Case-law Research Report

Similarity between pharmaceuticals and cosmetics

November 2024

This report is the result of discussions within the Consistency Circles and the General Consistency Meeting of the Boards of Appeal. It is a working document that reflects case-law and views at the given date of the report. It does not have any binding effect on the Boards of Appeal.

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1 Introduction

1 This report is a compilation of case-law from the Court of Justice (CJ), the General Court (GC) and the Boards of Appeal (the Boards or BoA), drawn up with the aim of identifying and analysing the relevant case-law and trends on the topic.

2 The purpose is to further support the work of the BoA with a view to maintaining and enhancing the **consistency** of decision-making practice with the case-law of the EU Courts and among the BoA. As such, it contributes to improving the **predictability** of decisions and legal certainty in general. Through divulging relevant legal information, it also serves to increase **knowledge, awareness and transparency** among the various BoA stakeholders.

3 It is a working document that reflects existing case-law and the result of discussions within the Consistency Circles and the General Consistency Meeting of the BoA at the given date of the report. **It does not have any binding effect on the BoA**. It has been made available to the staff of the BoA and the public in general for information purposes only.

4 This report focuses on the comparison between '*pharmaceuticals*' in Class 5 and '*cosmetics*' in Class 3 of the Nice Classification ([1]). Specifically, only the general indications '*pharmaceuticals*' in the class heading of Class 5 and '*non-medicated cosmetics and toiletry preparations; non-medicated dentifrices; perfumery, essential oils*' in the class heading of Class 3 and the goods falling within those general indications are covered in this report. Goods falling in any other general indication in Class 5 ([2]) or Class 3 ([3]) are beyond the scope of the analysis.

2 Legal Framework

2.1 EU law

5 Article 8(1)(b) EUTMR provides: '*Upon opposition by the proprietor of an earlier trade mark, the trade mark applied for shall not be registered if, because of its identity with, or similarity to, the earlier trade mark and the identity or similarity of the goods or services covered by the trade marks there exists a likelihood of confusion on the part of the public in the territory in which the earlier trade mark is protected; the likelihood of confusion includes the likelihood of association with the earlier trade mark*.'

6 Article 33(5) EUTMR provides: '*The use of general terms, including the general indications of the class headings of the Nice Classification, shall be interpreted as including all the goods or services clearly covered by the literal meaning of the*

([1]) The report refers to the 2024 version of the 12th edition of the Nice Classification, as in force from 01/01/2024.
([2]) Class 5: *medical and veterinary preparations; sanitary preparations for medical purposes; dietetic food and substances adapted for medical or veterinary use, food for babies; dietary supplements for human beings and animals; plasters, materials for dressings; material for stopping teeth, dental wax; disinfectants; preparations for destroying vermin; fungicides, herbicides*.
([3]) Class 3: *bleaching preparations and other substances for laundry use; cleaning, polishing and abrasive preparations*.

indication or term. The use of such terms or indications shall not be interpreted as comprising a claim to goods or services which cannot be so understood'.

7 Article 33(7) EUTMR provides: '*Goods and services shall not be regarded as being similar to each other on the ground that they appear in the same class under the Nice Classification. Goods and services shall not be regarded as being dissimilar from each other on the ground that they appear in different classes under the Nice Classification*.'

2.2 General principles of comparison of goods and services

8 According to settled case-law, in assessing the similarity of goods or services, all the relevant factors relating to those goods and services should be taken into account. As established in **CANON** ([4]), these factors include, in particular their **nature**, their **intended purpose**, their **method of use** and whether they are **in competition with each other** or are **complementary**. Other factors may also be taken into account, such as the **distribution channels** of the goods or services concerned, namely, the fact that those goods or services are often sold or offered in the same specialist sales outlets or the same sections of department stores or supermarkets ([5]). **Market practice** is a relevant factor that may strengthen the impression in the eyes of the relevant public that the same undertaking is responsible for the goods or services at issue. Accordingly, the **usual commercial origin** of the goods or services concerned, **as perceived by the relevant public**, is of particular relevance ([6]).

9 Defining the scope of a particular category or item of goods or services in a particular class of the Nice Classification is a necessary preliminary step before any comparison ([7]). A literal interpretation of the terms used in the list of goods and services must be carried out (i) by determining their **natural and usual meaning** (dictionaries, understanding from a commercial perspective) ([8]), (ii) in the light of the **Nice Classification** and its **Explanatory Notes** ([9]) and (iii) by reference to definitions as provided in relevant EU regulatory acts ([10]).

([4]) 29/09/1998, C-39/97, Canon, EU:C:1998:442, § 35.
([5]) 11/07/2007, T-443/05, Pirañam, EU:T:2007:219, § 37; 02/06/2021, T-177/20, Hispano Suiza / Hispano Suiza, EU:T:2021:312, § 44.
([6]) 18/07/2013, R 233/2012-G, PAPAGAYO ORGANIC / PAPAGAYO, § 67; 17/09/2015, T-323/14, BANKIA / BANKY, EU:T:2015:642; 37-38; 13/04/2022, R 964/2020-G, ZORAYA / VIÑA ZORAYA, § 33.
([7]) 17/01/2024, T-47/23, WILD INSPIRED / INSPIRED, EU:T:2024:12, § 22.
([8]) 10/12/2015, T-690/14, Vieta, EU:T:2015:950, § 66; 01/09/2021, T-697/20, Donas dulcesol / Dulcesol, EU:T:2021:526, § 29; 06/07/2022, T-478/21, Ballon d'or, EU:T:2022:419, § 35. According to the Guidelines, Part B, Examination, Section 3, Classification, Point 4.2.1: '"*Natural and usual meaning" refers to the general definition of a term, in other words how the term is commonly understood. It will frequently be defined by a grammatical interpretation in the language in which the application is filed, by definitions given in the Nice Classification, by use in dictionaries and encyclopaedia, and by the commercial language of traders*'.
([9]) 06/07/2022, T-478/21, Ballon d'or, EU:T:2022:419, § 52-59; 26/04/2023, T-794/21, Mouldpro, EU:T:2023:211, § 25-27; 20/12/2023, T-221/22 & T-242/22, LUTAMAX, EU:T:2023:858, § 40-47; 04/09/2024, T-73/23, TERTIANUM (fig.) / Tertianum WOHNEN UND LEBEN IM DRITTEN ALTER (fig.), EU:T:2024:578, § 48-68.
([10]) 13/09/2010, T-366/07, P&G PRESTIGE BEAUTÉ / Prestige (Fig.) et al., EU:T:2010:394, § 56; 20/12/2023, T-221/22 & T-242/22, LUTAMAX, EU:T:2023:858, § 40-47.

2.3 Other instruments

10 The **Office Guidelines** on the comparison of goods and services (Part C, Section 2, Chapter 2, Annex II, point 5.1.3), provide the following:

'*The general categories pharmaceuticals and cosmetics are considered to be similar. Cosmetics include preparations used to enhance or protect the appearance or odour of the human body and they are also often fragranced to add a pleasant smell. Pharmaceuticals, however, comprise products, such as skin or haircare preparations with medical properties. They may coincide in purpose with cosmetics. Moreover, they share the same distribution channels since they can be found in pharmacies or other specialised shops. They target the same public and are often manufactured by the same companies.*

However, when comparing specific pharmaceuticals with cosmetics, they might only have a low degree of similarity or they might even be entirely dissimilar, depending on the specific drug or specific cosmetic product, their specific purpose (medical indication/cosmetic application) or their method of use.'

11 According to the Office's **Similarity Tool** which reflects first instance Office practice on the comparison of goods and services ([11]), the general category of *pharmaceutical preparations* is **similar to an average degree** to *cosmetics* on account that these goods have the same purpose and that they usually coincide in producer, relevant public and distribution channels. The Tool indicates an **average degree of similarity** also between *cosmetics* and some narrower specified pharmaceutical preparations, such as *pharmaceutical preparations for skin care*; *pharmaceutical preparations for treating dandruff*; *medical preparations for slimming purposes*. However, pharmaceutical preparations with very specific therapeutic indication such as *styptic preparations* and *cosmetics* are indicated as **dissimilar**. As a related matter (see next section 2.4), the Tool indicates that, for example, *perfumery*, *perfumes*, *aromatics [essential oils]*, *ethereal oils* are only similar (and not identical) to *cosmetics* ([12]) although, *deodorants for personal use [perfumery]*, *deodorants for human beings*, *deodorants for human beings or for animals* are identical to *cosmetics* ([13]). Also, the Tool indicates that *dentifrices*, *mouthwash* are only similar (and not identical) to *cosmetics* ([14]).

2.4 The scope of the terms *pharmaceuticals* and *cosmetics*

2.4.1 Pharmaceuticals

12 According to a literal interpretation of the term, by its natural and usual meaning, *pharmaceuticals* refers to pharmaceutical preparations, medicinal drugs, medicines ([15]) that all can be regarded as synonyms.

([11]) http://www.euipo.europa.eu/sim/search.
([12]) Pair IDs 0030502-0057907, 0030502-0057908, 0030502-0058955, 0030502-0011715.
([13]) Pair IDs 0030502-0060362, 0030502-0075522, 0030502-0016092.
([14]) Pair IDs 0030502-0058197, 0030502-0004068.
([15]) Oxford English Dictionary at https://www.oed.com/dictionary/pharmaceutical_adj?tab=meaning_and_use#30726968; Collins English Dictionary at https://www.collinsdictionary.com/dictionary/english/pharmaceutical.

13 In the Nice Classification, *pharmaceuticals* is a general indication in Class 5. According to the Explanatory Note, '*Class 5 includes mainly pharmaceuticals and other preparations for medical or veterinary purposes*'.

14 Pursuant to Article 1(2) of the Directive 2001/83/EC ([16]) the term *medicinal product* is defined as:

> *Any substance or combination of substances presented as having properties for treating or preventing disease in human beings.*
>
> *Any substance or combination of substances which may be used in or administered to human beings either with a view to restoring, correcting or modifying physiological functions by exerting a pharmacological, immunological or metabolic action, or to making a medical diagnosis.*

15 Directive 2001/83/EC also establishes rules on labelling and communication, also having in mind consumer protection. Bearing in mind the literal identity of the terms *pharmaceuticals*, *medicinal drugs* and *medicines*, it can be ascertained that the definition of *medicinal products*, as provided in Directive 2001/83/EC, is equally applicable to define the scope of the term *pharmaceuticals* in the context of trade mark registrations.

2.4.2 Cosmetics

16 With regard to the term *cosmetics*, it is noted that Regulation No 1223/2009 on cosmetic products ([17]) defines *cosmetic products* in Article 2(1)(a) as follows:

> *'any substance or mixture intended to be placed in contact with the external parts of the human body (epidermis, hair system, nails, lips and external genital organs) or with the teeth and the mucous membranes of the oral cavity with a view exclusively or mainly to cleaning them, perfuming them, changing their appearance, protecting them, keeping them in good condition or correcting body odours'.*

Article 2(2) of Regulation No 1223/2009 delimits the scope of *cosmetic products*:

> *'a substance or mixture intended to be ingested, inhaled, injected or implanted into the human body shall not be considered to be a cosmetic product'.*

17 Moreover, Recital 7 of Regulation No 1223/2009 provides an illustrative, non-exhaustive list of product categories within the meaning of the above definition:

> '*The assessment of whether a product is a cosmetic product has to be made on the basis of a case-by-case assessment, taking into account all characteristics*

([16]) Directive 2001/83/EC of the European Parliament and of the Council of 6 November 2001 on the Community code relating to medicinal products for human use.
([17]) Regulation (EC) No 1223/2009 of the European Parliament and of the Council of 30 November 2009 on cosmetic products.

of the product. Cosmetic products may include creams, emulsions, lotions, gels and oils for the skin, face masks, tinted bases (liquids, pastes, powders), make-up powders, after-bath powders, hygienic powders, toilet soaps, deodorant soaps, perfumes, toilet waters and eau de Cologne, bath and shower preparations (salts, foams, oils, gels), depilatories, deodorants and anti-perspirants, hair colorants, products for waving, straightening and fixing hair, hair-setting products, hair-cleansing products (lotions, powders, shampoos), hair-conditioning products (lotions, creams, oils), hairdressing products (lotions, lacquers, brilliantines), shaving products (creams, foams, lotions), make-up and products removing make-up, products intended for application to the lips, products for care of the teeth and the mouth, products for nail care and make-up, products for external intimate hygiene, sunbathing products, products for tanning without sun, skin-whitening products and anti-wrinkle products.'

18 The above definitions and explanations – in view of the objective of Regulation No 1223/2009 to establish rules to be complied with by any cosmetic product made available on the internal market – should be viewed as a relevant, or even decisive element to determine the scope of the term 'cosmetics'. It is true that some dictionary definitions could suggest a narrower interpretation, arguably not including perfumery and dental care products ('*a preparation intended to beautify the hair, skin, or complexion*', '*beauty preparations; make-up*', '*substances that you put on your face or body that are intended to improve your appearance*' ([18])). However, the regulatory definition clearly covers perfumery and dental care products.

19 The general indication in the Nice Class 3 heading is *non-medicated cosmetics and toiletry preparations* ([19]). The dictionary meaning of *toiletries* is '*various articles, cosmetics, or products used in washing, dressing, etc.*'; '*things that you use when washing or taking care of your body, for example soap and toothpaste*'; '*objects and substances that you use in washing yourself and preventing the body from smelling unpleasant*' ([20]). It would therefore appear that, although *non-medicated cosmetics* and *non-medicated toiletry preparations* are listed separately in the Class 3 heading, they essentially overlap with each other. Indeed, class headings in the Nice Classification do not constitute a system in which goods or services included in one general indication or category are precluded from also forming part of another general indication or category ([21]).

20 *Non-medicated dentifrices* and *perfumery, essential oils* are also listed separately from *non-medicated cosmetics and toiletry preparations* in the Class 3 heading. Again, the question may arise whether they should be considered distinct categories. *Non-medicated dentifrices* and *perfumery, essential oils* clearly fall within the definition of

([18]) Oxford English Dictionary at https://www.oed.com/dictionary/cosmetic_adj?tab=meaning_and_use#8235478, Collins English Dictionary at https://www.collinsdictionary.com/dictionary/english/cosmetics; Cambridge Dictionary at https://dictionary.cambridge.org/dictionary/english/cosmetics.

([19]) The term *non-medicated toiletry preparations* was introduced in the 2018 version of the 11th edition of the Nice Classification, replacing the previous general indications *non-medicated soaps* and *non-medicated hair lotions*.

([20]) Oxford English Dictionary at https://www.oed.com/dictionary/toiletry_n?tab=meaning_and_use#18252245; Collins English Dictionary at https://www.collinsdictionary.com/dictionary/english/toiletries; Cambridge Dictionary at https://dictionary.cambridge.org/dictionary/english/toiletries.

([21]) 14/09/2015, T-453/11, LAGUIOLE, EU:T:2015:718, § 88; 01/09/2021, T-697/20, Donas dulcesol / Dulcesol, EU:T:2021:526, § 36.

cosmetics in Regulation No 1223/2009. Moreover, as stated before, the Nice Classification is not uniform; the purpose of the Nice Classification has never been to provide an accurate taxonomy of goods and services, but an aid for trade mark classification purposes. Therefore, as indicated above, general indications within the same class heading may overlap.

21 Accordingly, for the purposes of this analysis, *non-medicated toiletry preparations*, *non-medicated dentifrices* and *perfumery, essential oils* are considered to be *cosmetics*.

22 Case-law supports this interpretation. For instance, in **HOT** ([22]), the GC stated that '*perfumes and essential oils can be classified as 'cosmetics' because cosmetic products are generally defined as being products intended to be placed in contact with the surface areas of the human body in order to care for them or beautify them*'. In **EMPRO** ([23]), the BoA held that *perfumery, fragrances; deodorants and antiperspirants; oral hygiene preparations; soaps* all are included in the broad term *cosmetics*. In **NENESS** ([24]), the same was found with regard to *deodorants and antiperspirants*. In **PINK-PIE** ([25]), the BoA stated that in view of the regulatory definition, *soap*, *dentifrices* and *perfumes* ought to be regarded as included in the broad term *cosmetics*. In **EVELINE COSMETICS HARMONY** ([26]), the same was found in relation to *oils for cosmetic purposes* and *tooth care preparations*.

23 It should also be noted that a change was introduced in the 11th edition of the Nice Classification, which entered into force on 01/01/2017, that Class 3 included only *non-medicated cosmetics and toiletry preparations*, whereas medicated cosmetics such as *medicated shampoos*, *medicated hair lotions*, *medicated toiletry preparations*, *medicated soaps* and *medicated dentifrices* belonged to Class 5. Therefore, it is relevant to bear in mind that EUTMs and national (regional) trade marks applied for at the EUIPO and EU IP Offices and IRs designating the EU or Member States before 01/01/2017 and registered, for instance, for the category of *cosmetics* in Class 3 could be regarded as also encompassing **medicated** cosmetics ([27]). Those that specified *cosmetics* in Class 3 after this date can only be interpreted as covering **non-medicated** cosmetics.

24 Recently a new term *cosmeceuticals* has appeared to denote cosmetics that have, or are claimed to have, healing or curative (pharmaceutical) properties ([28]). However, as there is no legal regulation on *cosmeceuticals*, use of this term in a commercial context remains unclear. For trade mark registration purposes, the term *cosmeceuticals* is

([22]) 15/07/2015, T-611/13, HOT, EU:T:2015:492, § 46.
([23]) 11/04/2017, R 1344/2016-4 and R 1288/2016-4, empro / Hempro, § 24, 25.
([24]) 01/12/2021, R 151/2021-2, Neness (fig.) / Denenes et al., § 35.
([25]) 17/01/2022, R 423/2021-5, pink-pie (fig.) / Pimkie et al., § 30.
([26]) 25/10/2024, R 14/2024-5, EVELINE COSMETICS Harmony (fig.) / HARMONY et al., § 30.
([27]) Prior to the 11th edition of the Nice Classification, for instance, the 2016 version of 10th edition included *inter alia medicated soap* in Class 3 and the terms *shampoos*, *soaps*, *hair lotions*, *dentifrices* were in the alphabetical list without being marked by an asterisk that indicated that these goods (even if medicated) belonged exclusively to Class 3. See, also, *International Trademark Classification: a Guide to the Nice Agreement* by Jessie Roberts, p. 27 (Class 3), p. 45 (Class 5) (Oxford University Press, 2017).
([28]) See, for instance, Oxford English Dictionary at, https://www.oed.com/search/dictionary/?scope=Entries&q=cosmeceutical&tl=true, Collins English Dictionary at https://www.collinsdictionary.com/dictionary/english/cosmeceutical, Cambridge Dictionary at https://dictionary.cambridge.org/dictionary/english/cosmeceutical.

sometimes used in order to designate 'pharmaceutical products with cosmetic effect' or 'cosmetic products with pharmaceutical properties'. While the term *cosmeceuticals* is not a term in the classification database TMclass and the Harmonised Data Base ([29]), the terms 'cosmeceuticals for cosmetic purposes' in Class 3 and 'cosmeceuticals for medical purposes' in Class 5 are 'pre-approved' terms in the Madrid Goods & Services Manager database ([30]) for the purposes of international trade mark registration under the Madrid System.

3 Case-law Analysis

3.1 Similarity between the general category *pharmaceuticals* and the general category *cosmetics* or specific cosmetics

25 In **CLEANIC** ([31]), the GC held that some of the goods in Class 5 and Class 3 could share the same purpose, could be sold through the same distribution channels, such as pharmacies or other specialist shops, were often manufactured by the same companies, and addressed to the same end users. The GC confirmed that the contested *pharmaceutical preparations* were **similar** to *soaps; dentifrices* and **also similar to a certain degree** to *cosmetics; hair care products* of the earlier mark. Neither the GC nor the previous instances specified the degree of similarity. The difference in wording may suggest that there is a lower degree of similarity in respect of *cosmetics; hair care products* than in respect of *soaps; dentifrices* vis-à-vis *pharmaceutical preparations*, although this would be difficult to justify given the same reasons supporting both conclusions and the lack of any indication for treating those goods differently. Rather, the wording implies the same **unspecified** degree of 'similarity' for both sets of goods ([32]).

26 In **MITOCHRON** ([33]), the GC found that *pharmaceutical preparations* were **similar to a low degree** to *cosmetics* since (i) the purpose of certain pharmaceutical preparations, such as skin or hair care preparations with medical properties, medicated dentifrices and medicated soaps, coincided in part with the purpose of cosmetic creams or lotions, dentifrices and soaps not for medical use and (ii) both of those types of products were sold in pharmacies.

27 In **SANOLIE** ([34]), the GC overturned the Board's finding that *pharmaceutical preparations* were dissimilar to *body creams; face creams; body oil; facial oils; essential oils for cosmetic purposes* and found these goods to be **'slightly similar'** instead. The GC assessed in detail the relation between pharmaceuticals and cosmetics. It found, referring to **CLEANIC**, that some goods in Class 3 (such as *soaps, toothpastes, cosmetics and hair care products*) and *pharmaceutical products* could have the same

([29]) https://euipo.europa.eu/ec2/
([30]) https://webaccess.wipo.int/mgs/
([31]) 13/05/2015, T-363/12, CLEANIC natural beauty (fig.) / CLINIQUE, EU:T:2015:278, § 42-43; 13/05/2015, T-364/12, CLEANIC Kindii (fig.) / CLINIQUE, EU:T:2015:277, § 41-42; 13/05/2013, T-363/13, CLEANIC intimate (fig.) / CLINIQUE, EU:T:2015:276, § 41-42.
([32]) Particularly considering that, in principle, there is no need to determine similarity in respect of two sets of **earlier** goods, where the action would succeed, against the particular contested goods, on the basis of one of them.
([33]) 13/05/2016, T-62/15, MITOCHRON / mito (fig.), EU:T:2016:304, § 27.
([34]) 24/03/2021, T-175/20, SANOLIE / SANODIN, EU:T:2021:165, § 41-44.

purpose, be sold through the same distribution channels, such as pharmacies or other specialised shops, and often be manufactured by the same companies and addressed to the same end consumers. The GC added that pharmaceutical products treated human health problems (for instance skin problems) while cosmetics were not pharmaceuticals in nature but were often applied to the skin in order to protect it and improve its physical appearance. Although pharmaceuticals had a different nature from cosmetics because of their therapeutic indication, they could nevertheless include, like cosmetics, preparations intended to be applied to the skin, in particular in the form of creams, lotions and oils.

28 In **PANTA RHEI** ([35]), the GC found, referring to **MITOCHRON**, a **low degree of similarity** between *pharmaceuticals* and *cosmetics*. The GC indicated that *pharmaceuticals* was a broad category which encompassed goods whose intended purpose or benefits could be similar to those of *cosmetics*. As pharmaceuticals can have both medical and cosmetic properties, a medicated cream can, like a cosmetic cream, have effects on the appearance of the skin by moisturising it or by soothing inflammation. The GC also stressed that even a partial overlap between the points of sale (i.e. relating to some of the goods within the broad categories) could constitute a factor of similarity between the goods concerned.

29 In **SKINOVEA** ([36]), involving a comparison between *pharmaceutical products, including products for topical treatment for acne* and the broad categories *cosmetics*, *toiletries* and a wide range of specific cosmetics, the GC indicated the **purpose** to be the main difference between cosmetics (improving physical appearance) and pharmaceuticals (medical indication), by reference to **SANOLIE**. The GC acknowledged that both cosmetics and pharmaceuticals could be applied to skin or hair (for example, in the form of creams, lotions, oils). Therefore, although the nature of pharmaceuticals was different to that of cosmetics due to their therapeutic indication, they could nevertheless include, similarly to cosmetics covered by the mark applied for, goods intended to be applied to skin or hair in the form of creams, lotions or oils. Furthermore, the GC indicated, referring to **CLEANIC**, that some goods in Classes 3 and 5 could share the same purpose, could be sold via the same distribution channels such as pharmacies or other specialised shops, could often be manufactured by the same companies and were often intended for the same end users. In the end, the GC endorsed the Board's finding of a **low degree of similarity** between these goods, particularly because of the difference in their nature and broad purposes. It may be worth adding that in the contested decision ([37]), the BoA also stated that the lines between pharmaceuticals and cosmetics (in the dermatological field) were becoming increasingly blurred and that there were especially overlaps in distribution channels, target public and manufacturers, but the GC did not adopt that reasoning.

30 In **VITIS PHARMA** ([38]), the GC found, referring, by analogy, to **SK SKINTEGRATHE RARE MOLECULE** (reported in 3.2.1), that *pharmaceutical products* were **similar to a low degree** to *cosmetics* since certain pharmaceutical products (such as skin or hair care products with medical properties, medicinal toothpastes and medicinal soaps) had

([35]) 30/06/2021, T-501/20, PANTA RHEI / PANTA RHEI, EU:T:2021:402, § 32-34.
([36]) 02/03/2022, T-715/20, Skinovea / SKINOREN, EU:T:2022:101, § 31-33.
([37]) 04/09/2020, R 337/2020-5, Skinovea / Skinoren et al., § 33-35.
([38]) 03/05/2023, T-303/22, VITIS PHARMA (fig.) / viti DREN (fig.), EU:T:2023:232, § 39.

the same purpose as cosmetic creams or lotions, toothpastes and soaps for non-medical use. Furthermore, those two types of products could be sold in pharmacies.

31 In **BIOPÔLE** ([39]), the GC confirmed the BoA's undisputed finding of a **low degree of similarity** between *pharmaceutical products* and a wide range of cosmetic products.

32 Likewise, in **HEALTHILY** ([40]), the GC endorsed the Board's finding, without providing an independent reasoning, that there was **at least a low degree of similarity** between *pharmaceuticals* and the general category *cosmetics* (and a wide range of specific cosmetics, such as, *cosmetic preparations for slimming purposes, shaving preparations, breath fresheners, oral and dental preparations, hair grooming preparations, sun-tanning preparations [cosmetics], tissues impregnated with cosmetic lotions, depilatory preparations, cosmetic utensils, namely antiperspirants, mousses being hair styling aids, douching preparations for personal hygiene or deodorant purposes; sanitary preparations included in this class; ethereal oils*).

33 As to the BoA case-law, in **SKINERIES** ([41]), the BoA found *pharmaceutical products, including products for topical treatment for acne* to be **similar to a low degree** to the general category *cosmetics* and a wide range of specific cosmetics such as *face-care cosmetics; hair spray and hair gels; baby oils and creams* with the reasoning that numerous medical preparations had the additional purpose of beautifying (for example, skin creams) and certain cosmetic goods could also alleviate symptoms of diseases. It was emphasised that the lines between pharmaceuticals and cosmetics in the dermatological field were becoming increasingly blurred. For example, some anti-aging creams or acne creams were sold exclusively in pharmacies and were available only on prescription whereas other types of anti-aging or acne creams could be purchased in supermarkets or drug stores. Overall, pharmaceutical products could include skin or hair preparations with medical properties; they could coincide as regards purpose, shared the same distribution channels (pharmacies), targeted the same public and were often manufactured by the same companies.

34 In **FARMONA** ([42]), the BoA assessed similarity between *pharmaceutical preparations* and the general category *cosmetic products* and specific cosmetics (*cosmetic preparations for skin and body care; creams; lotions; cleansing milks; lotions; gels; deodorants; cosmetic preparations for baths; soaps; shampoos and hair care preparations; lipsticks; mouthwashes for cosmetic purposes; bath and shower salts not for medical purposes; sun-tanning cosmetics and preparations, after-sun cosmetics and preparations, and sunscreen cosmetics and preparations*). The BoA stated that the definition in Article 2(1)(a) of Regulation No 1223/2009 was an adequate starting point to define the scope of *cosmetics* and established a connection with *pharmaceutical preparations* by referring to the concept of cosmeceuticals. The BoA first noted that in **CLEANIC**, in view of the overlap in purpose, distribution channels, end consumers and commercial origin, the GC had found *pharmaceutical preparations* similar to *soaps; dentifrices* as well as similar to a certain degree to *cosmetics; hair care products* (§ 37). The BoA further noted that in **SILICIUM ORGANIQUE**, the GC

([39]) 17/01/2024, T-61/23, BIOPÔLE / AGUA BIOPOLAR et al., EU:T:2024:10, § 25.
([40]) 17/04/2024, T-288/23, Healthily (fig.) / Healthies (fig.), EU:T:2024:241, § 42.
([41]) 31/01/2020, R 668/2019-5, Skineries / Skinoren et al., § 31-33.
([42]) 23/07/2020, R 2171/2019-1, FARMONA (fig.) / Farmina et al., § 25-46.

had found an average degree of similarity between *pharmaceutical products* and *hair lotions containing organic silicon* by reference to **CLEANIC** ([43]) (§ 40). The BoA also noted that in **MITOCHRON**, a low degree of similarity was found between *pharmaceutical preparations* and *cosmetics* (§ 41) and that previous BoA decisions found 'a degree of similarity' or 'a very low degree of similarity' (§ 42, 44). The BoA added that '*it is well known that skincare brands are opting for a more clinical approach in the promotion of their products, with many wishing to emphasise the science-driven nature of their product rather than its holistic properties (the 'science' of anti-aging). We are all familiar with this from advertisements on television and other media such promotion being commonplace, as much in Poland as elsewhere. There is thus a clear overlap between these goods, which consumers cannot but be aware.*' (§ 39). Having regard to those arguments and adding that there was also an overlap in the 'nature', form of the goods (gels, creams, balms) and their method of use (applied to the external part of the body) (§ 45), the BoA concluded that the goods were 'similar' (§ 46), which it subsequently specified, in the global assessment of the likelihood of confusion, as a **low degree of similarity** (§ 58).

35 In **A AEMA** ([44]), the BoA compared *pharmaceutical preparations* with the general category *cosmetics* and certain specific cosmetics (*cosmetics for use on the skin; cosmetic preparations for skin care; cosmetic oils for the epidermis*) and found them **similar to a less than average degree at most**, as the purpose of cleansing, taking care of, or enhancing the beauty of various body parts could also be shared by pharmaceutical products (which could include medical preparations for skin and body care). The BoA also noted that pharmaceutical products often only differ from non-medical body care products by the higher concentration of certain ingredients.

36 In **MCGREGOR** ([45]), the BoA found *pharmaceutical preparations* **similar to a low degree** to *soap; oils, ethereal oils, hygiene and beauty care (preparations), toilet articles; dentifrices; non-medicated cleansers*. The BoA pointed out the main difference in the purpose of the goods (beauty care or hygiene versus preventing or curing illnesses) but nevertheless considered there to be an overlap in purpose. Indeed, some medical preparations had the additional purpose of beautifying, while some cosmetics could alleviate symptoms of diseases. The BoA also referred to the blurring lines between pharmaceuticals and cosmetics (in the dermatological field) and to the overlap in ingredients, intended purpose, distribution channels, target public and manufacturers. Regarding the distribution channels, the BoA specifically referred to the example of anti-aging creams and acne creams that could be sold both in supermarkets and in pharmacies.

37 Likewise, in **MASTELLI** ([46]) the BoA found that *pharmaceutical preparations* and a range of cosmetic products (*mascara; lipsticks; balms, other than for medical purposes; cosmetic creams; skin whitening creams; massage gels, other than for medical purposes; almond milk for cosmetic purposes; cleansing milk for toilet purposes; lotions for cosmetic purposes; beauty masks; oils for toilet purposes; oils for cosmetic purposes; pomades for cosmetic purposes; sun-tanning preparations [cosmetics];*

([43]) See the doubts about the solidness of that reference in **SILICIUM ORGANIQUE** to **CLEANIC**, above, where **SILICIUM ORGANIQUE** is reported.
([44]) 01/03/2021, R 1047/2020-5, A Aema (fig.) / Lema, § 28.
([45]) 11/01/2024, R 895/2023-1, McGREGOR / McGREGOR F.A.S.T., § 22-24.
([46]) 29/02/2024, R 2009/2023-2, MASTELLI (fig.) / MASTRELLE, § 36-37.

cosmetic preparations for baths; cosmetic preparations for skin care; depilatory preparations; make-up preparations; nail care preparations; shaving preparations; make-up removing preparations; gel eye patches for cosmetic purposes; cosmetics containing polynucleotides; eye-washes, not for medical purposes; after-shave lotions; astringents for cosmetic purposes) to be **similar to a low degree**. The BoA referred to **SKINOVEA** and **SANOLIE** indicating that the goods at issue coincided in purpose (body care), distribution channels (pharmacies or specialised shops), manufacturers, relevant public and methods of use.

38 In **PRISMANATURAL** ([47]), the BoA found *pharmaceutical preparations* **similar to a low degree** to *non-medicated cosmetics and toiletry preparations; cosmetics; face creams for cosmetic use; serums for cosmetic purposes; body care creams; cosmetic preparations for body care; hair preparations and treatments; sunscreen preparations; hair lotions; soap and natural gels; shampoo*, referring to **CLEANIC**, **SANOLIE**, **PANTA RHEI**, **SKINOVEA**, **SK SKINTEGRA THE RARE MOLECULE** and **VITIS PHARMA**. As a further argument, it added that '*it is well known that skincare brands are opting for a more clinical approach in the promotion of their products, with many wishing to emphasise the science-driven nature of their product rather than its holistic properties (the 'science' of anti-ageing). The relevant public is familiar with this from advertisements on television and other media, such promotion being commonplace*'. It noted though the discrepancy in the case-law, to the extent that the GC had previously found an **average degree of similarity** in respect of *cosmetics, skincare preparations, hair care preparations, soaps* (**MCCOSMETICS NY**) and *toilet preparations*; *cosmetic preparations*; *preparations for the care of the skin and hair*; *anti-aging creams; soaps, dentifrices*, *all containing organic silicon; preparations containing organic silicon for the care of the body, skin and hair* (**SILICIUM ORGANIQUE**). Eventually, the BoA concluded that it '*will apply the Court's majority case-law […] and will consider that there is a **low degree** rather than an average degree of similarity between the goods concerned*'.

39 In **MYLAQ** ([48]), the BoA found *pharmaceutical preparations with the exception of sexual aids, namely cosmetics, oils and lubricants and lubricants and aphrodisiacs for sexual purposes* **similar to a low degree** to *cosmetics* in general and to specific cosmetics for nail care because the former included goods that had the same general purpose (body care), could be offered by the same producers, targeted the same consumers, and were sold via the same distribution channels. The BoA also indicated, referring to **SANOLIE**, that while '*it is true that the nature of pharmaceutical preparations is different from that of cosmetics and that pharmaceuticals and cosmetics are usually displayed in different sections of a pharmacy or drugstore, but the broad category of pharmaceutical preparations includes goods for medical use intended to be applied to skin or hair, such as dermatological creams, lotions or shampoos, which therefore have a purpose which is very similar to that of cosmetics and share the same method of use, namely being applied to the skin*'. The same considerations were applied to nail care cosmetics.

40 In **SO'BIO ETIC** ([49]), the BoA found a range of goods in Class 5 that it categorised as *pharmaceuticals and natural remedies* to be **at least similar to a low degree** to

([47]) 05/04/2024, R 2026/2023-5, PrismaNatural (fig.) / PRISMA SKIN et al., § 60-71.
([48]) 17/07/2024, R 1889/2023-1, MYLAQ / MYLAN et al., § 32-36.
([49]) 08/08/2024, R 106/2024-5, SO'BIO ETIC (fig.) / SO...? et al., § 44.

cosmetics. Referring to **SANOLIE** and **PANTA RHEI**, it reasoned that '*pharmaceuticals and cosmetics share the same distribution channels and target in large part the same public, namely the general consumer. Although pharmaceuticals are different in nature on account of their therapeutic indication, they may nevertheless include, like the cosmetics, products intended to be applied to the skin, in particular in the form of creams, lotions and oils*'.

41 There is, however, **another line of case-law**, according to which there is **an average degree of similarity** between *pharmaceuticals* and *cosmetics* or specific cosmetics.

42 In **SILICIUM ORGANIQUE** ([50]), the GC found that *pharmaceutical products* were **similar to an average degree** ([51]) to *toilet preparations*; *cosmetic preparations*; *preparations for the care of the skin and hair*; *anti-aging creams*; *soaps, dentifrices*, *all containing organic silicon, and preparations containing organic silicon for the care of the body, skin and hair* because these products coincided in their purpose, shared the same distribution channels such as pharmacies, targeted the same public, and were often manufactured by the same companies. Furthermore, correcting the BoA that found only a low degree of similarity, the GC found that, for the same reasons, there was an **average degree of similarity** also in respect of *hair lotions containing organic silicon* and referred to **CLEANIC** in this regard. It must be noted though that, in **CLEANIC**, the GC found that *pharmaceutical preparations* were similar 'to a certain degree' to *cosmetics; hair care products*, without specifying the degree.

43 In **MCCOSMETICS NY** ([52]), the GC found, referring to **CLEANIC**, an **average degree of similarity** between *pharmaceuticals* and *cosmetics, skincare preparations, hair care preparations, soaps* with the reasoning that there was an overlap in intended purpose, distribution channels (such as pharmacies or other specialised shops), manufacturers and end users. It is, however, difficult to reconcile this finding with the previous GC case-law (such as **SANOLIE**, **SKINOVEA** or **SK SKINTEGRA THE RARE MOLECULE**) that – by the same reference to **CLEANIC** – found **only a low degree** of similarity between these goods.

44 In **SENEDERM** ([53]), the BoA found *pharmaceutical preparations* **similar to an average degree** to *cosmetics; skin lotions and skin cleaners*. The BoA indicated that *cosmetics* included a range of preparations used to enhance or protect the appearance of the human body such as skin lotions and skin cleaners, while *pharmaceutical preparations* comprised products, such as skin lotions and cleaners, with medical properties. The BoA found commonalities in the purpose of these goods (cleaning, caring or cosmetic effect), an overlap in methods of use (especially lotions, ointments and creams being applied the same way), and an overlap in manufacturers and distribution channels (pharmacies and other specialised shops).

([50]) 28/09/2016, T-539/15, SILICIUM ORGANIQUE G5 LLR-G5 (fig.) / Silicium Organique G5, § 34-38.
([51]) Although the English language version of the judgment, in § 37, refers to a 'low degree' of similarity, the French version refers to 'average degree'. Furthermore, when concluding on similarity, the Court refers only to 'average degree of similarity' in § 44 and 81, in both language versions. Curiously, although the Court endorses § 31 of the BoA's decision, that decision did not, in fact, specify the degree of similarity.
([52]) 26/04/2023, T-681/21, mccosmetics NY (fig.) / MAC MAKE-UP ART COSMETICS (fig.), EU:T:2023:215, § 32.
([53]) 26/06/2019, R 30/2019-4, Senederm / Sensoderm et al., § 14.

45 In **GENOVÉ GENOCUTAN** ([54]), the BoA found *pharmaceutical preparations* **similar to an average degree** to *non-medicated cosmetics, non-medicated hair lotions; non-medicated preparations for skin and hair hygiene and care; sun creams; tanning preparations; skin cleansing masks; non-medicated shampoos; non-medicated soaps; deodorant soap*. The BoA indicated that the broad term *pharmaceutical preparations* comprised skin lotions and cleaners, haircare preparations, preparations to reduce sun allergies with medical properties, dermatological products such as soaps with medical properties meant for instance to prevent skin conditions such as acne or other skin disorders. Such pharmaceuticals especially showed an overlap in purpose and method of use with the cosmetics. Furthermore, it found that there was an overlap in distribution channels, target public and manufacturers.

46 In the same vein, in **NORMADVANCE** ([55]), the BoA found, referring to **CLEANIC**, that *pharmaceutical products* were **similar to an average degree** to *cosmetic creams; washing creams* because of an overlap in intended purpose, method of use, distribution channels, target public and manufacturers.

47 In **FEMALAC** ([56]), the BoA compared *pharmaceutical preparations* and *topical skin sprays for cosmetic purposes; cosmetics; functional cosmetics being skin care preparations; cosmetics and cosmetic preparations*. It pointed out the difference in general purpose (enhancing beauty as opposed to medical), emphasised that the lines between pharmaceutical preparations in the dermatological field and cosmetics were becoming increasingly blurred and that there was an overlap in purpose and distribution channels (for example, some anti-ageing creams or acne creams sold exclusively in pharmacies and available only on prescription whereas other types of anti-ageing or acne creams could be purchased in supermarkets or para-pharmacies). Consequently, an **average degree of similarity** was found.

48 To conclude, case-law is consistent that a **similarity** exists between the general category *pharmaceuticals* in Class 5 and the general category *cosmetics* or specific cosmetics in Class 3 (except *perfumery, essential oils*) (in other words, that these goods are **not dissimilar**). There is, however, uncertainty regarding the specific degree of similarity ([57]). The prevailing trend in the **GC's** case-law is to find a **low degree of similarity** between these goods ([58]), while the **BoA** decision-making practice is divided between a **low and an average** degree of similarity. There is a certain tension inasmuch as both lines of case-law find support in the same criteria, namely (i) coinciding purpose of some products encompassed in the broad category of pharmaceuticals (such as medicated skin- or hair-care preparations, medicated soaps or medicated dentifrices) and the general category of '*cosmetics*' or specific cosmetics (except *perfumery, essential oils*), (ii) common distribution channels (in particular, pharmacies and specialised shops), (iii) same end users, and, occasionally, (iv) same form (gel, cream) and same method of use (applying on the external part of the body). Furthermore, in some cases, it has been also stated that (v) those goods were often

([54]) 25/03/2021, R 1627/2020-4, Genové genocutan / Gentacutan et al., § 22-24.
([55]) 24/03/2022, R 1608/2021-4, NORMADVANCE (fig.) / NORMOFARMA et al., § 22.
([56]) 04/04/2023, R 1085/2022-2, femalac / FEMAL et al., § 27-29.
([57]) Which may result from the fact that, often, the decision taking body does not consider it necessary to specify the degree of similarity, as it would not affect the outcome (see decisions concluding on 'similarity', 'certain degree of similarity', 'at least a low degree of similarity').
([58]) Analysis has shown that the majority of GC judgments concluded on a low degree of similarity, as opposed to an average degree of similarity or degree of similarity not specified.

manufactured by the same companies. Under such circumstances, it is debatable whether an overlap in purpose, distribution channels, end consumers, method of use and commercial origin could only lead to a low degree of similarity, and whether it would not be more coherent to acknowledge an **average degree of similarity**.

3.2 Similarity between specific pharmaceuticals and cosmetics

3.2.1 Pharmaceuticals with specific therapeutic indications for the treatment of the external part of the body

49 It seems justified to analyse separately the case-law relating to the comparison between pharmaceuticals with a specific therapeutic indication and cosmetics, as in those cases the purpose is more specified which allows a more concrete assessment. First, the analysis will focus on pharmaceuticals for the treatment of the external part of the body (particularly, dermatological preparations), as it suggests a closer field of application to cosmetics. It should be noted, in this regard, that the cases reported in the previous section 3.1 are also relevant to the extent that medicated skin- or hair-care preparations, medicated soaps or medicated dentifrices are often brought as examples of specific pharmaceuticals within the general category *pharmaceutical preparations* to support a finding of a similarity with cosmetics.

50 In **SK SKINTEGRA THE RARE MOLECULE** ([59]), the GC found, that *pharmaceutical products for skin protection and cleansing for the purposes of personal hygiene* and *pharmaceutical preparations for body care, for skin protection and cleansing*, on the one hand, and the broad categories *cosmetics*, *cosmetic preparations*, *decorative cosmetics* and a wide range of specific cosmetics, on the other hand, were **similar to a low degree**. The GC confirmed, referring to **SANOLIE** and **PANTA RHEI,** that '*pharmaceutical products in Class 5 were similar to a low degree to the cosmetics in Class 3, since (i) the purpose of certain pharmaceuticals, such as skin or hair care preparations with medical properties, medicated dentifrices and medicated soaps, coincided with the purpose of cosmetic creams or lotions, dentifrices and soaps not for medical use and (ii) both of those types of goods were sold in pharmacies*'. The GC also indicated that although the cosmetic products covered by the mark applied for were not pharmaceutical in nature, they could nevertheless be applied to the skin, often in order to protect it and improve its physical appearance. Moreover, as regards the complementarity of the goods at issue, the GC stated that, without any evidence from the applicant to the contrary, the finding of the contested decision that *non-medical cleansing and moisturising products* such as those covered by the mark applied for could be used in conjunction with a pharmaceutical-grade treatment, could not be called into question.

51 In contrast, in **UNISKIN** ([60]), the GC confirmed (referring to **SANOLIE** and to **PANTA RHEI**) the BoA's finding of an **average degree of similarity** between *pharmaceutical preparations for skin care* and *cosmetic preparations for skin care; beauty masks* that these goods could have the same purpose (beneficial effects for skin health like

([59]) 11/05/2022, T-93/21, SK SKINTEGRA THE RARE MOLUCULE (fig.) / Skintegrity et al., EU:T:2022:280, § 48-56.
([60]) 08/02/2023, T-787/21, UNISKIN by Dr. Søren Frankild (fig.) / UNICSKIN YOUR EFFECTIVE SOLUTION (fig.), EU:T:2023:56, § 26-28.

moisturizing it or soothing inflammation). The GC stated that these goods could be sold through the same distribution channels (pharmacies or specialised shops), were often manufactured by the same companies and were aimed at the same end users (general public). Furthermore, such goods could be used together and in the same way (applied to the skin). Moreover, pharmaceuticals encompassed goods that could have both medical and cosmetic properties.

52 In **SANOID** ([61]), the GC found that the BoA erred in finding *pharmaceuticals for the treatment of inflammation of the mouth* to be dissimilar to a broad variety of cosmetics (*cosmetic products, non-medicated toilet preparations, essential oils, soaps and hair lotions*). The GC held that, despite differences in nature and purpose, since cosmetic goods are, in principle, not pharmaceutical in nature, while *pharmaceuticals for the treatment of inflammation of the mouth* pursue a very specific medical purpose and clearly do not have additional aesthetic purposes, there is nevertheless an overlap regarding distribution channels (pharmacies and para-pharmacies), target public and manufacturers of these goods. In view of these common factors, the GC found that there was **a low degree of similarity**. This outcome may be explained by the affinity of pharmaceuticals for the treatment of the external part of the body with cosmetic products, which according to the definition in 2.4 above, also includes products for the treatment of the buccal cavity.

53 Regarding the case-law of the BoA, in **EDERMASTAMP II** ([62]), the BoA found *medical products for dermatology* and *products for body and beauty care, in particular cosmetics for transdermal application* **similar to an above-average degree** in view of an overlap in their purpose (benefits for the skin that can be both cosmetic and medical), consistency and form of those products (ointments or creams), method of use (applied to the skin) and distribution channels (pharmacies, drug stores, drug departments in department stores).

54 In **EVELINE PROFESSIONAL** ([63]), the BoA found an **average degree of similarity** between pharmaceutical products for skin treatment, including *acne creams [pharmaceutical preparations]*, *pharmaceutical products and preparations for hydrating the skin during pregnancy*, *acne treatment preparations*, *pharmaceutical preparations for treating dry skin caused by pregnancy*, on the one hand, and *cosmetics*, on the other. The main purpose of the former was not to beautify or simply care for the skin; rather, they had a medicinal character. Nevertheless, the goods at issue coincided in their method of use (being applied to the external parts of the body, on the skin), nature and consistency as cosmetic creams, balms and ointments. Moreover, the BoA stated, referring to **CLEANIC** and **MITOCHRON**, that '*the manufacturers and trade channels can overlap. Specialist or sophisticated skincare companies regularly offer purely cosmetic skincare products alongside specialised skincare products for sensitive or allergy-prone skin, ageing skin, pregnant women or acne. These types of high-quality skin products are sold in pharmacies or specialised chemists shops*'.

([61]) 13/03/2024, T-206/23, Sanoid (fig.) / SANODIN, EU:T:2024:164, § 33-35.
([62]) 04/03/2019, R 1501/2018-4, eDermastamp II / EDERMA, § 15.
([63]) 14/03/2024, R 1086/2020-5, EVELINE PROFESSIONAL (fig.) / Ebelin et al., § 41-44 (pending before the GC under T-292/24).

55 In the same vein, in **MCCEUTICALS** ([64]), the BoA found an **average degree of similarity** between *pharmaceutical products; preparations for medical use; dermatological products; dermatological preparations; therapeutic creams (medicinal); body gels (medicinal); creams for dermatological use; gels for dermatological use; medicinal lotions; injectable preparations for dermatological use; preparations for mesotherapy* and *cosmetics*. There was an overlap in intended purpose (especially body care), distribution channels (pharmacies and specialised shops), target public and manufacturers. Furthermore, the BoA stated that the goods concerned could be in competition with one another since cosmetics could be used as (lower strength) alternative remedies for numerous pharmaceutical preparations. The BoA referred to **SK SKINTEGRA THE RARE MOLECULE** in support of its reasoning, although, in that case, only a low degree of similarity was found.

56 In **V.SUN** ([65]), the BoA found **at least a low degree of similarity** between *pharmaceutical preparations for skin care* and *cosmetics*, referring to the overlap in purpose (despite their main purpose being different) and the more and more blurring lines between pharmaceuticals and cosmetics in the dermatological field. Furthermore, the BoA indicated an overlap in ingredients, distribution channels, target public and manufacturers.

57 To conclude, the trend in case-law appears to be that pharmaceuticals for the treatment of the external part of the body and the general category of *cosmetics* or specific cosmetics (except *perfumery*, *essential oils*) are found to be **similar to an average degree**.

3.2.2 Pharmaceuticals with other specific therapeutic indications

58 Next, the case-law relating to pharmaceutical preparations with a specific therapeutic indication other than for the treatment of the external part of the body will be analysed.

59 In **APIHEAL** ([66]), the GC found that *antipyretics* were **dissimilar** to *cosmetics; soaps; herbal baths (not for medical use)* and *dental care products, dentifrices, preparations for polishing dentures, dental whitening preparations, mouth elixirs, not for medical use*. The GC referred to the fundamental difference in purpose, as *antipyretics* served a very specific medicinal purpose and emphasised that not every overlap in health-beneficial properties (that the goods in Class 3 could also have) resulted in a finding of similarity. The goods were also different regarding their method of use and were not in competition with each other. As to the alleged complementarity, the GC stated that the goods were not indispensable or important to each other, such that consumers could think they had the same commercial origin. Any possible overlap in distribution channels (cosmetics being sold in pharmacies) or in the target public did not lead to similarity.

60 In **TRAUMGEL** ([67]), the GC held that *pharmaceutical substances, namely for the treatment of pain, injuries and other disorders and the prevention of degeneration of*

([64]) 18/03/2024, R 1036/2023-2, MCCEUTICALS (fig.) / md:ceuticals (fig.), § 67, 70.
([65]) 26/03/2024, R 1981/2023-2, V.SUN / sun (fig.) et al., § 32-33.
([66]) 05/10/2020, T-51/19, apiheal (fig.) / APIRETAL, EU:T:2020:468, § 36-49.
([67]) 12/09/2022, T-130/22, TRAUMGEL (fig.) / Traumeel, § 40-54.

the musculoskeletal system were **dissimilar** to a wide range of cosmetics, namely *moisturising gels [cosmetic]; body gels; hand gels; gels for cosmetic use; face gels; cosmetics in the form of gels; aloe vera gel for cosmetic purposes; non-medicated creams; dermatological creams [other than medicated]; skin moisturisers; skin emollients; skin conditioners*. The GC emphasised the differences in purpose of these goods and dismissed the argument that they could be regarded complementary. Regarding the alleged common origin of these goods, the GC stated, referring to **HIPANEMA** ([68]), that '*even if it were to be assumed, despite it not having been established, that it has become usual for manufacturers of the goods at issue to manufacture those goods and thus to exploit their commercial success under the theme of 'wellbeing of the bodies of users' by placing their trade marks on a wide range of goods, it must be noted, in any event, that the applicant has not provided any evidence that consumers were necessarily informed of such a practice and normally expected that the same undertaking could be responsible for the manufacture of the various goods at issue which, prima facie, are not related and do not come within the same family of goods*'.

61 Regarding the case-law of the BoA, in **SANOLINA** ([69]), the BoA found *pharmaceutical preparations for the treatment of inflammations of the mouth* to be **dissimilar** to *toiletries; cleaning preparations* as they do not coincide in purpose or method of use. The BoA specifically stressed that a finding of similarity was often related to broad terms being compared that allowed to find commonalities.

62 In **BIOPÔLE** ([70]), the BoA found *pharmaceutical products, namely antiplatelet agents, in particular for the prevention of thrombosis formation and to reduce the risk of blockage of the arteries* to be **dissimilar** to *non-medicated cosmetic products and toilet preparations; non-medicated toothpastes; soaps; hair lotions*. The BoA stressed that the argument of an overlap in general purpose, target public and distribution channels may apply to the general category of *pharmaceuticals*, but not to pharmaceuticals with a specific therapeutic indication.

63 Likewise, in **GENUIGEL** ([71]), the BoA found *pharmaceutical preparations for pain relief and wound healing of mouth, gums and teeth* to be **dissimilar** to a range of cosmetic products (such as *non-medicated cosmetics and toiletry preparations; toiletries; skin care preparations; hair and body wash; bubble bath preparations; shaving preparations; impregnated tissues for cleaning [non-medicated, for use on the person]; soaps; liquid soaps for hands and face; hand washes; skin cleansers; sponges impregnated with toiletries; disposable wipes impregnated with cleansing compounds for use on the face; face wipes; skin moisturisers*). The BoA indicated that there were clear differences in purpose (very specific therapeutic indication versus skin and beauty care). Furthermore, the BoA found that the goods had different methods of use, different manufacturers and different distribution channels and that they were not complementary.

([68]) 25/09/2018, T-435/17, HIPANEMA (fig.) / Ipanema (fig.) et al, EU:T:2018:596, § 59.
([69]) 14/04/2020, R 2296/2019-4, SANOLINA / SANODIN, § 27-28.
([70]) 17/11/2022, R 492/2022-5, BIOPÔLE / BIOPLAK, § 49-53.
([71]) 15/12/2023, R 2312/2022-4 & R 2580/2022-4, GENUIGEL (fig.) / GENGIGEL et al, § 83.

64 To conclude, the case-law is consistent in that pharmaceuticals with specific therapeutic indication other than for the treatment of the external part of the body and the general category of *cosmetics* or specific cosmetics are **dissimilar**.

3.3 Pharmaceuticals versus perfumery

3.3.1 *Perfumery* in general

65 *Perfumery* is a separate general indication in the class heading of Class 3. However, according to a literal interpretation of the term, by its natural and usual meaning ([72]), 'perfume' may be considered to overlap with the general indication *non-medicated cosmetics and toiletry preparations*.

66 In **YUKI** ([73]), the GC found that *perfumery products* are generally used to care for and beautify the body by giving it a pleasant smell or appearance, while on the other hand *pharmaceutical products* had a clearly different character, purpose and manner of use. Moreover, those goods were not generally sold on the same shop shelves and, in the case of some of them, not even in the same shops. The GC therefore held that there was **no similarity** between *pharmaceutical products* and *perfumery products*.

67 In **LE-VEL** ([74]), the GC confirmed that there was **no similarity** between *pharmaceuticals* and *perfumery*, *fragrances for personal use*; *perfume oils for the manufacture of cosmetic preparations*. The GC indicated that perfumery goods had a different purpose than *pharmaceutical preparations*. In contrast to pharmaceutical preparations that are intended for medical treatment or healthcare, perfumery goods are generally used to care for and beautify the body by giving it a pleasant smell or appearance. The argument that the goods in Class 3 could be used for alternative therapies was dismissed on the ground that the former were 'for personal use' and 'for the manufacture of cosmetic preparations'. Furthermore, the GC indicated that *pharmaceutical preparations* tended to be sold in pharmacies while *perfumery products* were rather sold in drugstores and supermarkets, so that there was no overlap in distribution channels. Moreover, even if certain specific perfumes were sold in pharmacies this was not sufficient to lead to similarity. The GC also held that there was no sufficient proof of a potential overlap in manufacturers and that the goods were not in competition or complementary.

68 However, in **HEALTHILY** ([75]), the GC endorsed the Board's finding, without providing an independent reasoning, that there was **at least a low degree of similarity** between *pharmaceuticals* and *perfumes, roll-on deodorants*. It should be noted though that this outcome was reached for a wide range of goods in Class 3 without distinguishing perfumery (see also reported in 3.1).

([72]) Oxford English Dictionary: '*The fragrance or odour emitted by any (usually pleasant-smelling) substance or thing*'; Collins English Dictionary: '*a pleasant-smelling liquid that you can put on your skin to make yourself smell nice*'; Cambridge Dictionary: '*a liquid with a pleasant smell, usually made from oils taken from flowers or spices and often used on the skin*'.
([73]) 16/11/2006, T-278/04, YUKI / YUPI, EU:T:2006:351, § 56-57.
([74]) 15/09/2021, T-331/20, Le-Vel / LEVEL, EU:T:2021:571, § 24-35.
([75]) 17/04/2024, T-288/23, Healthily (fig.) / Healthies (fig.), EU:T:2024:241, § 42.

69 In **APIHEAL** ([76]), the GC found that specific pharmaceuticals (*antipyretics*) were **dissimilar** to *perfumery; fragrances; deodorants (for personal use)* (see also reported in 3.2.2).

70 Regarding the case-law of the BoA, in **DOLMEN** ([77]), the BoA found *anti-inflammatory painkillers* to be **dissimilar** to *aromatic extracts; massage oils; massage oils, not medicated; aromatic oils; essential oils for personal use; non-medicated oils; scented oils; eau de parfum; Cologne; perfumes; eau de Cologne* as they are neither in competition with one another nor complementary, and furthermore, show differences in nature, method of use, intended purpose and distribution channels. The BoA also found **dissimilarity** in **SANOLINA** (*essential oils and aromatic extracts; fragrancing preparations*), **BIOPÔLE** (*perfumery products, essential oils; deodorants for personal use (perfumery)*) and **GENUIGEL** (*perfumery*), although they were all compared with pharmaceuticals with a specific therapeutic indication and not with the general category *pharmaceuticals* (as also reported in 3.2.2).

3.3.2 Additional remarks on *deodorants*

71 The analysis has also revealed that less attention is paid to *deodorants* which undoubtedly fall within the broad category 'perfumery'. Logically this would justify the same outcome of **dissimilarity** as with *perfumery* (as seen, for example, by the GC, in **APIHEAL** and by the BoA, in **BIOPÔLE**, reported in 3.3.1).

72 However, the cases reported in the previous sections illustrate that, without distinguishing from a range of other cosmetics, *deodorants* were sometimes found to be **similar to a low degree** to pharmaceuticals (for example, by the GC, in **SK SKINTEGRA THE RARE MOLECULE** – *deodorants; body deodorants [perfumery]* (reported in 3.2.1), **BIOPÔLE** – *deodorants* (reported in 3.1 above and 3.3.3 below) and **HEALTHILY** – *roll-on deodorants* (reported in 3.1); and by the BoA, in **FARMONA** – *deodorants* (reported in 3.1).

3.3.3 Additional remarks on *essential oils*

73 The analysis has also revealed that less attention is paid to *essential oils* (for cosmetic purposes), which arguably have much in common with *perfumery* (if not covered by that broad term)[78]. According to a literal interpretation of the term, by its natural and usual meaning, *essential oils* (for cosmetic purposes) are characterised by their odour and are not other oils (such as body oils, sun-tan oils) ([79]). In principle, this would justify

([76]) 05/10/2020, T-51/19, apiheal (fig.) / APIRETAL, EU:T:2020:468, § 36-49.
([77]) 28/02/2019, R 816/2018-4, Dolmen / Dolmen, § 16-22.
([78]) Note that *perfumery, essential oils* are separated only by a comma and not a semi-colon in the class heading of Class 3, suggesting the close relationship between the two categories.
([79]) Cambridge Dictionary: '*an oil, usually with a strong smell, that is taken from a plant and is used to make perfume, or for rubbing into a person's body during massage*'; Collins English Dictionary: '*any of various volatile organic oils present in plants, usually containing terpenes and esters and having the odour or flavour of the plant from which they are extracted: used in flavouring and perfumery*'; Oxford English Dictionary: '*A volatile oil, obtained by distillation, and marked by the characteristic odour of the plant or substance from which it is extracted; as the oil of laurel, oil of turpentine, etc. Now often as a synonym of 'volatile oil'*.

the same outcome of **dissimilarity** as with *perfumery* (as seen, for example, by the BoA in **DOLMEN**, **SANOLINA** and **BIOPÔLE**, reported above in 3.3.1).

74 However, the cases reported in the previous sections illustrate that *essential oils* are often found to be similar to a **low degree**. The distinction between 'dissimilar' and 'similar to a low degree' is relevant though, because if the goods are dissimilar, this leads to a lack of likelihood of confusion, in respect of those goods, without any global assessment.

75 In **COOLTECH** ([80]), the BoA found that *pharmaceutical preparations for stimulation of legs* were **at most similar to a low degree** to *toiletries; essential oils and aromatic extracts*. This was reasoned with the differences in purpose (hygiene and scent versus increasing blood circulation in the legs), lack of interchangeability and differences in distribution channels. Even if essential oils and aromatic extracts could also have medical functions (for example, antiseptic properties), there was still no overlap with the specific medical purpose of the pharmaceuticals concerned. It is debatable whether this reasoning was not more conducive of dissimilarity.

76 In **OMIKRON** ([81]), the BoA found *pharmaceutical products* **similar to a low degree** to *aromatherapy preparations; aromatic essential oils; aromatic oils; essential oils for soothing the nerves; skin care oils [non-medicated]; natural oils for cosmetic purposes; non-medicated oils; aromatherapy oil; essential vegetable oils; aromatics [essential oils]*. The BoA indicated that it was well known that essential oils were used as the basis of aromatherapy, which is considered as a 'complementary medicine' using a smell, a cream or a flavour of essential oils known for its benefits on health or wellbeing (therefore overlap in intended purpose). The BoA further indicated that those goods targeted the public at large, shared the same distribution channels (pharmacies or other specialised shops) and were often manufactured by the same companies.

77 A **low degree of similarity** was found with *pharmaceuticals* – without distinguishing from a range of other cosmetics – in several further cases reported in the previous sections (by the GC, in **SANOLIE** – *essential oils for cosmetic purposes* (reported in 3.1), **SKINOVEA** – *essential oils* (reported in 3.1), **BIOPÔLE** – *essential oils and aromatic extracts; preparations for flavouring; perfumery and fragrances*; *deodorants* (reported in 3.1), **HEALTHILY** – *ethereal oils* (reported in 3.1), **SKINERIES** – *essential oils, aromatics (essential oils)* (reported in 3.1), **SANOID** – *essential oils* (reported in 3.2.1); and by the BoA, in **MCGREGOR** – *ethereal oils* (reported in 3.1)).

4 Conclusions

78 The following conclusions can be drawn in order to safeguard consistency.

(i) General category *pharmaceuticals* in Class 5 *versus* the general category *cosmetics* or specific cosmetics in Class 3 (except *perfumery, essential oils*)

Case-law is consistent that the general category *pharmaceuticals* in Class 5 and the general category *cosmetics* or specific cosmetics in Class 3 (except

([80]) 04/05/2021, R 1425/2020-5, Cooltech / Coolegs, § 31-35.
([81]) 07/12/2023, R 903/2023-4, OMIKRON (fig.) / ORMICTON, § 34-38.

perfumery, essential oils) are **not dissimilar**. There is, however, uncertainty regarding the specific degree of similarity. The prevailing trend in the **GC's** case-law is to find a **low degree of similarity** between these goods, while the **BoA** decision-making practice is divided between **a low and an average** degree of similarity. On some occasions, the difference in the degree of similarity between the goods and services may affect the final outcome. It is debatable whether an overlap in purpose, distribution channels, end consumers, method of use and commercial origin could only lead to a low degree of similarity. For the sake of precision and a greater coherence in the reasoning, if it is also **proven** by the parties or can be deemed a **well-known fact** that pharmaceuticals and cosmetics have a common commercial origin (manufactured by the same undertakings and/or sold under the same brand), the finding of an **average degree of similarity** would seem justified. Moreover, if pharmaceuticals with specific therapeutic indications for the treatment of the external part of the body (such as medicated skin- or hair-care preparations, medicated soaps or medicated dentifrices) are considered similar to an average degree to cosmetics (see next conclusion point), it would be logical that the broad category *pharmaceuticals* encompassing those examples are also found to be similar to an average degree. (§ 25-48)

(ii) Pharmaceuticals with specific therapeutic indications for the treatment of the external part of the body in Class 5 *versus* the general category *cosmetics* or specific cosmetics in Class 3 (except *perfumery, essential oils*)

The trend in case-law is that pharmaceuticals with a specific therapeutic indication for the treatment of the external part of the body are **similar to an average degree** to cosmetics (except *perfumery, essential oils*) on account of an overlap in the purpose, end users, method of use, distribution channels and commercial origin. (§ 49-57)

(iii) Pharmaceuticals with other specific therapeutic indication in Class 5 *versus* the general category *cosmetics* or specific cosmetics in Class 3

The case-law is consistent that pharmaceuticals with a specific therapeutic indication other than for the treatment of the external part of the body are **dissimilar** to cosmetics. (§ 58-64)

(iv) *Pharmaceuticals* in Class 5 *versus perfumery* in Class 3

The case-law is consistent that *pharmaceuticals* are **dissimilar** to *perfumery* essentially due to the absence of an overlap in purpose, distribution channels and commercial origin. The occasional finding of a low degree of similarity in respect of *deodorants* and *essential oils* may be attributed to a global reasoning concerning a wide range of cosmetics, while a distinction may be justified in such cases in view of the noted differences. (§ 65-77)

Annex
List of cases reviewed

Court of Justice and General Court

16/11/2006, T-278/04, YUKI / YUPI, EU:T:2006:351
13/05/2015, T-363/12, CLEANIC natural beauty (fig.) / CLINIQUE, EU:T:2015:278
13/05/2015, T-364/12, CLEANIC Kindii (fig.) / CLINIQUE, EU:T:2015:277
13/05/2015, T-363/13, CLEANIC intimate (fig.) / CLINIQUE, EU:T:2015:276
13/05/2016, T-62/15, MITOCHRON / mito (fig.), EU:T:2016:304
28/09/2016, T-539/15, SILICIUM ORGANIQUE G5 LLR-G5 (fig.) / Silicium Organique G5
05/10/2020, T-51/19, apiheal (fig.) / APIRETAL, EU:T:2020:468
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26/04/2023, T-681/21, mccosmetics NY (fig.) / MAC MAKE-UP ART COSMETICS (fig.), EU:T:2023:215
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28/02/2019, R 816/2018-4, Dolmen / Dolmen
04/03/2019, R 1501/2018-4, eDermastamp II / EDERMA
26/06/2019, R 30/2019-4, Senederm / Sensoderm et al.
31/01/2020, R 668/2019-5, Skineries / Skinoren et al.
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23/07/2020, R 2171/2019-1, FARMONA (fig.) / Farmina et al.
01/03/2021, R 1047/2020-5, A Aema (fig.) / Lema
25/03/2021, R 1627/2020-4, Genové genocutan / Gentacutan et al.
04/05/2021, R 1425/2020-5, Cooltech / Coolegs
24/03/2022, R 1608/2021-4, NORMADVANCE (fig.) / NORMOFARMA et al.
17/11/2022, R 492/2022-5, BIOPÔLE / BIOPLAK
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07/12/2023, R 903/2023-4, OMIKRON (fig.) / ORMICTON
11/01/2024, R 895/2023-1, McGREGOR / McGREGOR F.A.S.T.
14/03/2024, R 1086/2020-5, EVELINE PROFESSIONAL (fig.) / Ebelin et al. (pending before the GC under T-292/24)
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26/03/2024, R 1981/2023-2, V.SUN / sun (fig.) et al.
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26/08/2024, R 502/2024-4, OMEYA (fig.) / OMIA LABORATOIRES (fig.)