

**DECISION
of the Fifth Board of Appeal
of 23 August 2021**

In case R 298/2021-5

ALDI Einkauf SE & Co. oHG

Eckenbergstr. 16

45307 Essen

Germany

Opponent / Appellant

represented by Schmidt, Von der Osten & Huber Rechtsanwälte, Steuerberater
Partnerschaft MBB, Rüttenscheider Str. 26, 45128 Essen, Germany

v

Zinkia Entertainment, S.A.

Infantas, 27, planta 1

28004 Madrid

Spain

Applicant / Defendant

represented by Ingenias, Av. Diagonal, 514 – 1º, 08006 Barcelona, Spain

APPEAL relating to Opposition Proceedings No B 3 105 014 (European Union trade
mark application No 18 088 080)

THE FIFTH BOARD OF APPEAL

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

Registrar: H. Dijkema

gives the following

Decision

Summary of the facts

- 1 By an application filed on 27 June 2019, Zinkia Entertainment, S.A. ('the applicant') sought to register the word mark

POCOYINA

for the following list of goods and services:

Class 3 - Soaps; perfumery; essential oils; cosmetics; hair lotion; dentifrices; baby oils; baby hair conditioner; baby shampoo; babies' creams [non-medicated]; baby bath mousse; baby lotions; talcum powder (non-medicated -) for babies; baby care products (non-medicated -); baby wipes;

Class 5 - Medical and veterinary preparations and articles; hygienic preparations and articles; baby food; dietary supplements and dietetic preparations; adhesive bands for medical purposes; dressings, medical; materials for dressings; teeth filling material; disinfectants; disinfectants and antiseptics; antiseptic cleansers; sanitizing wipes; disinfectants for hygiene purposes; disinfecting handwash; sterilising solutions; wipes for medical use; disposable diapers; diapers made of cellulose; babies' diapers; impregnated antiseptic wipes; sanitary wear; moist wipes impregnated with a pharmaceutical lotion;

Class 9 - Baby scales; video compact discs; video game discs; interactive video game programs; computer software applications, downloadable; downloadable video game programs; downloadable image files; DVDs; electronic book readers; sunglasses; fridge magnets; talking books; radios incorporating clocks; tablet computers; tablet computers; recorded content; animated cartoons;

Class 10 - Feeding bottles for babies; Dummies for babies; Covers for baby feeding bottles; Air mattresses for infants [for medical purposes]; Incontinence sheets for use with babies;

Class 16 - Scrapbooks; photographic albums; Christmas cards; paper baby bibs; paper pennants; ball pens; pencils; felt marking pens; crayons; pastel crayons; paint brushes; paintings; adhesives for stationery; paper bags; gift bags; cardboard boxes; writing or drawing books; rubber erasers; elastic bands for offices; invitation cards; books; books for children; music books; drawing books; canvas for painting; gift wrap paper; table napkins of paper; stationery; stickers [stationery]; stickers [decalcomanias]; albums for stickers; blackboards; modelling paste; pen boxes; postcards; posters; cards; printed matter; adhesives for stationery or household purposes; decoration and art materials and media; bags and articles for packaging, wrapping and storage of paper, cardboard or plastics; stationery and educational supplies;

Class 25 - Bathrobes; dressing gowns, bath robes; burnouses; bath robes; cloth bibs; swimming costumes; swimming costumes; lounging robes; rain boots; scarves; footwear; clothing; gym suits; rainproof clothing; waist belts; costumes; caps [headwear]; caps [headwear]; gloves [clothing]; underwear; fleeces; pyjamas; gaiters; ponchos; underwear; sandals; suspenders; gowns; sports shoes; shoes; infants' footwear; babies' pants [clothing];

Class 28 - Toy figurines; dolls; Christmas stockings; decorations for Christmas trees; party favors; paper party hats; streamers [party novelties]; toy aeroplanes; see-saws [playground apparatus]; rocking horses; balls for games; toy cameras [not capable of taking a photograph]; basketball baskets; carriages for dolls; carriages for dolls; toy pushchairs; hand-held electronic video games; card games; remote control toys; toy cars; toy vehicle tracks; swings [playthings]; costume masks; costumes being childrens playthings; balloons; toy banks; toy musical instruments; games; electronic games; musical games; board games; electronic games for the teaching of children; toys

adapted for educational purposes; toys; rattles [playthings]; tricycles for infants [toys]; toy buckets and spades; plush toys; piñatas; jigsaw puzzles; jigsaw puzzles; toy clocks and watches; toy whistles; paper party hats; toboggans;

Class 38 - Transmission of video films; video broadcasting; music broadcasting; radio and television program broadcasting; communications via global computer networks, in particular digital communications; video-on-demand transmission; television broadcasting; cable television broadcasting;

Class 41 - Television entertainment; interactive entertainment services; entertainment services; musical entertainment; entertainment by film; arranging of festivals for educational purposes.

- 2 The application was published on 3 September 2019.
- 3 On 3 December 2019, ALDI Einkauf SE & Co. oHG ('the opponent') filed an opposition against the registration of the published trade mark application for part of the goods, namely:

Class 25 - Bathrobes; dressing gowns, bath robes; burnouses; bath robes; cloth bibs; swimming costumes; swimming costumes; lounging robes; rain boots; scarves; footwear; clothing; gym suits; rainproof clothing; waist belts; costumes; caps [headwear]; caps [headwear]; gloves [clothing]; underwear; fleeces; pyjamas; gaiters; ponchos; underwear; sandals; suspenders; gowns; sports shoes; shoes; infants' footwear; babies' pants [clothing];

Class 28 - Toy figurines; dolls; Christmas stockings; decorations for Christmas trees; party favors; paper party hats; streamers [party novelties]; toy aeroplanes; see-saws [playground apparatus]; rocking horses; balls for games; toy cameras [not capable of taking a photograph]; basketball baskets; carriages for dolls; carriages for dolls; toy pushchairs; hand-held electronic video games; card games; remote control toys; toy cars; toy vehicle tracks; swings [playthings]; costume masks; costumes being childrens playthings; balloons; toy banks; toy musical instruments; games; electronic games; musical games; board games; electronic games for the teaching of children; toys adapted for educational purposes; toys; rattles [playthings]; tricycles for infants [toys]; toy buckets and spades; plush toys; piñatas; jigsaw puzzles; jigsaw puzzles toy clocks and watches; toy whistles; paper party hats; toboggans.

- 4 The grounds of opposition were those laid down in Article 8(1)(b) EUTMR.
- 5 The opposition was based on the EUTM registration No 15 490 097



filed on 31 May 2016 and registered on 14 September 2016 for the following goods:

Class 25 - Clothing; Footwear; Headgear; Children's wear; Children's footwear; Children's headwear.

- 6 By decision of 2 February 2021 ('the contested decision'), the Opposition Division rejected the opposition in its entirety on the grounds that there was no

likelihood of confusion for all the contested goods in Class 25 and 28. It gave, in particular, the following grounds for its decision:

- The examination of the opposition will proceed as if all the contested goods were identical to those of the earlier mark which, for the opponent, is the best light in which the opposition can be examined.
- The goods are directed at the public at large, whose degree of attention is average.
- The relevant territory is the European Union.
- The term ‘POCO’ (meaning ‘little’ in Italian and Spanish) will be understood by the Italian, Spanish and Portuguese-speaking (on account of the similar Portuguese term ‘POUCO’) public, but nevertheless will still have a normal degree of distinctiveness, since it is fanciful in relation to the goods and does not convey any clear descriptive information. For some music enthusiasts throughout the European Union, it will refer to a musical term describing the tempo or dynamics of a piece of music when added to other terms. The term will not be understood by the remaining part of the public, for whom this element is meaningless and therefore has a normal degree of distinctiveness.
- The term ‘PIANO’ will be understood by the relevant public throughout the European Union as a large musical instrument with a row of black and white keys, given the identical (e.g. in Czech, Danish, Dutch, English, Finnish, French, German, Italian, Portuguese, Slovak, Spanish and Swedish), or very close equivalent words (e.g. ‘pian’ in Romanian) in the different languages of the EU Member States. In some languages the term ‘PIANO’ has other meanings (e.g. ‘flat’ in Italian). Nonetheless, it is distinctive to a normal degree, since it is an arbitrary term in relation to the goods at issue (such as clothing, headgear, footwear, toys and games).
- The image of the giraffe is meaningless in relation to the relevant goods and therefore has a normal degree of distinctive character, except in the case of ‘toy figurines, costume masks, costumes being childrens playthings, toys adapted for educational purposes, toys, rattles [playthings], plush toys, piñatas’, where the giraffe symbol can be associated with the kind or shape of these goods and therefore has a lower degree of distinctiveness for them. This figurative element will certainly be noticed by the relevant public due to its size (being larger than the two-line verbal element) and position.
- The figurative element of the clothing (or other product) label is of very limited distinctiveness, as it will be perceived as purely decorative and lacks distinctiveness. A similar finding applies to the light and dark grey filling of the letters ‘P’, ‘A’ and ‘O’.
- The contested sign is meaningless as a whole throughout the EU. The term ‘POCO’ is not likely to be singled out from the contested sign as there is no space or other dividing element present in this sign, and its ‘second’ half ‘YINA’ has no meaning. Therefore, the relevant public will not tend to

artificially dissect the contested sign, which will simply be viewed as one meaningless, fanciful and arbitrary element. It has no dominant elements.

- Visually, the marks are similar to a low degree. The elements of the earlier mark, especially the verbal element ‘PIANO’ and the figurative element of the giraffe, establish a decisive visual difference. The relevant public will immediately notice the differing number of verbal elements and the different overall structures of the signs.
- Aurally, the marks are similar to a below-average degree. Although the sound of the initial string of letters ‘POCO-’ will first catch the attention of the consumer when encountering the signs, the differences in the endings and structures of the signs will easily be noticed. There is a noticeable pause between ‘POCO’ and ‘PIANO’ in the earlier mark, while the contested sign is read as one word.
- Conceptually, the marks are different. The contested sign has no meaning.
- The opponent did not explicitly claim that its mark is particularly distinctive by virtue of intensive use or reputation. Therefore, the distinctiveness of the earlier mark must be seen as normal.
- The relevant consumer will immediately be able to identify the differences between the signs, and the fact that they coincide in a string of four letters will have no particular relevance.
- Generally, in clothes shops customers can themselves either choose the clothes they wish to buy or be assisted by the sales staff. Whilst oral communication in respect of the product and the trade mark is not excluded, the choice of the item of clothing is generally made visually. Therefore, the visual perception of the marks in question will generally take place prior to purchase. Accordingly, the visual aspect plays a greater role in the global assessment of the likelihood of confusion. Therefore, the considerable visual differences between the signs caused by their different verbal and figurative elements are particularly relevant when assessing the likelihood of confusion between them. This is also the case in relation to the goods in Class 28, as they too are typically the object of a visual inspection by the consumers prior to a purchase.
- As the earlier sign has verbal and figurative elements with clear and specific meanings likely to be grasped immediately by the public (‘piano’ and ‘giraffe’), these evident conceptual differences between the signs counteract their (limited) visual and aural similarities resulting from a mere sequence of letters which, however, does not play an independent distinctive role in the contested sign.
- Considering the principle of interdependence, and despite assuming the identity of the goods, the differences between the signs are capable of maintaining a sufficient distance between their overall impressions. Therefore, there is no likelihood of confusion on the part of the public.

- 7 On 12 February 2021, 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 2 June 2021.
- 8 In its response received on 30 July 2021, 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 opponent does not contest the identity and similarity of the opposing goods.
 - As regards the similarity of the signs, it must be recalled that the average consumer only rarely has the chance to make a direct comparison between the different marks, but must place its trust in the imperfect picture of them that it has kept in its mind. It should also be borne in mind that the average consumer's attention is likely to vary according to the category of goods in question.
 - It is clear that the first word element of the earlier trade mark 'POCO' coincides with the beginning of the contested mark 'POCO'.
 - The term 'POCO' is meaningless. Even for the consumer who will pick-up the meaning of this word as 'little', it is perfectly distinctive in relation to the goods at hand in Classes 25 and 28.
 - Visually the beginning of the contested sign 'POCO' is identical to the dominant and first word element of the earlier mark. It is true, it forms part of a single word which terminates in the letter combination 'YINA'. However, reading from left to right, e.g. the Portuguese or Spanish-speaking consumer will not fail to recognise the word 'POCO' at the beginning of the contested sign, which, upon further reading, unusually terminates in the letter combination 'YINA'. Said letter combination does not exist as a word in the Spanish or Portuguese language and will most probably be perceived as an unimportant suffix. Hence, it is not arbitrary to presume that the contested sign will be perceived by the relevant consumers as a juxtaposition of the word 'POCO' with an unknown suffix 'YINA' – the same applies to the earlier right regarding the term 'PIANO'.
 - Furthermore, in complex marks, the word component of the sign usually has a stronger impact on consumers than the figurative element. This is because the public does not intend to analyse signs and will most readily refer to a sign by its verbal element. Thus, the impact of the illustration of a 'giraffe' is very limited when assessing the likelihood of confusion between the marks at issue.
 - Therefore, the signs are aurally and visually similar because of the identical first term 'POCO'. Even conceptually the signs have a certain similarity

because of the presence of the term ‘POCO’ (which may be picked up by the Portuguese and Spanish-speaking consumers as ‘little’). Furthermore, the contested goods are partly identical and in partly similar to the opposing goods.

- Consequently, the conflicting signs do not keep the necessary distance so that the consumer is likely to get confused.

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

- The prior goods in Class 25 and the contested goods in Class 28 are different and should not be assumed to be identical.
- The applicant agrees with the assertions made by the Opposition Division concerning the semantic content of the terms ‘PIANO’ and ‘POCO’ throughout the European Union. The compared signs are simply different with no chance of being confused by the public.
- In further support of the contested decision’s correct reasoning about how customers choose their clothes in shops and the importance of the visual perception of the marks, the applicant refers to what is stated in the Office Guidelines regarding figurative marks. To that effect, the verbal element of a sign does not automatically have a stronger impact (31/01/2013, T-54/12, Sport, EU:T:2013:50, § 40) and in certain cases, the figurative element of a composite mark may, owing to, inter alia, its shape, size, colour or position within the sign, rank equally with the word element (23/11/2010, T-35/08, Artesa Napa Valley, EU:T:2010:476, § 37). Some examples are the following judgements: 03/06/2015, T-559/13, GIOVANNI GALLI (fig.) / GIOVANNI, EU:T:2015:353; and 12/11/2015, T-449/13, WISENT / ŻUBRÓWKA BISON BRAND VODKA, EU:T:2015:839.
- In addition, the applicant recalls the following from the Guidelines: ‘...the degree of similarity will usually be lower, despite identical beginnings, if those are the weak elements in the signs or if the remaining elements have a clearly different meaning’. As it is in the present case.
- Given the differences between the signs, there is no likelihood of confusion on the part of the relevant public.

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

- 13 The opponent appealed the contested decision in its entirety, as the Opposition Division rejected the opposition.
- 14 Therefore, the Board will assess the legality of the contested decision in full.

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

- 15 Article 8(1)(b) EUTMR states, in material part, that 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.
- 16 The risk that the public might believe that the goods or services in question come from the same undertaking or, as the case may be, from economically-linked undertakings, constitutes a likelihood of confusion on the part of the public, in the absence of which Article 8(1) EUTMR does not apply (29/09/1998, C-39/97, Canon, EU:C:1998:442, § 29; 22/06/1999, C-342/97, Lloyd Schuhfabrik, EU:C:1999:323, § 17).
- 17 It is settled case-law that the likelihood of confusion must be appreciated globally, taking into account all factors relevant to the circumstances of the case. That global appreciation of the visual, aural or conceptual similarity of the marks in question must be based on the overall impression given by the marks, bearing in mind, in particular, their distinctive and dominant components. The average consumer normally perceives a mark as a whole and does not proceed to analyse its various details, as said consumer only rarely has the chance to make a direct comparison between the different marks but must place his or her trust in the imperfect picture of them that he or she has kept in his or her mind (11/11/1997, C-251/95, Sabèl, EU:C:1997:528, § 22-23; 22/06/1999, C-342/97, Lloyd Schuhfabrik, EU:C:1999:323, § 26).

Relevant public

- 18 As a preliminary point, it must be borne in mind that, in the global assessment of the likelihood of confusion, account should be taken of the average consumer of the category of products and services concerned, who is reasonably well-informed and reasonably observant and circumspect. It should also be borne in mind that the average consumer's level of attention is likely to vary according to the category of goods or services in question (13/02/2007, T-256/04, Respicur, EU:T:2007:46, § 42).
- 19 Given that the earlier trade mark is a European Union trade mark, the relevant public is the public in the European Union. In this regard, a likelihood of confusion for only part of the relevant public of the European Union is sufficient

to reject the contested application (18/09/2008, C-514/06 P, Armafoam, EU:C:2008:511, § 57).

- 20 The Board agrees with the contested decision that, in the present case, the public targeted for the goods at issue is primarily composed of the general public and that the level of attention paid by the relevant public is average.

Comparison of the goods

- 21 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). Additional factors include the purpose of the goods and services, whether or not they can be manufactured, sold or supplied by the same undertaking or by economically linked undertakings, and also their distribution channels and sales outlets.
- 22 For reasons of procedural economy, the Opposition Division did not undertake a full comparison of the goods and proceeded as if all the contested goods in Classes 25 and 28 were identical to those covered by the earlier application.
- 23 The parties do not dispute this assertion, in particular with regard to the contested goods in Class 25. Therefore, the Board endorses the contested decision which proceeds as if the goods in Class 25 were identical.
- 24 On the contrary, with respect to the goods in Class 28 listed in paragraph 1 above, the Board agrees with the applicant that they are dissimilar to the opponent's goods 'clothing; footwear; headgear; children's wear; children's footwear; children's headwear' in Class 25. These goods have a different nature, purpose and method of use. They are not complementary, nor in competition with each other. Furthermore, they do not originate from the same undertakings, they are offered through different distribution channels and target a different relevant public (24/09/2015, R 2862/2014-5, device of a stylised letter R (fig.) / device of a stylised letter R (fig.), § 42).


Comparison of the marks

- 25 With regard to the comparison of the signs, the likelihood of confusion must be determined by means of a global appraisal of the visual, phonetic and conceptual similarity of the signs, on the basis of the overall impression given by them, bearing in mind in particular their distinctive and dominant components (11/11/1997, C-251/95, Sabèl, EU:C:1997:528, § 23).
- 26 In general terms, two signs are similar when, from the point of view of the relevant public, they are at least partially identical as regards one or more relevant aspects, namely the visual, aural and conceptual aspects (23/10/2002, T-6/01, Matratzen, EU:T:2002:261, § 30 upheld by appeal by order of 28/04/2004, C-3/03 P, Matratzen, EU:C:2004:233; 12/07/2006, T-97/05, Marcorossi, EU:T:2006:203,

§ 39; and 22/06/2005, T-34/04, Turkish Power, EU:T:2005:248, § 43, upheld on appeal by order 01/06/2006, C-324/05 P, Turkish Power, EU:C:2006:368).

27 Given the relevance of the issue regarding the dominant element for the assessment of the similarity between the signs, the arguments in this respect must be examined before a comparison of those signs is undertaken (17/02/2011, T-10/09, F1-Live, EU:T:2011:45, § 37). Accordingly, the comparison of the signs at issue must be conducted by identifying any dominant or negligible elements first in respect of the earlier mark, and then in respect of the contested sign (03/09/2010, T-472/08, 61 a nossa alegria, EU:T:2010:347, § 57 and the case-law cited therein).

28 The signs to be compared are:

	<p>POCOYINA</p>
<p><i>Earlier mark</i></p>	<p><i>Contested sign</i></p>

(i) *The earlier mark*

29 The earlier mark is a complex figurative mark consisting of a tag with a string in the corner (which would be perceived as a clothing or other product label). Inside the label it is possible to appreciate the figurative elements of a giraffe on the left side, while on the right side there are two verbal elements depicted on two lines, namely the terms 'POCO' and 'PIANO' in which the letters 'P' and 'O' are filled in with a grey background. A depiction of a heart is visible on top of the letter 'C' and 'O' of 'POCO'.

30 The Board agrees with the contested decision that the term 'POCO' (meaning 'little' in Italian and Spanish) will be understood by the Italian, Spanish and Portuguese-speaking (on account of the similar Portuguese term 'POUCO') public or it will refer to a musical term describing the tempo or dynamics of a piece of music when added to other terms. By the remaining part of the public, the term will not be understood. In any case, this verbal element will still have a normal degree of distinctiveness, since it is fanciful in relation to the goods and does not convey any clear descriptive information.

31 As regards the contested decision's examination of the semantic content and the degree of distinctiveness of the other elements of the earlier right, namely the

term ‘PIANO’ and the figurative elements (the depiction of a label, a giraffe and a heart), this is not disputed by the parties.

- 32 The Board agrees with the reasoning carried out in the contested decision and the outcome, to which it hereby refers, in order to avoid repetition, bearing in mind that it may adopt the grounds of a decision taken by the Opposition Division, which thus make up an integral part of the reasons for the Board’s own decision (13/09/2010, T-292/08, *Oftan*, EU:T:2010:399, § 48; 11/09/ 2014, T-450/11, *Galileo*, EU:T:2014:771, § 36).
- 33 Therefore, the term ‘PIANO’ is distinctive to a normal degree, while the figurative elements of the clothing (or other product) label, as well as the depiction of a heart above the last letter ‘O’ of ‘POCO’ are considered as having a very limited distinctiveness and are negligible, respectively.
- 34 As regards the image of the giraffe, despite its possible association with some of the products in Class 28 (mainly toys), the figurative element has a normal degree of distinctiveness and will certainly be noticed by the relevant public due to its size and position.
- 35 As to the dominant element, the opponent claims that the term ‘POCO’ is the dominant element of the earlier mark. In that respect, the General Court has indicated that where a sign consists of both figurative and word elements, it does not automatically follow that the word element must always be considered dominant (24/11/2005, T-3/04, *KINJI by SPA*, EU:T:2005:418, § 45; 19/06/2019, T-28/18, *AC MILAN (fig.)/AC et al.*, EU:T:2019:436, § 32).
- 36 Thus, although there is case-law according to which, in a complex trade mark, the consumer usually focuses primarily on the verbal part as a point of reference, the Court has also pointed out that, in this type of trade mark, the figurative element may occupy a position that is equivalent to the word element (06/10/2015, T-61/14, *icexpresso + energy coffee (fig.)*, EU:T:2015:750, § 37; 16/01/2008, T-112/06, *idea*, EU:T:2008:10, § 45 and 48), and therefore the verbal element might not be considered to be dominant in every circumstance.
- 37 In the present case, evaluating the overall impression created by the sign, the position of the image of the giraffe – which has a normal degree of distinctiveness – is equivalent to the word elements ‘POCO’ and ‘PIANO’ and therefore, it will certainly not remain unnoticed by the relevant public.

(ii) The contested sign

- 38 The contested sign is a word mark and consists of the word element ‘POCOYINA’.
- 39 It is the term as such that is protected. Thus 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).

- 40 Concerning the meaning of the trade mark application, the Board agrees with the Opposition Division inasmuch as the sign does not convey any concrete meaning from the perspective of (at least) the majority of the relevant public and, thus, the sign is distinctive to a normal degree for the goods at issue.
- 41 In that regard, the applicant's submission that the consumer will break the contested sign down into two elements which suggest a concrete meaning, or which resemble known terminologies, namely 'POCO', must be rejected as unfounded.
- 42 As stated by the Opposition Division the term 'POCO-' is not likely to be singled out in the contested sign. There is no stylisation of the letters, irregular capitalisation or other visual separation, such as special characters (i.e. hyphens/other punctuation marks) that would suggest a division of the verbal element 'POCOYINA' so making that element more dominant. Moreover, its 'second' half '-YINA' has no meaning. Therefore, the relevant public will not tend to artificially dissect the contested sign, which will simply be viewed as one meaningless, fanciful and arbitrary element.
- 43 Since it is formed of a single word element, there are no elements that may be deemed dominant.

(iii) Visual, phonetic and conceptual comparison

- 44 Visually the conflicting signs coincide in the term 'POCO' of the earlier mark and in the first four letters 'POCO' of the contested sign.
- 45 The signs differ in the second term of the earlier mark 'PIANO' and in the last four letters of the contested mark '-YINA', and also in the additional figurative elements and stylisation of the earlier mark. These elements of the earlier mark will however have a lower visual impact due to their decorative nature, except the image of the giraffe, which will have a significant impact on the relevant public due to its size and position, as well as the fact that it is a distinctive element for most of the goods concerned.
- 46 The opponent claims that the fact that the earlier trade mark and the contested sign coincide in the term 'POCO' at their beginnings, is a strong indication of the given similarity between the signs since, in accordance with settled case-law of the Court of Justice, consumers normally pay greater attention to the beginning of signs (15/12/2009, T-412/08, Trubion, EU:T:2009:507, § 40; 25/03/2009, T-109/07, Spa Therapy, EU:T:2009:81, § 30).
- 47 Contrary to the opponent's argument, although the beginning of the mark is normally the part to which the consumer attaches more importance, that argument cannot hold true in all cases (12/07/2019, T-698/17, MANDO / MAN (fig.) et al., EU:T:2019:524, § 62-63 and the case-law cited; 23/10/2015, T-96/14, VIMEO / MEO (fig.) et al., EU:T:2015:799, § 35 and the case-law cited) and does not, in any event, cast doubt on the principle that the assessment of the similarity between the marks must take account of the overall impression created by them.

- 48 In the present case, the signs at issue exhibit a visual similarity consisting of the presence of the term 'POCO'/'POCO-'. However, apart from this coincidence, the trade marks exhibit numerous visual differences. The elements of the earlier mark, especially the verbal element 'PIANO' and the figurative element of the giraffe, establish a decisive visual difference.
- 49 Furthermore, as concluded above, the earlier mark is composed of two verbal elements 'POCO' and 'PIANO' depicted on two lines, while the contested sign forms a single verbal element 'POCOYINA'.
- 50 Therefore, the relevant public will immediately notice the differing number of verbal elements, the different overall structures and the figurative elements, especially the image of a giraffe.
- 51 Therefore, the Board confirms the low degree of visual similarity.
- 52 Aurally, the marks at issue coincide in the first word of the earlier sign and in the first four letters of the contested mark 'POCO'/'POCO-', in which both have a normal degree of distinctiveness.
- 53 Although the sound of the initial string of letters 'POCO-' will first catch the attention of the consumer when encountering the signs, the differences in the endings and structures of the signs will easily be noticed.
- 54 The two marks differ in that the earlier mark is followed by the second term 'PIANO', which is considered to have a normal degree of distinctiveness, while the contested mark cannot be dissected as mentioned above. Thus, the rhythm of the earlier mark will be pronounced with a noticeable pause between the two verbal elements 'POCO • PIANO', whereas the mark applied for will be read in a uniform and continuous sequence 'POCOYINA'.
- 55 The Board accordingly concludes that there is at most an average degree of similarity.
- 56 Conceptually, the Board agrees with the previous assertions of the contested decision concerning the semantic content conveyed by the element 'PIANO' and the element 'POCO' of the earlier mark. The signs differ in the figurative element in the earlier mark, which will be associated with the concept of a giraffe and recognised throughout the European Union.
- 57 The contested sign has no meaning at all. Contrary to the opponent's assertion, it is not very likely that the Spanish and Portuguese-speaking public will perceive the first four letters 'POCO-' with the concept of 'little'. As already mentioned, the consumer will not artificially dissect a sign into various elements (06/03/2015, T-257/14, BLACK JACK TM, EU:T:2015;141, § 39). This dissection is only possible if there are clear indications on how to dissect a sign, which is not the case. Therefore, the European Union public in general will not find any concept in the contested mark.

- 58 Consequently, since one of the signs will not be associated with any meaning, the signs are not conceptually similar.

Distinctiveness of the earlier right

- 59 The distinctive character of the earlier right is one of the relevant factors to be taken into consideration when making a global assessment of likelihood of confusion (22/09/2011, T-174/10, A, EU:T:2011:519, § 34; 29/09/1998, C-39/97, Canon, EU:C:1998:442, § 24).
- 60 Since the opponent did not claim the earlier mark's enhanced distinctiveness through use, the assessment must rest on its distinctiveness per se.
- 61 The earlier mark does not convey any concrete meaning in relation to the relevant goods from the perspective of the relevant public. Therefore, the distinctiveness of the earlier mark must be seen as normal, as correctly stated by the Opposition Division and has not been disputed by the opponent.

Overall assessment of the likelihood of confusion

- 62 The appreciation of likelihood of confusion on the part of the public depends on numerous elements and, in particular, on the recognition of the earlier mark on the market, the association which can be made with the registered mark, the degree of similarity between the marks and between the goods or services identified (eighth Recital of the EUTMR). It must be appreciated globally, taking into account all factors relevant to the circumstances of the case (22/06/1999, C-342/97, Lloyd Schuhfabrik, EU:C:1999:323, § 18; 11/11/1997, C-251/95, Sabèl, EU:C:1997:528, § 22).
- 63 Such a global assessment of a likelihood of confusion implies some interdependence between the relevant factors, and in particular, the similarity between the trade marks and between the goods or services. Accordingly, a greater degree of similarity between the goods may be offset by a lower degree of similarity between the marks, and vice versa (22/06/1999, C-342/97, Lloyd Schuhfabrik, EU:C:1999:323, § 20; 11/11/1997, C-251/95, Sabèl, EU:C:1997:528, § 24; 29/09/1998, C-39/97, Canon, EU:C:1998:442, § 17).
- 64 The average consumer only rarely has the chance to make a direct comparison between the different marks but must place his or her trust in the imperfect picture of them that he or she has kept in his or her mind (11/11/1997, Sabèl, EU:C:1997:528, § 23; 22/06/1999, C-342/97, Lloyd Schuhfabrik, EU:C:1999:323, § 26).
- 65 In the assessment of likelihood of confusion, one of the factors to be taken into account is the distinctive character of the earlier mark. The more distinctive the earlier mark, the greater the risk of confusion. 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 (27/04/2006, C-235/05 P, Flexi Air, EU:C:2006:271, § 36).

- 66 In the case at hand, the signs have been found to be visually similar to a low degree, aurally similar at most to an average degree and conceptually dissimilar. The distinctiveness of the earlier mark is normal, and the attention of the relevant consumer will be average.
- 67 As regards the goods at issue in Class 25, the visual similarities are important in the present case, having regard to the fact that the choice of the relevant clothing and fashion goods is generally made visually, so that visual perception of the marks in question will generally take place prior to purchase. In this regard, the visual aspect plays a greater role in the global assessment of the likelihood of confusion (07/05/2009, T-414/05, LA Kings, EU:T:2009:145, § 73; 06/10/2004, T-117/03 to T-119/03 and T-171/03, NL, EU:T:2004:293, § 50-53). Therefore, as is the case here at hand, the considerable visual differences between the signs caused by their different verbal and figurative elements are particularly relevant when assessing the likelihood of confusion between them.
- 68 In these circumstances, and taking a global approach, it must be held that contrary to the opponent's arguments, the similarities between the elements 'POCO' and 'POCO-' are not sufficient to neutralise the visual differences in the overall impression given by the signs, so as to give rise to a likelihood of confusion, even in respect of the presumed identical goods. Viewed as a whole, the signs convey sufficiently different overall impressions.
- 69 Furthermore, as correctly pointed out by the contested decision, case-law shows that the global assessment of the likelihood of confusion implies that conceptual differences between two signs may counteract aural and visual similarities between them, provided that at least one of those signs has, from the point of view of the relevant public, a clear and specific meaning, so that the public is capable of grasping it immediately (21/01/2016, T-802/14, Lenah.C / LEMA, EU:T:2016:25, § 48; 23/04/2008, T-35/07, Celia, EU:T:2008:125, § 46; 14/10/2003, T-292/01, Bass, EU:T:2003:264, § 54; 12/01/2006, C-361/04 P, Picaro, EU:C:2006:25, § 20; 23/03/2006, C-206/04 P, Zirh, EU:C:2006:194, § 35).
- 70 The element 'PIANO' and the image of a giraffe have clear and specific meanings likely to be grasped immediately by the public, which will counteract the (limited) visual and aural similarity.
- 71 Consequently, given the low level of visual similarity, the at most average phonetic similarity and the conceptual differences, the Opposition Division was therefore right in finding that there was no likelihood of confusion for the relevant public, including believing that the goods originate from the same undertaking or from economically-related undertakings.
- 72 As regards the contested goods in Class 28 which are considered not similar, the opposition is also unsuccessful. For an opposition to succeed on the basis of Article 8(1)(b) EUTMR, the requirements that the marks are similar or identical and that the goods and/or services are similar or identical are cumulative. If the conflicting goods or services are not similar, the opposition will not succeed (09/03/2007, C-196/06 P, Comp USA, EU:C:2007:159, § 26, 38).

73 The appeal is dismissed.

Costs

- 74 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.
- 75 As regards the appeal proceedings these consist of the applicant's costs of professional representation of EUR 550.
- 76 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

R. Ocquet

Signed

A. Pohlmann

Registrar:

Signed

p.o. E. Apaolaza

