

**DECISION  
of the Fifth Board of Appeal  
of 14 December 2022**

In case R 595/2022-5

**NH Hotel Group, S.A.**

Madrid, Spain

Opponent / Appellant

represented by Javier Ungría López, Madrid, Spain

v

**Nowinta Real Estate GmbH**

Aalen, Germany

Applicant / Defendant

represented by Lorenz & Kollegen Patentanwälte Partnerschaftsgesellschaft mbB,  
Heidenheim, Germany

APPEAL relating to Opposition Proceedings No B 3 071 699 (European Union trade  
mark application No 17 932 509)

**THE FIFTH BOARD OF APPEAL**

composed of V. Melgar (Chairperson), S. Rizzo (Rapporteur) and A. Pohlmann  
(Member)

Registrar: H. Dijkema

gives the following

## Decision

### Summary of the facts

- 1 By an application filed on 19 July 2018, Nowinta Bau GmbH, the predecessor in title of Nowinta Real Estate GmbH ('the applicant') sought to register the word mark

### UNOW

for the following list of services, as modified on 20 September 2018:

Class 35: *Business management; business administration; office functions; auctioneering of property; real estate marketing; arranging and conducting of real estate auctions; real estate marketing analysis; advertising services relating to real property.*

Class 36: *Insurance; financial affairs; monetary affairs; real estate affairs; investment advisory services relating to real estate; financing services relating to hotels; investment services; advisory services relating to real estate valuations; consultancy in the purchasing of real estate; advisory services relating to real estate ownership; real estate consultancy; assessment and management of real estate; real-estate valuations; real estate acquisition services; real estate consultancy; estate management; real estate investment; real estate affairs; estate agency services for sale and rental of buildings; real estate agency services relating to the purchase and sale of buildings; real estate services related to management of property investments; real estate investment; valuation of property; real estate listing services for housing rentals and apartment rentals; real estate investment planning; provision of information relating to property [real estate]; securing of funds for the purchase of property; financial services relating to real estate property and buildings; assessment and management of real estate; provision of finance for real estate development; real estate lending services; real estate investment; real estate investment advice; rental of offices [real estate]; arranging letting of real estate; real estate procurement for others; leases (arranging of -) [real estate property only]; arranging of leases and rental agreements for real estate; property portfolio management; management services for real estate investment; time share management services; accommodation bureaux (real estate property); providing information relating to real estate affairs, via the internet; providing real estate information relating to property and land.*

Class 37: *Building construction; repair in relation to real estate; installation in relation to real estate; advisory services relating to the renovation of property; construction of property.*

Class 43: *Services for providing food and drink; providing temporary accommodation.*

- 2 The application was published on 8 October 2018.
- 3 On 19 December 2018, NH Hotel Group, S.A. ('the opponent') filed an opposition against the registration of the published trade mark application for part of the services, i.e. all the services in Classes 35 and 43, namely:

Class 35: *Business management; business administration; office functions; auctioneering of property; real estate marketing; arranging and conducting of real estate auctions; real estate marketing analysis; advertising services relating to real property.*

Class 43: *Services for providing food and drink; providing temporary accommodation.*

- 4 The grounds of opposition were those laid down in Articles 8(1)(a) and 8(1)(b) EUTMR.
- 5 The opposition was based on the following earlier rights:
  - a) EUTM No 3 916 111

### **NHOW**

('earlier mark 1') filed on 6 July 2004 and registered on 11 October 2005 for, *inter alia*, the following services:

Class 35: *Administering management of hotels; advertising; commercial business management; assistance services for the working of a business company in a franchising system; exhibitions for commercial purposes.*

Class 43: *Hotel services; hotel reservations; providing of food and drink; temporary accommodation.*

- b) EUTM No 12 249 181

### **Nhow - elevate your stay**

('earlier mark 2') filed on 24 October 2013 and registered on 19 March 2014 for the following services:

Class 35: *Publicity and sales promotion services; business management; business administration; office functions; customer loyalty services for commercial, promotional or advertising purposes; dissemination of advertisements; marketing services; organisation of trade fairs and exhibitions for commercial or advertising purposes; import and export services; franchises, namely consultancy and assistance in the management, organisation and promotion of business relating to commercial or industrial business management assistance.*

Class 43: *Services for providing food and drink; temporary accommodation; providing hotel accommodation; rental of temporary accommodation; rental of tents; rental of transportable buildings; rental of facilities for meetings, conferences, exhibitions, shows, conventions, seminars, symposiums and training workshops; rental of chairs, tables, table linen, glassware; tourist homes; providing campground facilities; day-nurseries [crèches]; hotels; motels; room reservation services; hotel reservations; boarding house bookings; animal boarding; retirement homes; self-service restaurants; bar services; snack bars; cafeterias; cafeterias; catering services for the provision of food; canteens.*

c) figurative EUTM No 12 230 223

**nhow**

(‘earlier mark 3’) filed on 17 October 2013 and registered on 12 March 2014, for the following services:

Class 43: *Services for providing food and drink; temporary accommodation; accommodation agencies (hotels, boardinghouses); rental of temporary accommodation; rental of tents; rental of transportable buildings; rental of facilities for meetings, conferences, exhibitions, shows, conventions, seminars, symposiums and training workshops; rental of chairs, tables, table linen, glassware; tourist homes; providing campground facilities; day-nurseries [crèches]; hotel services; motel services; temporary accommodation reservations; hotel reservations; boarding house bookings; boarding for animals; retirement homes; self-service restaurants; bar services; snack-bars; cafés; cafeterias; catering; canteen services.*

d) figurative national Spanish registration No M 3 094 527

**nhow**

(‘earlier mark 4’) filed on 16 October 2013 and registered on 11 February 2014, for the following services:

Class 43: *Services for providing food and drink; Temporary accommodation; accommodation agencies (hotels, boardinghouses); Rental of temporary accommodation; rental of cooking apparatus; rental of tents; rental of transportable buildings; rental of dispensers of drinking water; rental of meeting rooms; rent of chairs, tables, table linen, glassware; holiday homes; campground facilities; day-nurseries; hotel services; motel services; temporary accommodation reservation; hotel reservation; boarding house bookings; boarding for animals; retirement homes; self-service restaurants; bar services; snack-bars; coffee shops; catering; canteen services.*

- 6 By decision of 25 February 2022 ('the contested decision'), the Opposition Division rejected the opposition in its entirety, on the grounds that the signs were not identical and that there was no likelihood of confusion. It gave, in particular, the following grounds for its decision:

*Proof of use*

- Proof of use of the earlier mark was requested by the applicant. However, the Opposition Division does not consider it appropriate to undertake an assessment of the evidence of use submitted. The examination of the opposition will proceed as if genuine use of the earlier mark(s) had been proven for all the services invoked, which is the best light in which the opponent's case can be considered.

*Likelihood of confusion – Article 8(1)(b) EUTMR*

- The opposition is based on more than one earlier trade marks. The Opposition Division finds it appropriate to first examine the opposition in relation to the opponent's EUTMs No 3 916 111 ('earlier mark 1') and No 12 249 181 ('earlier mark 2').

*(i) The services*

- The contested 'business management; business administration' of Class 35 include, as broader categories, the opponent's 'commercial business management' and 'administrating management of hotels' respectively of earlier mark 1. Since the Office cannot dissect *ex officio* the broad categories of the contested services, they are considered identical to the earlier services.
- The contested 'office functions' of Class 35 is listed identically in the list of services of earlier mark 2.
- The contested 'real estate marketing analysis; real estate marketing' of Class 35 are included in the opponent's broad category of 'marketing services' of earlier mark 2. Therefore, they are identical.
- The contested 'advertising services relating to real property' of Class 35 are included in the opponent's broad category of 'advertising' of earlier mark 1. Therefore, they are identical.
- However, the contested 'auctioneering of property; arranging and conducting of real estate auctions' are dissimilar to all the services of the earlier marks because they have nothing in common. The services of the earlier marks relate mainly to advertising, business management and assistance, clerical services, import and export, provision of temporary accommodation, rental services and the provision of food and drink. The contested services, however, concern the organization of public sales where people can bid on property consisting of houses and land. Clearly, their natures and purposes are different. They do not coincide in their providers and do not share the same distribution channels.

Furthermore, these services are neither complementary nor in competition and they target different end users.

- ‘Providing temporary accommodation; services for providing food and drink’ of Class 43 are identically listed in earlier mark 1 (including synonyms).

*Relevant public – degree of attention*

- The services found to be identical are directed at the public at large and the at business customers with specific professional knowledge or expertise. The degree of attention may vary from average to high, especially where it concerns services that affect the development and expansion of market shares of a company, such as business management.

*The signs*

- The relevant territory is the European Union.
- The earlier mark 1 ‘NHOW’, as such, has no meaning for the relevant public and is, therefore, distinctive.
- The earlier mark 2 comprises the letters ‘Nhow’ followed by the English slogan ‘elevate your stay’ separated by a hyphen. The laudatory slogan ‘elevate your stay’ has a meaning for the English-speaking part of the public indicating that the services provided increase the level of the time spent in a certain place. This expression, in relation to the services provided, is thus rather weak, as it will be perceived as ancillary promotional information, and not as the main badge of origin of the services, a function which will be attributed to the verbal element ‘Nhow’. For the rest of the relevant public this expression has no meaning and is therefore distinctive.
- The contested sign ‘UNOW’, as such, has no meaning for the relevant public, and is, therefore, distinctive.
- It is likely that at least the English-speaking part of the public, and the non-English-speaking part of the public with a basic knowledge of English, will split the term ‘NHOW’ into the components ‘N’ and ‘HOW’ (meaning: in what way or by what method) and the term ‘UNOW’ into the components ‘U’ (pronounced as ‘you’, used to refer to the person or people being spoken or written to) and ‘NOW’ (meaning: at the present time, not in the past future). In any event, these letter combinations, whether broken down or not, have no direct relation to the relevant services and are therefore distinctive.
- The length of the signs may influence the effect of the differences between them. The shorter a sign, the more easily the public is able to perceive all of its single elements. Therefore, small differences may frequently lead to a different overall impression. In the case of earlier mark 2, the length of the signs is so different that this also has an impact as will be assessed further on.

- Visually, the signs coincide in their last two letters ‘OW’ and their letter ‘N’, which is placed in different positions of their letter combinations ‘NHOW’ and ‘UNOW’. They differ in their letters ‘H’ and ‘U’ respectively. Furthermore, in the case of earlier mark 2, the signs differ in the expression ‘elevate your stay’.
- It is of importance in the case at hand that the beginnings of the verbal elements in the two signs are strikingly different, even if they share the same letter N, the earlier marks start with the letter 'N', whereas the contested sign starts with the letter 'U'. Therefore, contrary to the opponent’s arguments, earlier mark 1 is considered similar to a low degree, whereas earlier mark 2 is even less similar on account of the expression ‘elevate your stay’.
- Aurally, irrespective of the different pronunciation rules in different parts of the relevant territory, the pronunciation of the signs coincides in the sound of the letters ‘OW’ and the sound of their letter ‘N’ although placed in a different position. As regards earlier mark 2, the signs also differ in the expression ‘elevate your stay’, which has no counterpart in the contested sign.
- As regards the English-speaking part of the public, and the non-English-speaking part of the public with a basic knowledge of English, the signs are likely to be pronounced differently as in ‘N-HOW’ and ‘U-NOW’, for the reasons explained.
- Therefore, earlier mark 1 is considered similar to a low degree, whereas earlier mark 2 is even less similar on account of the expression ‘elevate your stay’.
- Conceptually, as the signs will be associated with a different meaning for the English-speaking public, the signs are not similar. For the other part of the public none of the signs has a meaning for the public in the relevant territory. Since a conceptual comparison is not possible, the conceptual aspect does not influence the assessment of the similarity of the signs.

#### *Distinctiveness of the earlier mark*

- The opponent did not explicitly claim that its marks are particularly distinctive by virtue of intensive use or reputation.
- The assessment of the distinctiveness of the earlier marks will rest on their distinctiveness per se. The earlier trade marks as a whole have no meaning for any of the services in question, from the perspective of the public in the relevant territory. Therefore, the distinctiveness of the earlier marks must be seen as normal, despite the presence of a weak element in earlier mark 2.

#### *Global assessment, other arguments and conclusion*

- The services have been found partly identical and partly dissimilar. They target both the public at large and the professional public with a degree of attention that may vary between average and high. The signs are visually and aurally

similar to a low degree or even less when considering earlier mark 2, whereas at conceptual level the signs are either not similar or remains neutral.

- The earlier marks have an average degree of inherent distinctiveness.
- However, as regards the similarity between the signs, it has been established as low on the visual and aural level. The conflicting signs display striking visual differences which are especially relevant because earlier mark 1 and the contested sign are relatively short marks. On the other hand, in case of earlier mark 2, the differences are even greater. This is a very important factor to be considered when evaluating the likelihood of confusion. This cannot be counterbalanced by the assessment on the conceptual level, as its outcome is either neutral or not similar.
- The signs are not sufficiently similar to give rise to a situation where the relevant public directly confuses them, despite the imperfect recollection of the signs that consumers tend to rely on. Nor are the signs similar enough to lead the relevant public to think that they designate services of the same undertaking, or an economically-linked undertaking, through likelihood of association.
- The rest of the contested services are dissimilar. As similarity of goods and services is a necessary condition for the application of Article 8(1) EUTMR, the opposition based on this Article and directed at these services cannot be successful.

#### *Further considerations*

- The other earlier marks 3 and 4 invoked by the opponent are less similar to the contested mark. This is because they are figurative and depicted in a pink colour. Moreover, they cover a narrower scope of the services. Therefore, the outcome cannot be different with respect to services for which the opposition has already been rejected; no likelihood of confusion exists with respect to those services.
  - The opposition must also fail insofar as based on grounds under Article 8(1)(a) EUTMR because the signs are obviously not identical.
- 7 On 8 April 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 27 June 2022.
- 8 In its response received on 25 August 2022, the applicant requested that the appeal be dismissed.

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

- 9 The arguments raised in the statement of grounds may be summarised as follows:



- The comparison must be based on the overall impressions and distinctive and dominant components of the signs.
- The relevant territory is the European Union but one of the relevant territories is Spain and other countries of the UE such as Italy or Portugal which are not so familiar with English and should also be taken into account when comparing the confronted signs. A likelihood of confusion for only part of the relevant public of the European Union is in fact sufficient to reject the contested application.
- The opponent finds it appropriate to focus the comparison of the signs also on the part of the Italian- and Spanish-speaking part of the public, for whom both verbal elements are meaningless and therefore distinctive.
- The earlier marks' font is standard and of a purely decorative nature. Regarding the depiction of the prior 'pink' earlier marks, part of the public will see it as purely decorative. In any event, the stylization and figurative aspects of this letter will not prevent the public from perceiving it as different from 'NHOW'. Also, contested sign is a word mark and has not additional elements other than the word 'UNOW'.
- Despite the marks are short marks, bearing in mind that there are high visual and phonetic similarities between them, a clear association in the consumers mind will occur.
- It is evident that the marks share the most important parts of the composition 'NHOW'/'NOW' and that there is an evident risk of confusion.
- With its analysis, the Opposition Division supposed that all the European Union consumers will analyse the confronted marks by giving them English translation instead of considering that for part of the public the marks will be meaningless.
- Visually, it is evident that the mark will be perceived to be highly similar without making a disaggregation of the marks.
- The signs coincide in the sequence of letters 'NHOW'/'NOW', which entails all of the letters/sounds of the contested sign and the majority of the earlier mark's letters/sounds. They only differ in the earlier mark's letter 'H' (which is moult)', which is placed in the middle of the sign and, therefore, has less impact on the public. This is because the public does not tend to analyse signs and will more easily refer to the signs in question by their verbal elements. Therefore, the signs are visually and aurally similar to an average degree.
- The additional figurative element has only a limited impact when assessing the likelihood of confusion between the marks.
- Moreover, within the market, most trade marks are known and recognized by their verbal sound so, it is seen as unavoidable that the public will not distinguish the signs in conflict.

- The aural analysis performed by the Opposition Division is not real since the ‘H’ is mute. The marks will be almost identical in almost all of its pronunciations.
- The pronunciation of the marks coincides in the syllables ‘UNOW’/’NHOW’ but the presence of the letter ‘U’ is almost imperceptible, present identically in both signs and to that extent the marks are aurally similar. Also, the marks have no meaning in Spanish which it is one of the relevant territories and where the differences between the signs ‘UNOW’/’NHOW’ will not be appreciated by consumers. The differences in the compositions are really small.
- The analysis of the Opposition Division only focused on the English-speaking part of the public without focusing on the remaining part of the European public.
- The highly distinctive nature of the sign ‘NHOW’ must be taken into consideration when appraising the likelihood of confusion. In fact, the more a mark is distinctive, the greater is the risk of confusion.
- The trade marks at issue are similar to a high degree due to the fact that they share the principal letters ‘NHOW’/’NOW’ and they differ only by the presence of the legend letter U at the beginning of the application mark. The fact that the signs are not particularly long as well as the required high level of attention in relation to the services protected by the contested mark is not particularly striking; on the contrary, is rather likely to go unnoticed due to the fact they share a very similar intonation, coup of voice and pronunciation. Therefore, the quasi-identity between the marks is totally evident.
- As a result of the quasi-identity of the marks, it is evident that they will be confusingly similar and will cause an unavoidable risk of confusion, association and error in the mind of the consumers if they coexist in the market, as also considered by the Australian Trademark Office.
- Consequently, the risk of confusion is evident because the average consumer will perceive by the first time to name the confronted marks aurally they are extremely similar (*sic*).

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

- The opponent does not present any arguments showing errors in the contested decision but only states in general terms that there is a disagreement with the decision. For this reason, the appeal is unfounded.
- The evidence of use should be taken into account in case the decision of the Board of Appeal differs from the decision of the Opposition Division.
- The opponent argues that the trade marks to be compared share the most important parts of the composition. For this purpose, the opponent compares ‘NHOW’ with ‘NOW’. However, the beginning of a trade mark is more noticed and memorized by the public. Therefore, it is not understandable for

what reason the opponent wants to disregard and omit the important initial letter 'U' of the contested sign. It is highly probable that 'NOW' would be seen as descriptive and therefore unprotectable term.

- The trade marks to be compared do not share the important parts of their composition. The signs to be compared 'UNOW' and 'nhow' have only two matching letters ('-ow') at the end. '-Ow' is a very common suffix in English.
- According to the website 'wordmine.info', one thousand sixty-six English words end with 'ow'. This means that the trade marks differ in two letters at the decisive beginning of the trade marks. Overall, the signs to be compared, each consisting of four letters, differ by 50%. Accordingly, the distance between the signs 'UNOW' and 'Nhow - elevate your stay' is even greater.
- The trade marks to be compared do not have sufficient similarities to justify a likelihood of confusion.
- The signs to be compared are 'NHOW' and 'UNOW'.
- The pronunciation of the signs in comparison differs clearly at the beginning. The first letter 'U' will be pronounced as 'you'. That means that the first letter 'U' has phonetically the same length as the element 'NOW', namely 'YOU NOW'. The phonetic difference between the signs in comparison is clearly audible since the signs to be compared have a completely different beginning which cannot be missed by the listener.
- Phonetically, omitting half of a trade mark in a comparison is obviously not correct and leads to incorrect results. The initial letter 'U' of the contested trade mark is not imperceptible. In addition, although the letter 'H' might be a silent letter in some languages, the 'H' changes the speech rhythm. The letter sequence 'HOW' is not pronounced like 'OW'. Thus the 'H' is also remarkable even if it is not crucial here, because also phonetically not 'NHOW' and 'NOW' are to be compared, but 'NHOW' and 'UNOW'.
- The opponent criticizes that the Office would have focused only on the English-speaking public. However, it fails to recognize that Spanish, Italian and Portuguese can also be expected to have a basic knowledge of English. Nevertheless, this discussion is not decisive since the difference between the trade marks is readily apparent and audible to both the English-speaking and non-English-speaking publics.
- The phonetical distance between the signs 'UNOW' / 'YOU NOW' and 'Nhow - elevate your stay' is even greater.
- The signs to be compared are phonetically not similar or at most similar to a low degree.
- The trade marks in comparison are visually and aurally not similar enough to create a likelihood of confusion.

- The distinctiveness of the earlier trade marks is at most average or even low due to the fact that such trade marks are intended to remind the simple English word ‘how’.
- The signs to be compared differ not only in the understandable words ‘now’ and ‘how’, but also in the letter preceding it, namely ‘U’ and ‘N’ which are not similar and therefore cannot be confused. Even assuming that the meaning of the English word elements ‘how’ and ‘now’ is not known, the signs to be compared, namely ‘UNOW’ and ‘nhow’ / ‘Nhow - elevate your stay’ show characterizing differences and are not ‘quasi-identical’, as stated by the opponent.
- The assertion that the Australian Trademark Office also considered a likelihood of confusion is factually incorrect.
- The high number of existing trade marks including the word elements ‘now’ or ‘how’ shows that the costumers are easily able to distinguish those marks even if the meaning of the words ‘now’ and ‘how’ is not known. This applies in particular to the case of if the previous first letter is different and easily distinguishable, as it is in the present case.
- The trade marks to be compared maintain the necessary distance even if the services to be compared will be considered as partly identical or similar.

### **Reasons**

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

### *Scope of the appeal and preliminary remarks*

- 13 The opponent appealed the contested decision in its entirety.
- 14 For reasons of procedural economy, the Opposition Division first based its assessment on EUTMs No 3 916 111 ‘NHOW’ (word mark) and No 12 249 181 ‘Nhow - elevate your stay’ (word mark).
- 15 In addition, the Opposition Division based its assessment on the assumption that genuine use has been proven for all the earlier rights in relation to all relevant services, which is the best light in which the opponent’s case can be considered.
- 16 The Board will follow the same approach, since it is not prejudicial to either party.

*Article 8(1)(b) EUTMR*

- 17 According to Article 8(1)(b) EUTMR, the trade mark applied for shall 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 two 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.
- 18 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 within the meaning of that Article (11/11/1997, C-251/95, Sabèl, EU:C:1997:528, § 16-18; 29/09/1998, C-39/97, Canon, EU:C:1998:442, § 30).
- 19 A likelihood of confusion must be assessed globally, taking into account all factors relevant to the circumstances of the case (11/11/1997, C-251/95, Sabèl, EU:C:1997:528, § 22; 29/09/1998, C-39/97, Canon, EU:C:1998:442, § 16; 22/06/1999, C-342/97, Lloyd Schuhfabrik, EU:C:1999:323, § 18).
- 20 The global appreciation must be based on the overall impression given by the trade marks, bearing in mind, in particular, their distinctive and dominant components (11/11/1997, C-251/95, Sabèl, EU:C:1997:528, § 23; 22/06/1999, C-342/97, Lloyd Schuhfabrik, EU:C:1999:323, § 25).

*Relevant public*

- 21 The earlier rights are EUTMs, the relevant public is the public throughout the European Union.
- 22 The relevant public for the assessment of the likelihood of confusion is composed of users likely to use both the goods and services covered by the earlier mark and those covered by the mark applied for that were found to be identical or similar (24/05/2011, T-408/09, ancotel, EU:T:2011:241, § 38 and the case-law cited; 01/07/2008, T-328/05, Quartz, EU:C:2009:450). Furthermore, the relevant public is identified by means of the nature of the goods and services covered by the conflicting marks.
- 23 For the purpose of the global appreciation, the average consumer of the category of services concerned is deemed to be reasonably well-informed and reasonably observant and circumspect (22/06/1999, C-342/97, Lloyd Schuhfabrik, EU:C:1999:323, § 26).
- 24 It should, however, be recalled that the average consumer's level of attention is likely to vary according to the category of goods or services in question and that the average consumer only rarely has the chance to make a direct comparison between the different marks, but must place trust in the imperfect picture of them that he or she has kept in his or her mind (22/06/1999, C-342/97, Lloyd Schuhfabrik, EU:C:1999:323, § 26).

- 25 In the present case, the Board agrees with the undisputed finding of the Opposition Division according to which the services in question are directed at the general public and at business customers with specific professional knowledge and expertise, whose degree of attention may vary from average to high, especially where it concerns services that affect the development and expansion of market shares of a company, such as business management or advertising and related services (21/03/2013, T-353/11, *eventer Event Management Systems*, EU:T:2013:147, § 34; 13/12/2016, T-58/16, *APAX / APAX et al.*, EU:T:2016:724, § 27; 13/03/2018, T-824/16, *K (fig.) / K (fig.) et al.*, EU:T:2018:133, § 39, 43).
- 26 The relevant territory is the European Union.
- 27 The unitary character of the European Union trade mark means that an earlier European Union trade mark can be relied on in opposition proceedings against any application for registration of a European Union trade mark that would adversely affect the protection of the first mark, even if only in relation to the perception of consumers in part of the European Union (18/09/2008, C-514/06 P, *Armafoam*, EU:C:2008:511, § 57). Therefore, a likelihood of confusion for only part of the relevant public of the European Union is sufficient to reject the contested application.

*Comparison of the services*

- 28 In assessing the similarity of the goods or services concerned, all the relevant factors relating to those goods or services themselves should be taken into account. Those factors include, inter alia, their nature, their intended purpose, and their method of use and whether they are in competition with each other or are complementary (29/09/1998, C-39/97, *Canon*, EU:C:1998:442, § 23, 12/05/2020, R 2779/2019-5, *Racetools / Race (fig.)*, § 15). Other factors may also be taken into account such as, for example, the distribution channels of the goods concerned (11/07/2007, T-443/05, *PiraÑAM*, EU:T:2007:219, § 37).

- 29 The services applied for which are at issue in the present appeal are the following:

*Class 35: Business management; business administration; office functions; auctioneering of property; real estate marketing; arranging and conducting of real estate auctions; real estate marketing analysis; advertising services relating to real property.*

*Class 43: Services for providing food and drink; providing temporary accommodation.*

- 30 The opposition is based on the following services:

- a) EUTM No 3 916 111 (earlier mark 1)

*Class 35: Administrating management of hotels; advertising; commercial business management; assistance services for the working of a business company in a franchising system; exhibitions for commercial purposes.*

Class 43: *Hotel services; hotel reservations; providing of food and drink; temporary accommodation.*

b) EUTM No 12 249 181 (earlier mark 2)

Class 35: *Publicity and sales promotion services; business management; business administration; office functions; customer loyalty services for commercial, promotional or advertising purposes; dissemination of advertisements; marketing services; organisation of trade fairs and exhibitions for commercial or advertising purposes; import and export services; franchises, namely consultancy and assistance in the management, organisation and promotion of business relating to commercial or industrial business management assistance.*

Class 43: *Services for providing food and drink; temporary accommodation; providing hotel accommodation; rental of temporary accommodation; rental of tents; rental of transportable buildings; rental of facilities for meetings, conferences, exhibitions, shows, conventions, seminars, symposiums and training workshops; rental of chairs, tables, table linen, glassware; tourist homes; providing campground facilities; day-nurseries [crèches]; hotels; motels; room reservation services; hotel reservations; boarding house bookings; animal boarding; retirement homes; self-service restaurants; bar services; snack bars; cafeterias; cafeterias; catering services for the provision of food; canteens.*

- 31 The Board shares the contested decision's undisputed findings according to which the contested services are partly identical and partly dissimilar to the opponent's goods.
- 32 The Board recalls that according to Article 33(5) EUTMR, the use of general terms, including general indications of the class headings of the Nice Classification, will be interpreted as including all the goods or services clearly covered by the literal meaning of the indication or term within the context of the class in which it is applied for. The use of such terms will not be interpreted as comprising a claim to goods or services that cannot be so understood.
- 33 The contested 'business management; business administration' include, as broader categories, the opponent's 'commercial business management and administrating management of hotels' of earlier mark 1. Since the Office cannot dissect ex officio the broad categories of the contested services, they are considered identical to the earlier services.
- 34 The contested 'office functions' is listed identically in the list of the services covered by earlier mark 2.
- 35 The contested 'real estate marketing analysis; real estate marketing' are included in the opponent's broad category of 'marketing services' of earlier mark 2. Therefore, they are identical.
- 36 The contested 'advertising services relating to real property' are included in the opponent's broad category of 'advertising' of earlier mark 1. Therefore, they are identical.

- 37 The Board notes that, as found by the Opposition Division, the contested ‘auctioneering of property; arranging and conducting of real estate auctions’ are dissimilar to all the services of the earlier marks. The services of the earlier marks relate mainly to advertising, business management and assistance, clerical services, import and export, provision of temporary accommodation, rental services and the provision of food and drink. The contested services, however, concern the organization of public sales where people can bid on property consisting of houses and land. Clearly, their natures and purposes are different. They do not coincide in their providers and do not share the same distribution channels. Furthermore, these services are neither complementary nor in competition and they target different end users.
- 38 With reference to the contested services in Class 43, the Board notes that ‘providing temporary accommodation; services for providing food and drink’ are identically listed in earlier mark 1 (including synonyms).

*Comparison of the marks*

- 39 It must be recalled and it is settled case-law that the global assessment of the likelihood of confusion must, as far as concerns the visual, aural or conceptual similarity of the signs at issue, be based on the overall impression given by the signs, bearing in mind, inter alia, their distinctive and dominant components (see 17/11/2005, T-154/03, Alrex, EU:T:2005:401, § 52 and the case-law cited).
- 40 The signs to be compared are:

<b>1) NHOW</b>	<b>UNOW</b>
<b>2) Nhow - elevate your stay</b>	
<i>Earlier marks</i>	<i>Contested sign</i>

- 41 The signs under comparison are word marks. Thus, the terms as such are protected. The use of small or capital letters or a specific font is, in principle, not taken into account when determining the scope of protection of a word mark (20/04/2005, T-211/03, Faber, EU:T:2005:135, § 33; 22/05/2008, T-254/06, RadioCom, EU:T:2008:165, § 43 ; 25/06/2013, T-505/11, dialdi, EU:T:2013:332, § 65).
- 42 The earlier mark 1 consists of the sequence of letters ‘NHOW’, while the earlier mark 2 consists of the same sequence of letters ‘NHOW’ followed by the terms



‘elevate your stay’, separated by a hyphen. The contested sign is the sequence of letters ‘UNOW’.

- 43 The earlier mark 1 ‘NHOW’ has, as such, no meaning for the relevant public and is, therefore, distinctive.
- 44 The same applies to the verbal element ‘NHOW’ included in the earlier mark 2. With reference to the element ‘elevate your stay’ comprised in earlier mark 2, taken as a whole, it has a meaning for the English-speaking part of the public, as it may be understood as a laudatory slogan indicating that the services provided increase the level of the time spent in a certain place. The Board considers that – as noted by the Opposition Division – this expression, in relation to the services provided, is thus rather weak, as it will be perceived as ancillary promotional information. For the rest of the relevant public, the Board notes that this expression has no meaning and is therefore distinctive.
- 45 The contested sign ‘UNOW’ has, as such, no meaning for the relevant public, and is, therefore, distinctive.
- 46 As correctly observed in the contested decision, although ‘NHOW’ of the earlier marks and the contested sign ‘UNOW’ are both one verbal element, it cannot be excluded that the English-speaking part of the public, and the non-English-speaking part of the public with a basic knowledge of English, will split the letter combinations into the components ‘N’ and ‘HOW’ (meaning: in what way or by what method) on the one hand and ‘U’ (pronounced as ‘you’, used to refer to the person or people being spoken or written to) and ‘NOW’ (meaning: at the present time, not in the past future) on the other. In any event, these letter combinations, whether broken down or not, have no direct relation to the relevant services and are therefore distinctive, as noted by the Opposition Division.
- 47 The Board notes that earlier mark 1 and the contested sign are short marks.
- 48 When faced with such short marks, in principle the relevant public is likely to perceive more clearly what differentiates them (09/07/2015, T-89/11, NANU / NAMMU, EU:T:2015:479, § 56; 23/10/2015, T-597/13, dadida / CALIDA, EU:T:2015:804, § 26; 03/12/2014, T-272/13, M&Co., EU:T:2014:1020, § 47; 04/05/2018, T-241/16, EW (fig.) / WE, EU:T:2018:255, § 54; 10/11/2021, T-73/21, P.I.C. Co. (fig.) / P!K (fig.), EU:T:2021:777, § 63). The shorter a sign, the more easily the public is able to perceive its various elements (10/11/2021, T-73/21, P.I.C. Co. (fig.) / P!K (fig.), EU:T:2021:777, § 61). However, it has to be determined in each case whether such differences lead to different overall impressions of the signs (10/11/2021, T-73/21, P.I.C. Co. (fig.) / P!K (fig.), EU:T:2021:777, § 63).
- 49 As far as earlier mark 1 and the contested sign are concerned, three out of the four letters of which they are composed, are the same. However, it is noted that the mere presence of the same letters in both signs cannot be sufficient to conclude that there is an average degree of visual similarity (04/05/2018, T-241/16, EW (fig.) / WE, EU:T:2018:255, § 34).

- 50 The signs coincide in the first letter of the earlier mark 1 and second letter of the contested sign 'N', as well as in their final letters '-O-W'. The signs differ in the first letter 'U-' of the contested sign and in the second letter 'H' of the earlier mark 1.
- 51 It is of importance, in the case at hand, that the beginnings of the two signs are strikingly different. It is recalled that, according to reiterated case-law, the beginning of a sign is the part to which consumers normally attach more importance (17/03/2004, T-183/02 & T-184/02, Mundicor, EU:T:2004:79, § 81; 26/01/2006, T-317/03, Variant, EU:T:2006:27, § 50; 23/05/2007, T-342/05, Cor, EU:T:2007:152, § 42). This is justified by the fact that the public reads from left to right, which makes the part placed at the left of the sign (the initial part) the one that first catches the attention of the reader.
- 52 Therefore, contrary to the opponent's arguments, the earlier mark 1 and the contested sign are considered similar to a low degree.
- 53 As far as earlier mark 2 is concerned, the Board recalls what has been noted above with reference to the comparison between the term 'UNOW' composing the contested sign and 'NHOW' included in the earlier signs. In addition, the Board notes that these signs also differ in the expression 'elevate your stay' included in the earlier sign 2, that make them even less similar than the others under comparison.
- 54 Aurally, irrespective of the different pronunciation rules in different parts of the relevant territory, the Board considers that, as found by the Opposition Division, the pronunciation of the signs coincides in the sound of the letters '-O-W' and the sound of their letter 'N' although placed in a different position. The pronunciation of the signs differs in the pronunciation of the letter 'U' at the beginning of the contested sign and of the letter 'H' in the earlier mark, for the part of the public that will pronounce it. It is to be noted that, even considering that part of the public will not pronounce the letter 'H' as it is mute, as noted by the opponent, the pronunciation of the signs still differs in the letter 'U', which is placed at the beginning of the contested sign.
- 55 As regards earlier mark 2, the signs also differ in the pronunciation of the expression 'elevate your stay', which has no counterpart in the contested sign.
- 56 As regards the English-speaking part of the public, and the non-English-speaking part of the public with a basic knowledge of English, the signs are likely to be pronounced differently as in 'N-HOW' and 'U-NOW', for the reasons explained above.
- 57 Therefore, contrary to the opponent's arguments, the earlier mark 1 is considered similar to a low degree, whereas earlier mark 2 is even less similar on account of the expression 'elevate your stay'.
- 58 Conceptually, reference is made to the previous assertions concerning the semantic content conveyed by the marks.

- 59 As the signs will be associated with a different meaning for the English-speaking public and the non-English-speaking part of the public with a basic knowledge of English, the signs are conceptually not similar.
- 60 For the other part of the public, neither of the signs has a meaning for the public in the relevant territory. Since a conceptual comparison is not possible, the conceptual aspect does not influence the assessment of the similarity of the signs.

*Distinctiveness of the earlier marks*

- 61 The distinctiveness of the earlier marks is one of the factors to be taken into account in the global assessment of likelihood of confusion.
- 62 The opponent did not claim that the earlier marks enjoy an enhanced distinctive character.
- 63 Consequently, the assessment of the distinctiveness of the earlier marks will rest on their distinctiveness per se.
- 64 In the present case, the earlier trade marks as a whole have no meaning for any of the services in question from the perspective of the public in the relevant territory. Therefore, the distinctiveness of the earlier marks must be seen as normal, despite the presence of the weak element in mark 2, consisting of the slogan ‘elevate your stay’.

*Overall assessment of the likelihood of confusion*

- 65 According to the case-law of the Court of Justice, 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. It follows from the very wording of Article 8(1)(b) EUTMR that the concept of a likelihood of association is not an alternative to that of a likelihood of confusion, but serves to define its scope (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).
- 66 A likelihood of confusion on the part of the public must be assessed globally. That global assessment implies some interdependence between the factors taken into account and in particular similarity between the trade marks and between the goods or services covered. Accordingly, a lesser degree of similarity between these goods or services may be offset by a greater degree of similarity between the marks, and vice versa (29/09/1998, C-39/97, Canon, EU:C:1998:442, § 17; 22/06/1999, C-342/97, Lloyd Schuhfabrik, EU:C:1999:323, § 19). 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).

- 67 As seen above, the assessment of the distinctiveness of the earlier trade marks rests on their inherent distinctiveness, which must be seen as average.
- 68 The services under comparison have been found to be partly identical and partly dissimilar. They target both the public at large and the professional public with a degree of attention that may vary between average and high.
- 69 As regards the signs, they are visually and aurally similar to a low degree or even less when considering earlier mark 2, whereas at conceptual level the signs are either not similar or remains neutral.
- 70 The signs under comparison display striking visual differences which are especially relevant because earlier mark 1 and the contested sign are short marks. In case of earlier mark 2, the differences are even greater, considering the presence of the terms 'elevate your stay' in the earlier mark. These findings cannot be counterbalanced by the assessment on the conceptual level, as its outcome is either neutral or not similar.
- 71 In light of the above, the Board considers that, as concluded by the Opposition Division, the signs are not sufficiently similar to give rise to a situation where the relevant public directly confuses them, despite the imperfect recollection of the signs that consumers tend to rely on. Furthermore, the signs are not similar enough to lead the relevant public to think that they designate services of the same undertaking, or an economically-linked undertaking, through likelihood of association.
- 72 Considering all the above, even if some of the services are identical and the level of attention is average for part of the relevant public, and thus taking into consideration the principles of interdependence and imperfect recollection, there is no likelihood of confusion on the part of the public.
- 73 The rest of the contested services are dissimilar. As similarity of goods and services is a necessary condition for the application of Article 8(1) EUTMR, the opposition based on this Article and directed at these services cannot be successful.
- 74 Therefore, the opposition must be rejected, as concluded in the contested decision.

#### *Other rights*

- 75 The Board notes that the opposition is also based on EUTM No 12 230 223 and Spanish national trade mark registration No M 3 094 527. These earlier rights invoked by the opponent are less similar to the contested mark. This is because they are figurative and depicted in a pink colour. Moreover, they cover a narrower scope of the services. Therefore, as concluded by the Opposition Division, the outcome cannot be different with respect to services for which the opposition has already been rejected. Therefore, with respect to those services there is no likelihood of confusion.

*Article 8(1)(a) EUTMR.*

- 76 For the sake of completeness, it must be mentioned that the opposition must also fail insofar as based on grounds under Article 8(1)(a) EUTMR, given that the signs are obviously not identical.

*Conclusion*

- 77 In light of the above, it must be concluded that there is no likelihood of confusion on the part of the relevant public. The Opposition Division correctly rejected the opposition with respect to all the services at issue.
- 78 Therefore, the contested decision is confirmed, and the appeal dismissed.

**Costs**

- 79 Pursuant to Article 109(1) EUTMR and Article 18 EUTMIR, the opponent, as the losing party, must bear the applicant's costs of the opposition and appeal proceedings.
- 80 As regards the appeal proceedings, these consist of the applicant's costs of professional representation of EUR 550.
- 81 As to the opposition proceedings, the Opposition Division ordered the opponent to bear the applicant's representation costs which were fixed at EUR 300. This decision remains 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 pay EUR 550 for the applicant's costs in the appeal proceedings. The total amount to be paid by the opponent in the opposition and appeal proceedings is EUR 850.**

Signed

V. Melgar

Signed

S. Rizzo

Signed

A. Pohlmann

Registrar:

Signed

H. Dijkema

