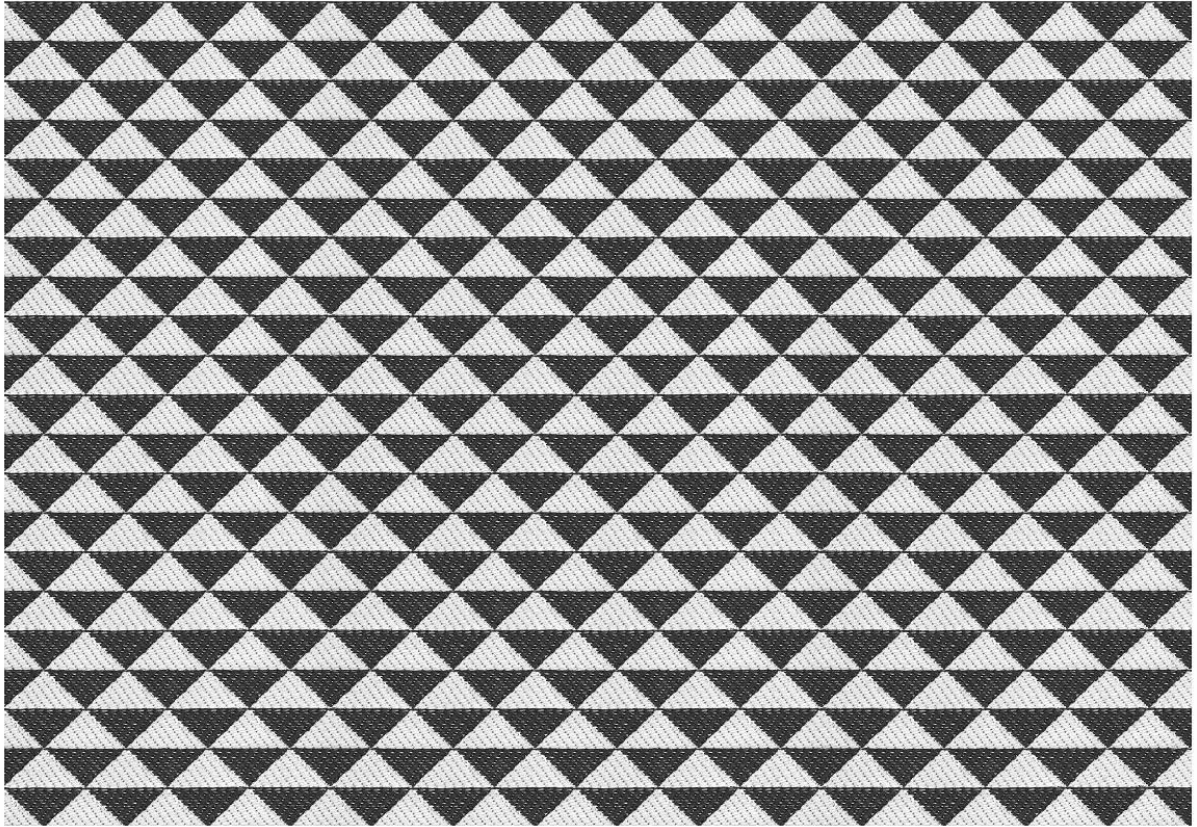
Registrar: H. Dijkema

gives the following

Decision

Summary of the facts

- 1 By an application filed on 7 April 2022, PRADA S.A. ('the applicant'), sought to register the pattern mark No 18 683 223



for the following goods and services:

Class 3: Non-medicated cosmetics and toiletry preparations; non-medicated dentifrices; perfumery, essential oils; bleaching preparations and other substances for laundry use; cleaning, polishing, scouring and abrasive preparations; cosmetics creams; face make up cleansing; preparations for face make up cleansing; face toners; hair toners; talcum powder; bath foams; shaving foam, after-shave, after shave lotions, aftershave balms; make-up; powder make-up; face make-up removing preparations; beauty masks; mascara; eye liner; eye shadow; lipstick; foundation; nail varnish; personal deodorants; soaps; baby soaps; shampoos; perfumes; eau-de-toilette; essential oils for perfumes; hair gels; hair conditioners; hair straightening preparations; hair sprays; moisturizing hair sprays; hair dyes; sun screen and sun block preparations; after sun lotions; dentifrices; nail care preparations; nail polish; scented lotions, scented body creams and milks; perfumed shower gels; perfumed soaps and perfumed deodorants; lipstick cases; incense; air fragrance reed diffusers.

Class 9: *Navigation, photographic, cinematographic, audiovisual, optical, signaling and teaching apparatus and instruments; apparatus and instruments for recording, transmitting, reproducing or processing sound, images or data; recorded and downloadable media, computer software, blank digital or analogue recording and storage media; computers and computer peripheral devices; diving suits, divers' masks, ear plugs for divers, nose clips for divers and swimmers, gloves for divers, breathing apparatus for underwater swimming; LED [light-emitting diodes]; mobile phone; gps apparatus; protective helmets for sports; portable computers; electronic publications; smartphones; spectacles, eyeglasses, sunglasses, spectacles cases, chains and cords for eyeglasses; smartwatches; cases for smartphones; headphone cases; ear pads for headphones; headphones; battery chargers; USB chargers, covers for smartphones; goggles; protective masks; smartglasses; spectacle lenses / eyeglass lenses/optical lenses; filters for use in photography; smartphone accessories, namely sleeves, straps and lanyards for smartphones, earphones for smartphones, wireless headsets for smartphones, screen protectors for smartphones, smartphone screen magnifiers, selfie sticks used as smartphone accessories, selfie ring lights for smartphones, wireless charging pads for smartphones, chargers for smartphones, joysticks adapted for smartphones, cables for use with smartphones; lenses.*

Class 14: *Precious metals and their alloys; jewelry, precious and semi-precious stones; horological and chronometric instruments; key rings; key chains; charms; key fobs; key fobs made of leather; watches; clocks; rings; earrings; bracelets; boxes of precious metals; cufflinks; watch boxes; necklaces; tie clips.*

Class 16: *Paper and cardboard; printed matter; bookbinding material; photographs; stationery and office requisites, except furniture; adhesives for stationery or household purposes; drawing materials and materials for artists; paintbrushes; instructional and teaching materials; plastic sheets, films and bags for wrapping and packaging; printers' type, printing blocks; pens; pencils; albums; baggage claim check tags of paper; boxes of paper or cardboard; calendars; catalogues; books; graphic prints; graphic representations; graphic reproductions; magazines [periodicals]; pen cases; posters; printed publications; money clips; ribbons (paper-).*

Class 18: *Leather and imitations of leather; animal skins and hides; luggage and carrying bags; umbrellas and parasols; walking sticks; collars, leashes and clothing for animals; trunks and travelling bags; baggage; card holders; card cases; credit card holders made of leather; wallets; conference folders made of leather; hand bags, trunks [luggage]; travel garment covers; make-up bags sold empty; sports bags; athletics bags; evening bags and shoulder bags; shopping bags; school book bags; travel bags for carrying shoes; beach bags; diaper bags; rucksacks; travelling cases; canvas bags; overnight bags; bags for climbers; satchels; leather handbags; vanity cases, not fitted; cases of leather or leather board; briefcases [leather goods]; harness made from leather; leather leashes; card cases [notecases]; briefcases; music device cases; pocket wallets; tool bags of leather, empty; sling bags for carrying infants; bags; backpacks; wheeled shopping bags; bags for campers; pouches, of leather, for packaging; garment bags for travel; pouch baby carriers; travelling sets made of leather; valises; cosmetic cases sold empty; clothing for animals; clothing for pets.*

Class 20: *Furniture, mirrors, picture frames; containers, not of metal, for storage or transport; unworked or semi-worked bone, horn, whalebone or mother-of-pearl; shells; meerschaum; yellow amber; air mattresses, not for medical purposes; air pillows, not for*

medical purposes; floating inflatable mattresses [airbeds]; air mattresses for use when camping; camping mattresses; sleeping mats for camping [mattresses]; inflatable mattresses for use when camping; baskets, not of metal; cushions; pillows; benches [furniture]; tables; chairs; beds; folding tables; folding chairs; boxes of wood or plastic; curtain holders, not of textile material; dog kennels; mirrors; picture frames.

Class 24: Textiles and substitutes for textiles; household linen; curtains of textile or plastic; Adhesive fabric for application by heat; bath linen, except clothing; beach towels; bed blankets; bed covers; bedspreads; coverlets [bedspreads]; quilts; bed linen; bivouac sacks being covers for sleeping bags; blankets for household pets; bunting of textile or plastic; canvas for tapestry or embroidery; chenille fabric; cloth; cloths for removing make-up; coasters of textile; cotton fabrics; unfitted covers for furniture; covers for cushions; curtain holders of textile material; damask; door curtains; eiderdowns [down coverlets]; elastic woven material; esparto fabric; fabric for footwear; fabric of imitation animal skins; fabric; fabrics for textile use; face towels of textile; fiberglass fabrics for textile use; filtering materials of textile; coverings made of plastic for furniture; furniture coverings of textile; glass cloths [towels]; haircloth [sackcloth]; handkerchiefs of textile; hat linings, of textile, in the piece; hemp fabric; jersey [fabric]; jute fabric; knitted fabric; labels of textile for identifying clothing; lingerie fabric; lining fabric for footwear; linings [textile]; marabouts [cloth]; mattress covers; moleskin fabric not for medical use; muslin fabric; non-woven textile fabrics; picnic blankets; pillow shams; pillowcases; place mats of textile; plastic material [substitute for fabrics]; printers' blankets of textile; ramie fabric; rayon fabric; sheets [textile]; shower curtains of textile or plastic; silk fabrics for printing patterns; sleeping bag liners; sleeping bags; table linen, not of paper; table napkins of textile; serviettes of textile; table runners, not of paper; tablecloths, not of paper; tablemats of textile; taffeta [cloth]; textile material; towels of textile; traced cloths for embroidery; travelling rugs [lap robes]; tulle; upholstery fabrics; velvet; woollen fabric; silk [cloth]; synthetic fiber fabrics; fabrics made from synthetic yarns; fabrics made from synthetic threads; textiles made of synthetic materials; fabrics made from artificial fibres [other than for insulation]; fabrics made from artificial fibres [for insulation]; resin impregnated textile fabrics.

Class 25: Clothing, footwear, headwear; bandanas [neckerchiefs]; headbands [clothing]; stockings; bibs, not of paper; berets; smocks; boas [necklets]; teddies [undergarments]; hosiery; caps [headwear]; bathing caps; shower caps; boots; half-boots; suspenders; collar protectors for wear; camisoles; pants; bathing trunks; bodices [lingerie]; hoods [clothing]; belts [clothing]; money belts [clothing]; shawls; footmuffs, not electrically heated; sweaters; hats; headgear for wear; socks; slippers; football boots; beach shoes; ski boots; boots for sports; shirts; short-sleeve shirts; tights; shoulder wraps; wet suits for water-skiing; slips [undergarments]; combinations [clothing]; corselets; corsets [underclothing]; suits; swimsuits; beach clothes; ear muffs [clothing]; neckties; breeches for wear; babies' pants [clothing]; sashes for wear; shirt yokes; esparto shoes or sandals; fur stoles; detachable collars; sock suspenders; scarfs; furs [clothing]; gabardines [clothing]; girdles; galoshes; ski gloves; gloves [clothing]; vests; motorists' clothing; cyclists' clothing; top hats; waterproof clothing; leg warmers; stocking suspenders; garters; jerseys [clothing]; skirts; shorts; petticoats; layettes [clothing]; leggings [trousers]; singlets; cuffs; coats; mantillas; sleep masks; mittens; topcoats; trousers; parkas; dressing gowns; bath robes; pelisses; shirt fronts; ponchos; pullovers; pyjamas; dresses; jumper dresses; bath sandals; underpants; bath slippers; gymnastic shoes; sports shoes; underwear; anti-sweat underwear; brassieres; aprons [clothing]; heelpieces for

footwear; heels; tee-shirts; knitwear [clothing]; uniforms; stuff jackets [clothing]; jackets [clothing]; outer clothing; clothing for gymnastics; clothing of leather; clothing of imitations of leather; visors [headwear]; cap peaks; veils [clothing]; terrycloth robes; towel robes; snow suits; ski suits; surf suits; sub suits; wet suits; tuxedos; tuxedo belts; embroidered clothing; tuxedo shirts; embroidered dresses; embroidered stoles; stoles; overalls; dungarees; stoles of textile; clothing of interlock jersey; undergarments; bermuda shorts; pea coats; quilted jackets, quilted coats; winter coats; winter jackets; rain coats; rainwear; winter clothing; rain proof clothing; rain proof footwear; rain proof headwear; balaclavas; denim clothing; eco-leather clothing; eco-leather footwear; eco-leather headwear; sports jerseys; sweatshirts; cashmere clothing; eco-fur clothing.

Class 27: Carpets, rugs, mats and matting, linoleum and other materials for covering existing floors; wall hangings, not of textile; yoga mats; picnic rugs; bath mats; door mats; non-slip mats; wallpaper.

Class 28: Games, toys and playthings; video game apparatus; gymnastic and sporting articles; decorations for Christmas trees; poker chips; jump ropes; playing balls; basketball balls; volleyball balls; soccer balls; rugby balls; beach volley balls; amusement game machines; rackets; bats for games; flippers for diving; flippers for swimming; inflatable games for swimming pools; surfboards; skateboards; flying disks; snowboards; longboards; flying kites; table games; wooden toys; trick robots; stuffed animals (toys); swimming pool play articles; playing cards; dolls; roller skates; toys for pets; skis; ski poles.

Class 35: Advertising; business management; business administration; office functions; auctioneering; business research; commercial information and advice for consumers [consumer advice shop]; import-export agencies; marketing research; marketing studies; modelling for advertising or sales promotion; organization of exhibitions for commercial or advertising purposes; presentation of goods on communication media, for retail purposes; public relations; shop window dressing; promoting the sale of goods and services of others through promotional events; promoting the goods and services of others via computer and communication networks; advertising by transmission of on-line publicity for third parties through electronic communications networks; organization of fashion shows for promotional purposes; retail services relating to jewelry; retail services relating to clothing; retail services in relation to fabrics; retail services in relation to bags; retail services in relation to cutlery; retail services in relation to luggage; retail services in relation to footwear; retail services in relation to headgear; retail services in relation to yarns; retail services in relation to toys; retail services in relation to toiletries; online retail services relating to handbags; online retail services relating to jewelry; online retail services relating to toys; online retail services relating to luggage; online retail services relating to clothing; online retail services relating to cosmetics; retail services relating to sporting goods; retail services relating to fragrancing preparations; retail services in relation to sporting articles; retail services in relation to pet products; retail services in relation to food cooking equipment; retail services connected with the sale of clothing and clothing accessories.

- 2 On 29 June 2022, the Office raised an objection pursuant to Article 7(1)(b) EUTMR with respect to some of the goods and services for which protection was sought. The objection was based on the following findings.

- The goods subject to the objection and covered by the mark applied for are goods for mass consumption and are mainly aimed at average consumers. In view of the nature of the goods in question, the awareness of the relevant public will be that of the average consumer who is reasonably well informed and reasonably observant and circumspect.
 - The mark applied for consists of a set of black and white triangle elements which are repeated regularly, and the pattern is nothing more than the outward appearance of the goods. Although patterns may be represented in the form of square/rectangular labels, they should nonetheless be assessed as if they covered the entire surface of the goods for which protection is sought.
 - The Office notes that this type of pattern is typically applied, inter alia, to clothes, textiles or other materials that are commonly used for clothing, handbags, decorations or appear as a surface of different subjects and their packaging. For this reason, the targeted public would merely perceive the repeating pattern as a typical design of decorative elements, as opposed to a trade mark.
 - Therefore, the mark applied for merely consists of a decorative design on the goods subject to the objection or their packaging in Classes 3, 9, 14, 16, 18, 20, 24, 25, 27 and 28 and as a banal design element in relation to the services in Class 35.
 - The relevant consumers would perceive the repeating pattern of basic/simple design as surface designs of the goods or their packaging and a banal design element in relation to the services. The mark does not convey any ‘message’ that could attract the consumer’s attention and make the sign easily memorable.
 - Therefore, the sign in question is devoid of any distinctive character within the meaning of Article 7(1)(b) EUTMR.
- 3 The applicant maintained its request for registration notwithstanding the objections raised by the examiner. Its observations, as summarised by the examiner in its subsequent decision, are as follows.
- PRADA is today well known as a global leader in the luxury field. Over time, the PRADA brand, through massive use, advertising and through the high level of luxury and quality of its goods is now recognised as an international well-known trade mark, as are its associated logos and/or other identification elements, in particular the iconic upside-down isosceles triangle which has clearly become PRADA’s iconic signature.
 - PRADA has developed and introduced evolved and modernized versions of its historical upside-down isosceles triangle logo (all of which have been registered as trade marks, in particular before the Office), which are not only duly used as trade marks and applied on the different goods offered for sale by the applicant, but are also used as the main element of brand communication.

- Some samples of the iconic upside-down isosceles triangle are provided:



- The Office already accepted the registration of trade marks, without any objections regarding their inherent distinctive character, for simple elements, on the grounds that they indicated the commercial origin of the goods and/or services for which they had been applied. This use of the pattern as a trade mark shapes the public's perception which, therefore, immediately recognises PRADA's signature and see, without hesitation, a clear indication of the origin of the goods (i.e. as coming from PRADA).
 - The applicant argues that it has extensively used and promoted the contested sign.
- 4 On 20 February 2023, the examiner took a decision ('the contested decision') partially refusing the trade mark applied for, under Article 7(1)(b) EUTMR, with regard to the following goods and services:

Class 3: Non-medicated cosmetics and toiletry preparations; non-medicated dentifrices; perfumery, essential oils; bleaching preparations and other substances for laundry use; cleaning, polishing, scouring and abrasive preparations; cosmetics creams; face make up cleansing; preparations for face make up cleansing; face toners; hair toners; talcum powder; bath foams; shaving foam, after-shave, after shave lotions, aftershave balms; make-up; powder make-up; face make-up removing preparations; beauty masks; mascara; eye liner; eye shadow; lipstick; foundation; nail varnish; personal deodorants; soaps; baby soaps; shampoos; perfumes; eau-de-toilette; essential oils for perfumes; hair gels; hair conditioners; hair straightening preparations; hair sprays; moisturizing hair sprays; hair dyes; sun screen and sun block preparations; after sun lotions; dentifrices; nail care preparations; nail polish; scented lotions, scented body creams and milks; perfumed shower gels; perfumed soaps and perfumed deodorants; lipstick cases; incense; air fragrance reed diffusers.

Class 9: Navigation, photographic, cinematographic, audiovisual, optical, signaling and teaching apparatus and instruments; apparatus and instruments for recording, transmitting, reproducing or processing sound, images or data; computers and computer peripheral devices; diving suits, divers' masks, ear plugs for divers, nose clips for divers and swimmers, gloves for divers, breathing apparatus for underwater swimming; mobile phone; gps apparatus; protective helmets for sports; portable computers; smartphones; spectacles, eyeglasses, sunglasses, spectacles cases, chains and cords for eyeglasses; smartwatches; cases for smartphones; headphone cases; ear pads for headphones; headphones; battery chargers; USB chargers, covers for smartphones; goggles; protective masks; smartglasses; spectacle lenses / eyeglass lenses/optical lenses; filters for use in photography; smartphone accessories, namely sleeves, straps and lanyards for smartphones, earphones for smartphones, wireless headsets for smartphones, screen protectors for smartphones, smartphone screen magnifiers, selfie sticks used as smartphone accessories, selfie ring lights for smartphones, wireless charging pads for

smartphones, chargers for smartphones, joysticks adapted for smartphones, cables for use with smartphones; lenses.

Class 14: Precious metals and their alloys; jewelry, precious and semi-precious stones; horological and chronometric instruments; key rings; key chains; charms; key fobs; key fobs made of leather; watches; clocks; rings; earrings; bracelets; boxes of precious metals; cufflinks; watch boxes; necklaces; tie clips.

Class 16: Paper and cardboard; printed matter; bookbinding material; photographs; stationery and office requisites, except furniture; adhesives for stationery or household purposes; drawing materials and materials for artists; paintbrushes; instructional and teaching materials; plastic sheets, films and bags for wrapping and packaging; printers' type, printing blocks; pens; pencils; albums; baggage claim check tags of paper; boxes of paper or cardboard; calendars; catalogues; books; graphic prints; graphic representations; graphic reproductions; magazines [periodicals]; pen cases; posters; printed publications; money clips.

Class 18: Leather and imitations of leather; animal skins and hides; luggage and carrying bags; umbrellas and parasols; walking sticks; collars, leashes and clothing for animals; trunks and travelling bags; baggage; card holders; card cases; credit card holders made of leather; wallets; conference folders made of leather; hand bags, trunks [luggage]; travel garment covers; make-up bags sold empty; sports bags; athletics bags; evening bags and shoulder bags; shopping bags; school book bags; travel bags for carrying shoes; beach bags; diaper bags; rucksacks; travelling cases; canvas bags; overnight bags; bags for climbers; satchels; leather handbags; vanity cases, not fitted; cases of leather or leather board; briefcases [leather goods]; harness made from leather; leather leashes; card cases [notecases]; briefcases; music device cases; pocket wallets; tool bags of leather, empty; sling bags for carrying infants; bags; backpacks; wheeled shopping bags; bags for campers; pouches, of leather, for packaging; garment bags for travel; pouch baby carriers; travelling sets made of leather; valises; cosmetic cases sold empty; clothing for animals; clothing for pets.

Class 20: Furniture, mirrors, picture frames; containers, not of metal, for storage or transport; unworked or semi-worked bone, horn, whalebone or mother-of-pearl; meerschaum; air mattresses, not for medical purposes; air pillows, not for medical purposes; floating inflatable mattresses [airbeds]; air mattresses for use when camping; camping mattresses; sleeping mats for camping [mattresses]; inflatable mattresses for use when camping; baskets, not of metal; cushions; pillows; benches [furniture]; tables; chairs; beds; folding tables; folding chairs; boxes of wood or plastic; curtain holders, not of textile material; dog kennels; mirrors; picture frames.

Class 24: Textiles and substitutes for textiles; household linen; curtains of textile or plastic; adhesive fabric for application by heat; bath linen, except clothing; beach towels; bed blankets; bed covers; bedspreads; coverlets [bedspreads]; quilts; bed linen; bivouac sacks being covers for sleeping bags; blankets for household pets; bunting of textile or plastic; canvas for tapestry or embroidery; chenille fabric; cloth; cloths for removing make-up; coasters of textile; cotton fabrics; unfitted covers for furniture; covers for cushions; curtain holders of textile material; damask; door curtains; eiderdowns [down coverlets]; elastic woven material; esparto fabric; fabric for footwear; fabric of imitation animal skins; fabric; fabrics for textile use; face towels of textile; fiberglass fabrics for textile use; filtering materials of textile; coverings made of plastic for furniture; furniture

coverings of textile; glass cloths [towels]; haircloth [sackcloth]; handkerchiefs of textile; hat linings, of textile, in the piece; hemp fabric; jersey [fabric]; jute fabric; knitted fabric; labels of textile for identifying clothing; lingerie fabric; lining fabric for footwear; linings [textile]; marabouts [cloth]; mattress covers; moleskin fabric not for medical use; muslin fabric; non-woven textile fabrics; picnic blankets; pillow shams; pillowcases; place mats of textile; plastic material [substitute for fabrics]; printers' blankets of textile; ramie fabric; rayon fabric; sheets [textile]; shower curtains of textile or plastic; silk fabrics for printing patterns; sleeping bag liners; sleeping bags; table linen, not of paper; table napkins of textile; serviettes of textile; table runners, not of paper; tablecloths, not of paper; tablemats of textile; taffeta [cloth]; textile material; towels of textile; traced cloths for embroidery; travelling rugs [lap robes]; tulle; upholstery fabrics; velvet; woollen fabric; silk [cloth]; synthetic fiber fabrics; fabrics made from synthetic yarns; fabrics made from synthetic threads; textiles made of synthetic materials; fabrics made from artificial fibres [other than for insulation]; fabrics made from artificial fibres [for insulation]; resin impregnated textile fabrics.

Class 25: Clothing, footwear, headwear; bandanas [neckerchiefs]; headbands [clothing]; stockings; bibs, not of paper; berets; smocks; boas [necklets]; teddies [undergarments]; hosiery; caps [headwear]; bathing caps; shower caps; boots; half-boots; suspenders; collar protectors for wear; camisoles; pants; bathing trunks; bodices [lingerie]; hoods [clothing]; belts [clothing]; money belts [clothing]; shawls; footmuffs, not electrically heated; sweaters; hats; headgear for wear; socks; slippers; football boots; beach shoes; ski boots; boots for sports; shirts; short-sleeve shirts; tights; shoulder wraps; wet suits for water-skiing; slips [undergarments]; combinations [clothing]; corselets; corsets [underclothing]; suits; swimsuits; beach clothes; ear muffs [clothing]; neckties; breeches for wear; babies' pants [clothing]; sashes for wear; shirt yokes; esparto shoes or sandals; fur stoles; detachable collars; sock suspenders; scarfs; furs [clothing]; gabardines [clothing]; girdles; galoshes; ski gloves; gloves [clothing]; vests; motorists' clothing; cyclists' clothing; top hats; waterproof clothing; leg warmers; stocking suspenders; garters; jerseys [clothing]; skirts; shorts; petticoats; layettes [clothing]; leggings [trousers]; singlets; cuffs; coats; mantillas; sleep masks; mittens; topcoats; trousers; parkas; dressing gowns; bath robes; pelisses; shirt fronts; ponchos; pullovers; pyjamas; dresses; jumper dresses; bath sandals; underpants; bath slippers; gymnastic shoes; sports shoes; underwear; anti-sweat underwear; brassieres; aprons [clothing]; heelpieces for footwear; heels; tee-shirts; knitwear [clothing]; uniforms; stuff jackets [clothing]; jackets [clothing]; outer clothing; clothing for gymnastics; clothing of leather; clothing of imitations of leather; visors [headwear]; cap peaks; veils [clothing]; ribbons; terrycloth robes; towel robes; snow suits; ski suits; surf suits; sub suits; wet suits; tuxedos; tuxedo belts; embroidered clothing; tuxedo shirts; embroidered dresses; embroidered stoles; stoles; overalls; dungarees; stoles of textile; clothing of interlock jersey; undergarments; bermuda shorts; cabans; quilted jackets, quilted coats; winter coats; winter jackets; rain coats; rainwear; winter clothing; rain proof clothing; rain proof footwear; rain proof headwear; balaclavas; denim clothing; eco-leather clothing; ecoleather footwear; eco-leather headwear; sports jerseys; sweatshirts; cashmere clothing; eco-fur clothing.

Class 27: Carpets, rugs, mats and matting, linoleum and other materials for covering existing floors; wall hangings, not of textile; yoga mats; picnic rugs; bath mats; door mats; non-slip mats; wallpaper.

Class 28: *Games, toys and playthings; video game apparatus; gymnastic and sporting articles; decorations for Christmas trees; poker chips; jump ropes; playing balls; basketball balls; volleyball balls; soccer balls; rugby balls; beach volley balls; amusement game machines; rackets; bats for games; flippers for diving; flippers for swimming; inflatable games for swimming pools; surfboards; skateboards; flying disks; snowboards; longboards; flying kites; table games; wooden toys; trick robots; stuffed animals (toys); swimming pool play articles; playing cards; dolls; roller skates; toys for pets; skis; ski poles.*

Class 35: *Advertising; commercial information and advice for consumers [consumer advice shop]; organization of exhibitions for commercial or advertising purposes; presentation of goods on communication media, for retail purposes; promoting the sale of goods and services of others through promotional events; promoting the goods and services of others via computer and communication networks; advertising by transmission of on-line publicity for third parties through electronic communications networks; retail services relating to jewelry; retail services relating to clothing; retail services in relation to fabrics; retail services in relation to bags; retail services in relation to cutlery; retail services in relation to luggage; retail services in relation to footwear; retail services in relation to headgear; retail services in relation to yarns; retail services in relation to toys; retail services in relation to toiletries; online retail services relating to handbags; online retail services relating to jewelry; online retail services relating to toys; online retail services relating to luggage; online retail services relating to clothing; online retail services relating to cosmetics; retail services relating to sporting goods; retail services relating to fragrancing preparations; retail services in relation to sporting articles; retail services in relation to pet products; retail services in relation to food cooking equipment; retail services connected with the sale of clothing and clothing accessories.*

- 5 The contested decision also held that the application could proceed for the remaining goods and services:

Class 9: *Recorded and downloadable media, computer software, blank digital or analogue recording and storage media; LED [light-emitting diodes]; electronic publications.*

Class 20: *Shells; yellow amber.*

Class 35: *Business management; business administration; office functions; auctioneering; business research; import-export agencies; marketing research; marketing studies; modelling for advertising or sales promotion; public relations; shop window dressing; organization of fashion shows for promotional purposes.*

- 6 The decision was based on the following main findings:
- Consumers are not in the habit of assuming a commercial origin of a pattern depicting a set of black and white triangle elements which are repeated regularly and being nothing else than the outward appearance of the goods, unless the particular arrangement is striking and memorable. This is not the case in the Office's view.
 - The upside-down isosceles triangle in the mark applied for is rather commonplace. Therefore, the mark does not appear unusual or contain any distinguishing feature which allows it to significantly differ from other upside-down isosceles triangles, also considering the wide range of triangles patterns available on the market.

- The Office does not agree with the assertion that the upside-down isosceles triangle is so iconic in PRADA’s universe that it is not only duly used as a trade mark and applied on the different goods offered for sale by the said company, but it is also used as the main element of brand communication. There is, for example, the mark GUESS which



also uses an upside-down triangle. It does not have two angles of the same size but it is quite similar.

- The registrability of a sign as an EUTM must be assessed solely on the basis of the EUTMR, as interpreted by the EU judicature, and not on the basis of previous Office practice.
 - As regards the applicant’s argument that the sign has been extensively used and promoted: having considered all of the submissions filed by the applicant to date, which evidence the existence and the promotion of the applicant’s sign and its goods and services, and which attest to the considerable profile of the applicant itself, the Office still finds that the application should be refused. The evidence provided is not sufficient to prove that the mark applied for has become distinctive in consequence of the use which has been made of it.
- 7 On 18 April 2023, the applicant filed an appeal against the contested decision, requesting that the decision be partially set aside, namely to the extent that the examiner rejected the trade mark applied for as regards the goods and services indicated in paragraph 4. The statement of grounds of the appeal was received on 19 June 2023.

Grounds of appeal

- 8 The arguments raised in the statement of grounds may be summarised as follows.
- The applicant never claimed that Article 7(3) EUTMR would have to be applied. Therefore, the Board of Appeal must take in to consideration that the applicant did not claim the acquired distinctive character through use within the meaning of Article 7(3) EUTMR and will declare all the examiner’s assertions on this point as irrelevant.
 - The trade mark as applied is a very specific pattern trade mark is (i) a striated and granulated surface, (ii) closely intertwined with the representation of PRADA’s very iconic protected upside-down isosceles triangle, (iii) in black, (iv) replicated and (v) connected to each other by its angles, (vi) in order to form successive horizontal lines, (vii) presented in staggered rows and (viii) creating as many empty neutral intervals (i.e. under the very exact representation as filed (without any modification, magnification, etc.)).
 - The very nature of a pattern trade mark is to be constituted of sets of regularly repeated elements. Therefore, the protection as a trade mark cannot be refused on a general ground that the sign contains only one regularly repeated element.
 - The specific combination and particular arrangement in the EU pattern trade mark are not insignificant in terms of perception for the consumer and create a global impression that is sufficiently distinctive. In particular, the specific layout of a singular element – the black iconic upside-down isosceles triangle (i.e. its juxtaposition and its

repetition side-by-side and one below each other and connected by all angles in staggered rows creates a very special and very unusual visual effect for the consumer, which is the presence of the alternation of filled shapes and empty neutral intervals).

- This very special and very unusual visual effect for the consumer is emphasised by the use of a very specific striated and granulated surface which presents a striated and granulated material effect completely unusual, including in the sector of the goods and services for which the trade mark has been applied. This effect creates a very peculiar weft and warp theme which represents a ‘pattern within the pattern’ and is reminiscent of a woven structure.
- Requesting that a pattern trade mark contains a verbal element in order to be registered goes against the law, as the presence of a verbal element in a pattern trade mark is not a condition of the validity of this type of trade mark.
- Even if a pattern is ‘simple’ or ‘common’, it could be perfectly registered as a trade mark as long as it is suitable for identifying the goods and/or the services for which the registration has been requested, suitable for identifying them as coming from a specific company and, consequently, able to distinguish these products and/or these services from those of other competing companies, as it is in the case of the present pattern.
- The form of an upside-down isosceles triangle in itself has already been applied and registered by the Office without any objection. Therefore, if the singular element is eligible for registration in itself, the repetition of this same distinctive element as a pattern trade mark must obviously also be eligible for registration.
- The registrability of a trade mark has to be examined in relation to each good and/or service, or at least each categories of goods and/or services which have been refused, and this has not be done in the present matter. The practices of these various sectors are necessarily different, and the ‘general’ conclusion reached by the examiner is unfounded. It is all the more unfounded in that it is incoherent, as goods belonging to the same categories have been accepted on one side and refused on another. The fact that the EU pattern trade mark could be used as an outward appearance of the different goods for which the trade mark is applied cannot be a decisive or crippling criteria.
- It is essential to determine not whether the pattern can be considered as decorative and as representing the outward appearance of the goods, but whether, irrespective of a possible decorative effect (when used in connection with the claimed goods), the trade mark can also function as an indication of origin.
- There is an established trade practice, especially in the fashion sector, to use patterns – even without a verbal element – and consumers, generally, attribute an identifying function for pattern signs when they systematically use the same undertaking. For example, names such as Burberry, Louis Vuitton, Gucci, Fendi and Céline have for many years sold goods covered with registered patterns and perceived by the public as indicators of origin.
- The Office has already accepted the registration of trade marks, without any objections regarding their inherent distinctive character, for simple elements or patterns, as they

were considered as indicating the commercial origin of the goods and/or services for which they had been applied.

- The relevant public will identify in this pattern a reminder to the iconic upside-down isosceles triangle – which is the exclusive property of the applicant – and will analyse this EU pattern trade mark as being a new interpretation of this icon with a specific and particularly striking arrangement. Therefore, the present pattern resonates with the concept of the iconic upside-down isosceles triangle underlying PRADA’s signature. The extreme prior knowledge of the upside-down isosceles triangle relates to the overall population. It is therefore unrealistic to assume that the trade mark applied for, with this iconic upside-down isosceles triangle, will not be understood as a further development of the famous applicant’s signature.
- The applicant submits extracts of the WIPO database; the Book PRADA A MILAN; advertising campaigns from the 1980s; of the Office’s database; of the website www.prada.com; catalogue PRADA 2009; catalogue PRADA NATALE 2021; Prada On Ice pop-up store series presentation; Prada On Ice pop-up store series at ‘Copenhagen Illum’ in Copenhagen in November 2021; Prada On Ice pop-up store series at ‘Les Galeries Lafayette’ in Paris in January 2022; presentation POP UP PRADA; press articles from Vogue, The Cut.com, Wallpaper Corriere Della Serra, la Repubblica, GQ; extracts of other websites; press articles; presentation of the project ‘Symbol PRADA’; extract of the website www.prada.com; photos of the PRADA retail store in Paris (exhibits 01-25); internet excerpts of fashion blog articles and magazines (exhibits 26-43).

Reasons

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

Documents submitted for the first time before the Board

- 10 The applicant has submitted further evidence (i.e. evidence not presented in the proceedings before the first instance and submitted for the first time before the Board). This evidence consists of internet excerpts of fashion blog articles and magazines (exhibits 26-43).
- 11 According to Article 95(2) EUTMR and Article 27(4) EUTMDR, the Board of Appeal may accept facts or evidence submitted for the first time before it if they are, on the face of it, likely to be relevant for the outcome of the case; and they have not been produced in due time for valid reasons, in particular where they are merely supplementing relevant facts and evidence which had already been submitted in due time, or are filed to contest findings made or examined by the first instance of its own motion in the decision subject to appeal.
- 12 Those same principles are reiterated in Article 54(1) BoA-RP, according to which such facts or evidence may also not be disregarded if they were not available before or at the time the contested decision was taken or are justified by any other valid reason.

- 13 In the present case, the additional evidence supplements the arguments of the applicant concerning the presence of the applicant in the relevant sectors, which could be of relevance to the outcome of the case.
- 14 In view of the above considerations, the Board decides to admit the new documents into the proceedings.
- 15 Nevertheless, the Board stresses that the prima facie relevance of the evidence submitted before the Board does not imply that it is conclusive for the outcome of the present case.

Article 7(1)(b) EUTMR – Non-distinctive trade marks

- 16 Article 7(1)(b) EUTMR provides that trade marks which are devoid of any distinctive character are not to be registered.
- 17 According to the case-law, an absolute ground for refusal must be interpreted in light of the general interest underlying it. As regards Article 7(1)(b) EUTMR, the underlying notion of general interest is, manifestly, indissociable from the essential function of a trade mark, which is to guarantee the identity of the origin of the marked product or service to the consumer or end-user by enabling them, without any possibility of confusion, to distinguish the product or service from others which have another origin (21/04/2015, T-359/12, Device of a checked pattern (maroon & beige), EU:T:2015:215, § 17; 21/04/2015, T-360/12, Device of a chequerboard Pattern (grey), EU:T:2015:214, § 17 and case-law cited; in the following paragraphs only the first judgment is cited, however the second judgment and its equivalent paragraphs apply equally).
- 18 For a trade mark to possess distinctive character for the purposes of Article 7(1)(b) EUTMR, it must serve to identify the product in respect of which registration has been applied for as originating from a particular undertaking, and thus to distinguish that product from those of other undertakings (21/04/2015, T-359/12, Device of a checked pattern (maroon & beige), EU:T:2015:215, § 18 and the case-law cited).
- 19 That distinctive character must be assessed, first, by reference to the products or services in respect of which registration has been applied for and, second, by reference to the perception of the relevant public, which consists of average consumers of the products or services in question, who are reasonably well informed and reasonably observant and circumspect. The level of attention of the average consumer, who is deemed to be reasonably well informed and reasonably observant and circumspect, varies according to the category of the products and services in question (21/04/2015, T-359/12, Device of a checked pattern (maroon & beige), EU:T:2015:215, § 19 and the case-law cited).
- 20 According to equally established case-law, the criteria for assessing the distinctive character of three-dimensional marks consisting of the appearance of the product itself are no different from those applicable to other categories of trade mark (21/04/2015, T-359/12, Device of a checked pattern (maroon & beige), EU:T:2015:215, § 20 and case-law cited).
- 21 However, it should be borne in mind that, for the purpose of applying those criteria, the relevant public's perception is not necessarily the same in the case of a three-dimensional mark, which consists of the appearance of the product itself, as it is in the case of a word or figurative mark, which consists of a sign unrelated to the appearance of the products it

denotes (21/04/2015, T-359/12, Device of a checked pattern (maroon & beige), EU:T:2015:215, § 21 and the case-law cited).

- 22 Average consumers are not in the habit of making assumptions about the origin of products on the basis of their shape or the shape of their packaging in the absence of any graphic or word element and it could therefore prove more difficult to establish distinctiveness in relation to such a three-dimensional mark than in relation to a word or figurative mark (21/04/2015, T-359/12, Device of a checked pattern (maroon & beige), EU:T:2015:215, § 22 and the case-law cited).
- 23 Furthermore, in accordance with the case-law, the more closely the shape in respect of which registration as a trade mark is applied for resembles the shape most likely to be taken by the product in question, the greater the likelihood of the shape being devoid of any distinctive character for the purposes of Article 7(1)(b) EUTMR. In those circumstances, only a mark which departs significantly from the norm or customs of the sector and thereby fulfils its essential function of indicating origin is not devoid of any distinctive character for the purposes of Article 7(1)(b) EUTMR (21/04/2015, T-359/12, Device of a checked pattern (maroon & beige), EU:T:2015:215, § 23 and case-law cited).
- 24 That case-law, which was developed in relation to three-dimensional trade marks consisting of the appearance of the product itself, also applies where the contested mark is a figurative mark consisting of the two-dimensional representation of that product. In such a case, the mark likewise does not consist of a sign unrelated to the appearance of the products it covers (21/04/2015, T-359/12, Device of a checked pattern (maroon & beige), EU:T:2015:215, § 24 and case-law cited). The same applies to a pattern mark consisting of the two-dimensional representation of that product.
- 25 That is also the case for a figurative mark consisting of a part of the shape of the product that it represents, inasmuch as the relevant public will immediately and without further thought perceive it as a representation of a particularly interesting or attractive detail of the product in question, rather than as an indication of its commercial origin (21/04/2015, T-359/12, Device of a checked pattern (maroon & beige), EU:T:2015:215, § 25 and case-law cited). The same applies to a pattern mark consisting of a part of the shape of the product that it represents.

The relevant public

- 26 As regards the relevant public, consideration must be given to the average consumer of the category of goods or services covered by the trade mark, who is normally well informed and reasonably observant and circumspect (31/03/2004, T-216/02, Looks like grass..., EU:T:2004:96, § 26; 21/01/2011, T-310/08, executive edition, EU:T:2011:16, § 24), also taking into account the fact that the level of attention of the average consumer may vary according to the category of goods or services concerned (05/03/2003, T-194/01, Soap device, EU:T:2003:53, § 42).
- 27 The variety of goods and services that are the subject of the objection are addressed both to the general public and to a specialised public, whose level of attention will vary from medium-low to high depending on the price, complexity and marketing conditions of those goods and services.

- 28 Consumers in all the Member States of the European Union will perceive the mark in the same way since it lacks any verbal elements requiring linguistic analysis. Therefore, the public consists of the entire European Union.

The sign applied for

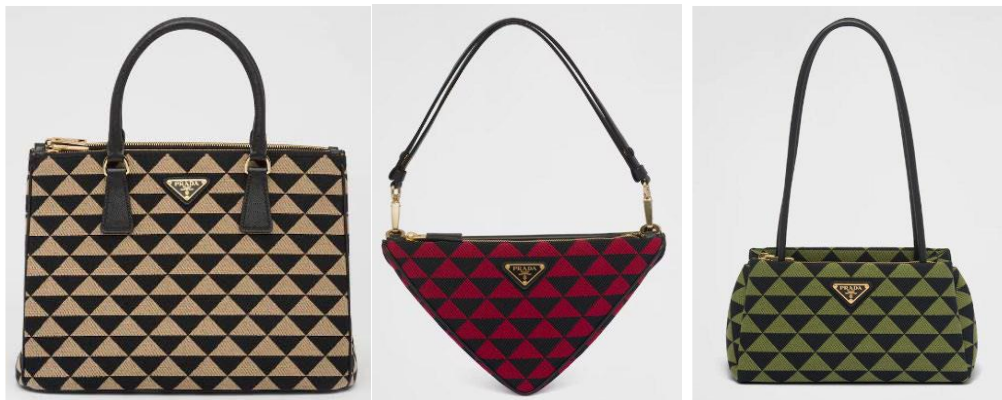
- 29 The contested mark is a regular and repeating pattern of black and white triangle elements, portraying a wavy granular background texture. The triangles depicted are isosceles triangles, this is, triangles that have exactly two equal sides. In the pattern, the white triangles point up, whereas the black triangles point down.
- 30 Having regard to the goods in question, the contested mark is presented in the form of a pattern intended either to be placed on part of the goods or to cover the whole of their surface area and thus corresponds to the outward appearance of the goods, or as a design element in relation to the marketing or rendering of the services. Therefore, the assessment of the distinctive character of the contested mark shall primarily be based on the principles applicable to three-dimensional marks (21/04/2015, T-359/12, Device of a checked pattern (maroon & beige), EU:T:2015:215, § 28-31 and the case-law cited).
- 31 The Court has held on several occasions that very simple and commonplace shapes have no distinctive character. In particular, it has held that although patterns and simple designs affixed to the products applied for may be perceived in some cases as indications of commercial origin, that does not mean that any pattern would be perceived that way (15/12/2015, T-64/15, Parallel stripes (posit.), EU:T:2015:973, § 17). One of the factors to be taken into account in this assessment is what are the goods and services in question. In the case at issue the examiner has, correctly, refused the mark for such goods and services which are generally covered with patterns of different kinds (e.g. bags, printed matter; textiles; retail of these goods) and accepted it for goods and services for which that is not necessarily the case (e.g. LED [light-emitting diodes], business management; public relations; [light-emitting diodes]; electronic publications; yellow amber).
- 32 It follows from the case-law in the above paragraph that if the appearance of goods in a given sector, or that of a component of those goods, serves to indicate the manufacturer, that is only because the appearance of a sufficient number of those goods or of their components differs significantly from the norms or customs of that sector (21/04/2015, T-359/12, Device of a checked pattern (maroon & beige), EU:T:2015:215, § 33 and the case-law cited).
- 33 The triangle-shaped pattern at issue is a basic and commonplace figurative pattern, since it is composed of a regular succession of triangles of the same size which are juxtaposed and differentiated by alternating different colours. The pattern thus does not contain any notable variation in relation to the conventional representation of triangle-shaped pattern and is the same as the traditional form of such a pattern.
- 34 Even applied to goods and services such as those falling within Classes 3, 9, 14, 16, 18, 20, 24, 25, 27, 28 and 35 for which the mark has been refused, as will be noted below, the pattern in question does not differ from the norms or customs of the sector inasmuch as such goods are generally covered with patterns of different kinds, and the triangle-shaped pattern, due to its great simplicity, might constitute precisely one of those patterns (by analogy, 21/04/2015, T-359/12, Device of a checked pattern (maroon & beige), EU:T:2015:215, § 28-31 and the case-law cited).

The sign in relation to the goods and services

- 35 As the examiner adduced, the pattern applied for is typically applied, *inter alia*, to clothes, textiles or other material that is commonly used for clothing, handbags, decorations or appear as a surface of different subjects and their packaging. For this reason, the targeted public would merely perceive the repeating pattern as a typical design of decorative elements, as opposed to a trade mark. Therefore, the mark applied for merely consists of a decorative design on the objected goods or their packaging in Classes 3, 9, 14, 16, 18, 20, 24, 25, 27 and 28 and as a banal design element in relation to the services in Class 35.
- 36 In fact, the presentation of triangle-shapes in alternating colours does not, from a graphic point of view, contain any notable variation in relation to the conventional presentation of such goods, so that the relevant public will in fact perceive only a commonplace and everyday pattern (by analogy, 21/04/2015, T-359/12, Device of a checked pattern (maroon & beige), EU:T:2015:215, § 40).
- 37 The applicant contends that the distinctiveness of a trade mark has to be examined in relation to each of the goods and/or services, or at least for each of the categories of goods and/or services for which it has been refused. In that regard, it indicated that the practices of the various sectors covering the goods and services at issue are necessarily different, and therefore any attempt aimed at concluding that the contested mark is non-distinctive for all the goods and services applied for by merely providing a general reasoning must be considered as unfounded.
- 38 In that regard, the Board notes the following.
- 39 In order to determine whether the goods and services covered by an application for registration of an EUTM are interlinked in a sufficiently direct and specific way and can be placed in sufficiently homogeneous categories and groups, account must be taken of the fact that the objective of that exercise is to enable and facilitate the assessment *in concreto* of the question of whether or not the mark applied for comes under one of the absolute grounds for refusal (17/05/2017, C-437/15 P, Deluxe (fig.), EU:C:2017:380, § 32).
- 40 The Court has made clear that such a power extends only to goods and services which are interlinked in a sufficiently direct and specific way, to the point where they form a sufficiently homogeneous category or group of goods or services (17/10/2013, C-597/12 P, Zebexir, EU:C:2013:672, § 27).
- 41 Accordingly, the placement of the goods and services at issue in one or more groups or categories must be carried out in particular on the basis of the characteristics which are common to them and which are relevant for the analysis of whether or not a specific absolute ground for refusal may apply to the mark applied for in respect of those goods and services. It follows that such an assessment must be carried out *in concreto* for the examination of each application for registration and, as the case may be, for each of the different absolute grounds for refusal which may apply (17/05/2017, C-437/15 P, Deluxe (fig.), EU:C:2017:380, § 33).
- 42 In the case at issue, it must be noted that all the goods at issue are susceptible to bear a printed pattern which remains visible from their outward appearance, either affixed to the products themselves or to their external packaging. This is the case for the goods in Class 3

(e.g. *cosmetics like soaps, eyeliners, lipsticks; perfumery*), Class 9 (e.g. *apparatus, instruments, devices, gadgets and accessories*), Class 14 (e.g. *jewelry, watches, key chains*), Class 16 (e.g. *printed matter, pencils, calendars*), Class 18 (e.g. *leather goods and imitations of leather, bags, wallets, clothing for pets, briefcases, pocket wallets*), Class 20 (e.g. *furniture, mattresses, cushions, pillows*), Class 24 (e.g. *textiles and its substitutes, curtains, bed covers and fabrics*), Class 25 (e.g. *clothing, footwear, headgear*), Class 27 (e.g. *carpets, rugs, yoga mats*), and those in Class 28 (e.g. *games, toys, playthings, gymnastic and sporting articles; decorations for Christmas trees*).

- 43 Since the pattern in which the mark applied for consists may be applied to the surface of the applicant's products, the mark, which is figurative, does not consist of a sign unrelated to the appearance of the products it covers (13/09/2011, C-546/10 P, Kopfplatte, EU:C:2011:574, § 59; 14/09/2009, T-152/07, Uhr, EU:T:2009:324, § 70; 21/04/2015, T-359/12, Device of a checked pattern (maroon & beige), EU:T:2015:215, § 24).
- 44 With respect to the services in Class 35, they refer, among others, to the retail of the abovementioned goods, and also to *advertising and organization of exhibitions for commercial or advertising purposes*. With respect to the promotion or rendering of these services, the contested sign will be perceived as a mere decorative element.
- 45 There is little doubt that the mark might be quite naturally (as illustrated by the applicant's own evidence) applied to part of the surface shape of the products and services in question (i.e. items of clothing, pieces of textiles, pieces of upholstered furniture, retail services of the products at issue) inasmuch as the relevant public will immediately and without further thought perceive it as an attractive detail of the product in question, or as a banal decorative element, rather than as an indication of its commercial origin (21/04/2015, T-359/12, Device of a checked pattern (maroon & beige), EU:T:2015:215, § 25).



- 46 Therefore, with regard to the abovementioned goods, the pattern at issue may to a greater or lesser extent cover their surface and thus correspond to the outward appearance of the goods (21/04/2015, T-359/12, Device of a checked pattern (maroon & beige), EU:T:2015:215, § 29), or as a banal design element in relation to the services.
- 47 Therefore, it cannot be considered that the pattern at issue differs significantly from the norm or customs of the sector and, accordingly, allows consumers to identify the pattern corresponding with the contested form of presentation as originating from a particular company and therefore to distinguish it from patterns originating from other companies.

- 48 The applicant claims its mark is a ‘very specific pattern’, which is inherently distinctive, composed, among other features, of a striated and granulated surface closely intertwined with the representation of PRADA’s (the applicant) iconic protected upside-down isosceles triangle.
- 49 However, the Board notes straight away that the triangle-shaped pattern at issue is a basic and commonplace style of fabric or design, since it is composed of a regular succession of triangles of the same size which are differentiated by alternating a dark and a bright colour. The slightly wavy, striated and granulated texture in the background will merely be perceived by consumers as a commonplace weft and warp texture. The pattern thus does not contain any notable variation in relation to the conventional representation of a pattern consisting of the repetition of a basic geometric shape found everywhere in the fields of the goods and services at issue. Such simple regular patterns are commonly applied to, for instance, clothing, smartphone cases, furniture such as mattresses and pillows, while shirts and trousers may also bear such a simple pattern. This is not mere conjecture. Even if one sets aside common knowledge, the examiner cited several web page addresses where patterns consisting of a combination of triangles were found on smartphone cases, shirts and bags (see the letter of provisional refusal from 29 June 2022):



- 50 When the applicant’s own exhibits, coupled with the examiner’s examples, coupled with common knowledge, are borne in mind it becomes clear that the pattern in question does not differ from the norm or customs of the sector inasmuch as such goods are generally covered with fabrics or designs of different kinds, and the repeating-triangle pattern, due to its great simplicity, might constitute precisely one of those patterns. There is simply no ground for asserting, on the contrary, that it is in any sense ‘peculiar’ or ‘uncommon’. On the contrary, the mark is banal and commonplace.
- 51 The applicant contends that consumers will immediately associate the upside-down isosceles triangle shape within the pattern at issue with one of the applicant’s allegedly iconic ‘house mark’ signs, which consists of an upside-down isosceles triangle shape sometimes depicting PRADA’s signature. In this context, the mark applied for would be perceived as a developed version of PRADA’s iconic signature, that will attract the consumer’s attention and make the sign easily memorable.
- 52 In this regard, it must be noted that the applicant has explicitly refrained from relying on Article 7(3) EUTMR, which provides that a trade mark may still be registered despite the fact that it does not comply with Article 7(1)(b) EUTMR, provided that it ‘has become

distinctive in relation to the goods or services for which registration is requested in consequence of the use which has been made of it’.

- 53 Therefore, taking exclusively into account the inherent distinctiveness of the sign, in the absence of verbal elements or other elements that could allow the sign at issue to be perceived by consumers *prima facie* as an indicator of commercial origin, the Board considers that the overall impression created by the simple disposition of juxtaposed triangles following a pattern, as in the mark applied for, is devoid of any distinctive character for all the goods and services in question. The relevant consumers will not conceive the mark as a badge of trade origin, but merely as a decorative pattern of a style which is commonplace in the field of textiles and other industries concerned in the case at issue.
- 54 As to the applicant’s contentions that there is an established trade practice, especially in fashion, to use patterns – even without a verbal element – and that consumers generally attribute an identifying function for pattern signs when they are systematically used by the same undertaking, the Board notes that it is precisely in that context where signs might acquire distinctiveness on account of the use they have made of the sign on the relevant sector, and be lawfully registered following the provisions of Article 7(3) EUTMR. However, since in the case at issue the applicant is exclusively relying on the inherent distinctiveness of the mark applied for, this argument cannot succeed, since, in particular, as it has been concluded, the elements forming the sign applied for do not allow to conclude that it diverges from the norm or customs of the sector concerned.
- 55 As regards the applicant’s submission that other signs similar to the contested mark have been registered at the Office, including other basic geometric shapes filed by the applicant, it should be recalled that the decisions of the Office are adopted in the exercise of circumscribed powers and are not a matter of discretion. Accordingly, the legality of the decisions must be assessed solely on the basis of that regulation, as interpreted by the Courts of the European Union, and not on the basis of a previous decision-making practice of those Boards (15/09/2005, C-37/03 P, *BioID*, EU:C:2005:547, § 47; 13/04/2011, T-159/10, *Parallélogramme*, EU:T:2011:176, § 37).
- 56 The allegedly similar marks cited by the applicant are in reality not similar. Whatever the view is of their inherent distinctiveness, they look completely different and are not materially in any way similar to the challenged mark and therefore their acceptance by the Office is not a significant factor in the evaluation of the contested mark’s distinctiveness.
- 57 In any event, the Boards have been consistent in rejecting, on the grounds of lack of distinctive character, simple patterns that may be used as mere decorative coverings, or consist of patterned surfaces, of the goods (see, e.g. 18/07/2014, R 406/2014-4, *DEVICE OF A PATTERN I*, § 16, 17; 24/07/2018, R 2751/2017-2, *DEVICE OF TWO HORIZONTAL STRIPES ONE RED ONE BLUE* (fig.), § 17; 26/03/2018, R 2202/2017-5, *DEVICE CONSISTING OF HORIZONTAL STRIPES WITH COLOURS FROM DARK RED TO YELLOW (FIG.)*, *DARK RED TO YELLOW* (fig.), § 25; 31/08/2016, R 1643/2015-4, *REPRESENTATION OF RECTANGLE IN BLUE AND YELLOW* (fig.), § 24; 08/06/2016, R 1828/2015-2, *DEVICE OF POINTING ARROWS (FIGURATIVE MARK)*, § 25; 23/10/2015, R 286/2015-5, *DARSTELLUNG EINER REIHE VON SENKRECHTEN RECHTECKIGEN FARBELEMENTEN* (fig.), § 18, 21; 14/08/2015, R 2845/2014-1, *DEPICTION OF THREE VERTICAL STRIPES* (fig.), § 18; 23/07/2015, R 2347/2014-1, *TM* (fig.), § 23; 02/07/2015, R 2602/2014-4,

REPRESENTATION OF GEOMETRIC SHAPES (FIG), § 14; 04/07/2014, R 365/2014-4, MULTICOLOURED STRIP, § 12; 03/06/2014, R 1112/2013-2, FLORAL PRINT (FIGURATIVE MARK), § 18; 19/05/2014, R 136/2014-5, DEVICE OF A CHECKED PATTERN (FIG. MARK), § 18; 20/11/2013, R 495/2013-1, DEVICE OF A COLOURED PATTERN (FIG. MARK), § 28; 27/06/2013, R 1652/2012-5, REPRESENTATION OF A CHECKED PATTERN (FIG. MARK) § 19; 14/11/2012, R 2600/2011-1, DEVICE OF A BLACK AND WHITE PATTERN (FIG. MARK), § 27).

58 In light of the above, the appeal is dismissed.

Order

On those grounds,

THE BOARD

hereby:

Dismisses the appeal.

Signed

S. Stürmann

Signed

K. Guzdek

Signed

H. Salmi

Registrar:

Signed

H. Dijkema

