

## JUDGMENT OF THE GENERAL COURT (Third Chamber)

21 June 2023 (\*)

(EU trade mark – Opposition proceedings – Application for the EU figurative marks InterMed Pharmaceutical Laboratories eva intima – Earlier EU and national word marks EVAX – Relative ground for refusal – Likelihood of confusion – Article 8(1)(b) of Regulation (EU) 2017/1001)

In Joined Cases T-197/22 and T-198/22,

**Ioulia and Irene Tseti Pharmaceutical Laboratories SA**, established in Athens (Greece), represented by C. Chrysanthis, P.-V. Chardalia and A. Vasilogamvrou, lawyers,

applicant,

v

**European Union Intellectual Property Office (EUIPO)**, represented by T. Frydendahl, acting as Agent,

defendant,

the other party to the proceedings before the Board of Appeal of EUIPO, intervener before the General Court, being

**Arbora & Ausonia, SL**, established in Madrid (Spain), represented by J. Mora Cortés, lawyer,

THE GENERAL COURT (Third Chamber),

composed of F. Schalin, President, G. Steinfatt and D. Kukovec (Rapporteur), Judges,

Registrar: A. Juhász-Tóth, Administrator,

having regard to the written part of the procedure,

further to the hearing on 1 February 2023,

gives the following

### Judgment

- 1 By its actions under Article 263 TFEU, the applicant, Ioulia and Irene Tseti Pharmaceutical Laboratories SA, seeks the annulment of the decisions of the First Board of Appeal of the European Union Intellectual Property Office (EUIPO) of 1 March 2022 in Case R 1244/2021-1 ('the first contested decision') and in Case R 1245/2021-1 ('the second contested decision') (together, 'the contested decisions').

#### Background to the dispute

- 2 On 23 September 2019, the applicant filed an application for registration of an EU trade mark with EUIPO in respect of the following figurative sign ('the first mark applied for'):



eva  
intima

- 3 That mark designated goods and services in Classes 3, 5, 10 and 35 of the Nice Agreement Concerning the International Classification of Goods and Services for the Purposes of the Registration of Marks of 15 June 1957, as revised and amended, and corresponding, for each of those classes, to the following description:
- Class 3: ‘Toiletries; Body cleaning and beauty care preparations; Cosmetics and cosmetic preparations; Oral hygiene preparations; Essential oils and aromatic extracts; Cleaning and fragrancing preparations; Detergents; Bleaching preparations; Cloths impregnated with a detergent for cleaning; Perfumery and fragrances; Cosmetic creams and lotions; Cleaning agents for household purposes’;
  - Class 5: ‘Dietary supplements and dietetic preparations; Hygienic preparations and articles; Sanitary preparations for medical purposes; Medical preparations; Pharmaceuticals and natural remedies; Feminine hygiene products; Disinfectants and antiseptics; Absorbent articles for personal hygiene; Deodorizers and air purifiers; Medicated and sanitising soaps and detergents; Infant formula; Nutritional supplements; Dental preparations and articles, and medicated dentifrices; Pest control preparations and articles; Dental preparations and articles’;
  - Class 10: ‘Medical and veterinary apparatus and instruments’;
  - Class 35: ‘Advertising, marketing and promotional services; Business analysis, research and information services; Business assistance, management and administrative services’.
- 4 On the same day, the applicant filed a second application for registration of an EU trade mark with EUIPO in respect of the following figurative sign (‘the second mark applied for’):



eva  
intima  
(v)

- 5 That second mark designated the same goods and services as those listed in paragraph 3 above.

- 6 On 8 January 2020, the intervener, Arbora & Ausonia, SL, filed a notice of opposition to the registration of the first and second marks applied for (together, ‘the marks applied for’) in respect of the goods and services referred to in paragraph 3 above.
- 7 The opposition was based on a number of earlier marks, including, in particular, the EU word mark EVAX, registered under No 3 780 947, and the Spanish word mark EVAX, registered under the reference M 2 601 121.
- 8 The EU word mark EVAX designates, in so far as genuine use has been demonstrated, goods in Class 5 corresponding to the following description: ‘sanitary towels, panty liners (sanitary), menstruation tampons’.
- 9 The Spanish word mark EVAX designates, in so far as genuine use has been demonstrated, goods in Class 5 corresponding to the following description: ‘hygienic pads, feminine hygiene pads, pantliners (hygienic products), menstruation tampons’.
- 10 The ground relied on in support of the opposition was that set out in Article 8(1)(b) of Regulation (EU) 2017/1001 of the European Parliament and of the Council of 14 June 2017 on the European Union trade mark (OJ 2017 L 154, p. 1).
- 11 On 30 and 29 June 2021 respectively, the Opposition Division, relying on the EU word mark EVAX and the Spanish word mark EVAX and considering that the other earlier marks on which the opposition was based did not cover a wider range of goods than that covered by the abovementioned marks, upheld the opposition in part on account of a likelihood of confusion and rejected the application for registration of the marks applied for in so far as they designated the following goods:
- Class 3: ‘Toiletries; body cleaning and beauty care preparations; cleaning and fragrancng preparations; perfumery and fragrances; detergents; cloths impregnated with a detergent for cleaning’;
  - Class 5: ‘Hygienic preparations and articles; sanitary preparations for medical purposes; feminine hygiene products; absorbent articles for personal hygiene; medicated and sanitising soaps and detergents’.
- 12 On 19 July 2021, the applicant filed a notice of appeal with EUIPO against the decisions of the Opposition Division.
- 13 By the contested decisions, the Board of Appeal upheld the appeals in part on the ground that there was no likelihood of confusion in respect of some of the goods covered by the marks applied for.
- 14 Thus, the Board of Appeal declared the oppositions unfounded in so far as they related to ‘beauty care preparations; fragrancng preparations; perfumery and fragrances; detergents; cloths impregnated with a detergent for cleaning’.
- 15 By contrast, as regards the goods covered by the marks at issue and regarded as identical or similar, the Board of Appeal found that there was a likelihood of confusion and dismissed the appeals.
- 16 Accordingly, pursuant to the contested decisions, registration of the marks applied for was refused in respect of the following goods (‘the goods concerned’):
- Class 3: ‘Toiletries; body cleaning preparations; cleaning preparations’;
  - Class 5: ‘Hygienic preparations and articles; sanitary preparations for medical purposes; feminine hygiene products; absorbent articles for personal hygiene; medicated and sanitising soaps and detergents’.

### **Forms of order sought**

- 17 In each case, the applicant claims that the contested decision concerned should be annulled and that EUIPO and the intervener should be ordered to pay the costs.
- 18 EUIPO and the intervener contend that the actions should be dismissed and that the applicant should be ordered to pay the costs and, in the case of the intervener, to pay the costs incurred in the proceedings before EUIPO.

## Law

- 19 The applicant relies on a single plea in law alleging infringement of Article 8(1)(b) of Regulation 2017/1001.
- 20 The single plea is divided into two parts, which it is appropriate to examine together. By the first part, the applicant alleges that EUIPO, in essence, disregarded the conceptual meaning of the marks applied for. By the second part, the applicant argues, in essence, that the global assessment of the likelihood of confusion is vitiated by errors.
- 21 According to EUIPO, supported by the intervener, the actions must be dismissed. Any conceptual difference between the marks at issue is not such as to counteract the similarity between those marks in other respects in consideration of which the Board of Appeal correctly found that there was a likelihood of confusion.
- 22 Although the applicant does not dispute all the assessments made by the Board of Appeal during the various stages of the examination of whether there is a likelihood of confusion, the fact remains that the General Court cannot be bound by an incorrect assessment of the facts by that board, since that assessment is part of the findings whose legality is being disputed before that court. Thus, according to the case-law, the General Court is competent to examine the assessment made by the Board of Appeal in this respect (see, to that effect, judgment of 18 December 2008, *Les Éditions Albert René v OHIM*, C-16/06 P, EU:C:2008:739, paragraphs 47 and 48).
- 23 In order to comply with the *audi alteram partem* rule, the Court expressly requested the parties, by way of a measure of organisation of procedure, to express, at the hearing, their views on EUIPO's assessment in the contested decisions as to the phonetic similarity and, as regards the second contested decision, on the visual comparison and the identification of the dominant elements. In addition, at the hearing, the parties were reminded of that request.
- 24 Article 8(1)(b) of Regulation 2017/1001 provides that, upon opposition by the proprietor of an earlier trade mark, the trade mark applied for is not to 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. Furthermore, under Article 8(2)(a) of Regulation 2017/1001, 'earlier trade marks' means trade marks registered in a Member State with a date of application for registration which is earlier than the date of application for registration of the EU trade mark.
- 25 The risk that the public may believe that the goods or services in question come from the same undertaking or from economically linked undertakings constitutes a likelihood of confusion. The likelihood of confusion must be assessed globally, according to the relevant public's perception of the signs and goods or services in question and taking into account all factors relevant to the circumstances of the case, in particular the interdependence between the similarity of the signs and that of the goods or services covered (see judgment of 9 July 2003, *Laboratorios RTB v OHIM – Giorgio Beverly Hills (GIORGIO BEVERLY HILLS)*, T-162/01, EU:T:2003:199, paragraphs 30 to 33 and the case-law cited).
- 26 For the purposes of applying Article 8(1)(b) of Regulation 2017/1001, a likelihood of confusion presupposes both that the marks at issue are identical or similar and that the goods or services which they cover are identical or similar. Those conditions are cumulative (see judgment of 22 January 2009, *Commercy v OHIM – easyGroup IP Licensing (easyHotel)*, T-316/07, EU:T:2009:14, paragraph 42 and the case-law cited).

27 Where the protection of the earlier trade mark extends to the entirety of the European Union, it is necessary to take into account the perception of the marks at issue by the consumer of the goods in question in that territory. However, it must be borne in mind that, for an EU trade mark to be refused registration, it is sufficient that a relative ground for refusal for the purposes of Article 8(1)(b) of Regulation 2017/1001 exists in part of the European Union (see, to that effect, judgment of 14 December 2006, *Mast-Jägermeister v OHIM – Licorera Zacapaneca (VENADO with frame and others)*, T-81/03, T-82/03 and T-103/03, EU:T:2006:397, paragraph 76 and the case-law cited).

### ***The relevant public***

28 The Board of Appeal found, in essence, in paragraphs 26 to 37 of the contested decisions, that the relevant Spanish public included, as regards the goods concerned in Class 3, the general public with an average level of attention. As regards the goods concerned in Class 5, the Board of Appeal found that they were aimed at the general public and at professional consumers whose level of attention may vary from average to high depending on the specialised nature of the goods.

29 There is no reason to call into question those assessments, which appear to be consistent with the material in the case file and which, moreover, are not disputed by the parties.

### ***The comparison of the goods***

30 As regards the goods concerned in Class 3, namely ‘toiletries; body cleaning preparations; cleaning preparations’, the Board of Appeal found a similarity between those goods and the goods covered by the earlier marks, which was ‘below average’.

31 As regards one part of the goods concerned in Class 5, namely ‘hygienic articles; feminine hygiene products; absorbent articles for personal hygiene’, the Board of Appeal found that they fell within very broad categories of goods, which included the goods covered by the earlier marks, with the result that the goods in question had to be regarded as identical.

32 By contrast, as regards another part of the goods concerned in Class 5, namely ‘hygienic preparations’ and ‘sanitary preparations for medical purposes’, the Board of Appeal found that the similarity between those goods and the goods covered by the earlier marks was ‘below average’.

33 There is no reason to call into question those assessments, which appear to be consistent with the material in the case file and which, moreover, are not disputed by the parties.

### ***The comparison of the signs***

34 The global assessment of the likelihood of confusion must, so far as concerns the visual, phonetic or conceptual similarity of the signs at issue, be based on the overall impression given by the signs, bearing in mind, in particular, their distinctive and dominant elements. The perception of the marks by the average consumer of the goods or services in question plays a decisive role in the global assessment of that likelihood of confusion. In this regard, the average consumer normally perceives a mark as a whole and does not engage in an analysis of its various details (see judgment of 12 June 2007, *OHIM v Shaker*, C-334/05 P, EU:C:2007:333, paragraph 35 and the case-law cited).

35 Assessment of the similarity between two marks means more than taking just one component of a composite trade mark and comparing it with another mark. On the contrary, the comparison must be made by examining each of the marks in question as a whole, which does not mean that the overall impression conveyed to the relevant public by a composite trade mark may not, in certain circumstances, be dominated by one or more of its components. It is only if all the other components of the mark are negligible that the assessment of the similarity can be carried out solely on the basis of the dominant element (judgment of 12 June 2007, *OHIM v Shaker*, C-334/05 P, EU:C:2007:333, paragraphs 41 and 42). That could be the case, in particular, where that component is capable on its own of dominating the image of that mark which members of the relevant public retain, with the result that all the other components are negligible in the overall impression created by that mark (judgments of 20 September 2007, *Nestlé v OHIM*, C-193/06 P, not published, EU:C:2007:539, paragraph 43, and

of 24 October 2019, *ZPC Flis v EUIPO – Aldi Einkauf (Happy Moreno choco)*, T-498/18, EU:T:2019:763, paragraph 71).

36 In this instance, after describing the marks at issue, the Board of Appeal found that the most distinctive elements of the signs in question were the word elements ‘eva’ and ‘evax’ and that the dominant elements of the marks applied for were the word elements ‘eva’ and ‘intima’.

37 As regards the first mark applied for, the Board of Appeal’s finding regarding the identification of the dominant elements, which, moreover, is not specifically disputed by the applicant, appears to be correct.

38 As regards, on the other hand, the second mark applied for, the Board of Appeal’s finding that the most distinctive elements of the signs in question are the word elements ‘eva’ and ‘evax’ and that the dominant element of the mark applied for corresponds to the word elements ‘eva’ and ‘intima’ appears to be incorrect.

39 In this instance, the Board of Appeal found that ‘the stylised depiction of a female belly will be perceived as indicating that the goods [in question] have the purpose to treat the female body’.

40 As was confirmed by EUIPO’s representative at the hearing, that finding must be understood as meaning that that figurative element is descriptive and, therefore, that it is not to be regarded as dominant.

41 Admittedly, according to the case-law, the descriptive, and therefore weakly distinctive, elements of a trade mark are not generally regarded by the public as being dominant in the overall impression conveyed by that mark (see, to that effect, judgment of 31 January 2013, *K2 Sports Europe v OHIM – Karhu Sport Iberica (SPORT)*, T-54/12, not published, EU:T:2013:50, paragraph 24).

42 However, the weak distinctive character of an element of a composite trade mark does not necessarily imply that that element cannot constitute a dominant element since it may, on account, in particular, of its position in the sign or its size, make an impression on consumers and be remembered by them (judgment of 13 June 2006, *Inex v OHIM – Wiseman (Representation of a cowhide)*, T-153/03, EU:T:2006:157, paragraph 32).

43 When assessing the dominant character of one or more given components of a composite trade mark, account must be taken, in particular, of the intrinsic qualities of each of those components by comparing them with those of other components. In addition and accessorially, account may be taken of the relative position of the various components within the arrangement of that mark (judgment of 23 October 2002, *Matratzen Concord v OHIM – Hukla Germany (MATRATZEN)*, T-6/01, EU:T:2002:261, paragraph 35).

44 In that regard, first, it should be noted that the figurative element is twice as large as the word element ‘eva’ and five times larger than the word element ‘intima’, those last two elements being regarded by the Board of Appeal as ‘dominant’.

45 Secondly, unlike the classification of the figurative element, the descriptive character of the word element ‘intima’ did not prevent the Board of Appeal from regarding that element as ‘dominant’.

46 Thirdly, as regards the ‘intrinsic qualities’ of the figurative element, which must be taken into account in accordance with the case-law referred to in paragraph 43 above, it must be pointed out that, because that element is highly stylised and simplified, it is easy to grasp and memorise and thus shapes the overall impression of the second mark applied for.

47 In those circumstances, the Board of Appeal was incorrect to find, as regards the second mark applied for, that the word elements ‘eva’ and ‘intima’ were the only dominant elements.

### ***The visual comparison***

- 48 The Board of Appeal found, as regards the first mark applied for, that there was an average degree of visual similarity ‘due to the high similarity between the more distinctive and eye-catching verbal elements “eva” and “evax”’.
- 49 As regards the second mark applied for, the Board of Appeal found that there was a low degree of visual similarity.
- 50 For the purposes of assessing the similarity between a composite figurative mark and an earlier word mark, it is appropriate, in accordance with the case-law, to begin by analysing the visual similarity between the word elements and then, if such a similarity is found, to ascertain whether the additional graphic or figurative element, specific to the mark applied for, is capable of constituting a distinguishing feature sufficient to preclude any visual similarity between the signs at issue in the eyes of the relevant public (judgment of 20 April 2005, *Faber Chimica v OHIM – Industrias Quimicas Naber (Faber)*, T-211/03, EU:T:2005:135, paragraph 39).
- 51 As regards the first mark applied for, the Board of Appeal’s finding that there is an average degree of similarity between the signs at issue is correct.
- 52 The mark in question contains few original or eye-catching elements which could constitute distinguishing features sufficient to preclude any similarity between them and the word elements of the earlier mark.
- 53 As regards the second mark applied for, the Board of Appeal found that there was a low degree of visual similarity.
- 54 In that regard, it should be noted that the logic supporting the Board of Appeal’s finding that ‘the marks under comparison are visually similar to a low degree due to the high similarity between the more distinctive and eye-catching verbal elements “eva” and “evax”’ is far from obvious.
- 55 Furthermore, as is apparent from the reasoning set out in paragraphs 77 to 83 of the second contested decision, the Board of Appeal, for the purposes of examining the visual similarity, barely took into account the figurative element consisting of a stylised depiction of a female belly.
- 56 The Board of Appeal confined itself in that regard to the findings that, in general, the word elements are more distinctive than the figurative elements and the figurative element in question has a descriptive character.
- 57 As is apparent from the examination carried out in paragraphs 39 to 47 above, the figurative element consisting of a stylised depiction of a female belly is just as dominant as the word elements ‘eva’ and ‘intima’.
- 58 Lastly, as regards the comparison of a word mark with a figurative mark, it is necessary, after finding that the word elements are visually similar, to ascertain whether the additional graphic or figurative element, specific to the mark applied for, is capable of constituting a distinguishing feature sufficient to preclude any visual similarity between the signs at issue in the eyes of the relevant public (judgment of 20 April 2005, *Faber*, T-211/03, EU:T:2005:135, paragraph 39).
- 59 It must be permissible for a person applying for registration of a figurative mark to avoid similarity with an earlier word mark by adding features which sufficiently distinguish the figurative mark from the earlier word mark. To that end, it is important to examine whether the additional graphic or figurative elements are original and eye-catching.
- 60 In that regard, it should be pointed out that, in this instance, the figurative element is twice as large as the word element ‘eva’. Furthermore, it is a composition resulting from a conceptual and artistic effort. The figurative element, which is an original artistic composition, is easy to grasp and memorise because it is highly stylised and simplified.
- 61 However, it cannot be concluded that the figurative element is capable of constituting a distinguishing feature sufficient to preclude any visual similarity between the word elements of the signs at issue,

namely 'eva' and 'evax'.

62 The figurative element is not sufficiently distinctive to shape the overall impression of the second mark applied for.

63 In those circumstances, the Board of Appeal's finding that there is, as regards the second mark applied for, a low degree of similarity between the signs at issue is correct.

### ***The phonetic comparison***

64 The Board of Appeal found that the marks applied for were phonetically similar to the sign EVAX 'at least' to an average degree.

65 In that regard, in the contested decisions, the Board of Appeal found that, as regards the most distinctive element, namely 'eva' and 'evax', the Spanish public will tend to omit or not clearly spell out the sound of the consonant 'x' when pronouncing the earlier signs, citing the case-law reference ('see, by analogy, 03/09/2009, C-394/08 P, *Zipcar*, EU:C:2009:334, [paragraph] 43').

66 In that regard, first, it should be noted that the order of the Court of Justice to which EUIPO refers does not contain such a finding, either in paragraph 43 thereof or elsewhere.

67 By contrast, in paragraph 43 of the judgment of 25 June 2008 in *Zipcar v OHIM – Canary Islands Car (ZIPCAR)* (T-36/07, not published, EU:T:2008:223), apparently referred to in the contested decisions, it is stated that, 'according to the rules of pronunciation of ordinary Spanish, the first letter of each of the two [marks at issue] ("c" and "z") is pronounced in the same way'.

68 The General Court's assessment in that judgment as regards the pronunciation of the letters 'c' and 'z' as the first letters making up a sign cannot be transposed 'by analogy' to the situation in this instance, which concerns the question whether the Spanish public clearly spells out the sound of the last consonant, 'x', of the word sign EVAX.

69 Secondly, following a question put by the Court at the hearing, all the parties have confirmed by written answers that, in general, the Spanish public clearly spells out the sound of the last consonant, 'x', of the word sign EVAX.

70 Thirdly, at the hearing, the intervener alleged that the applicant's position regarding the pronunciation in Spanish of the word sign EVAX was out of time, in so far as it should have been stated before the Board of Appeal. In addition, the intervener disputed the evidence on which the applicant had relied.

71 Those complaints must be rejected.

72 The applicant adopted a position on a question put by the Court, introduced by a measure of organisation of procedure and put at the hearing. Furthermore, the intervener and the applicant agree that the letter 'x' is pronounced, so that the evidence put forward by the applicant is in any event irrelevant.

73 Fourthly, in its written answer, EUIPO argues that, at least in a non-negligible part of the Spanish territory, which therefore concerns a non-negligible part of the relevant public, the word sign EVAX will be pronounced without clearly spelling out the consonant 'x'.

74 Without it being necessary to examine the relevance of that assertion by EUIPO, it must be held that, even if the letter 'x' in the word sign EVAX is not pronounced, EUIPO's finding as to an average degree of phonetic similarity is not vitiated by error.

75 The final letter 'x', whether or not it is pronounced by the consumer, cannot be regarded as a particularly striking consonant capable of substantially influencing the phonetic impression produced by the earlier marks. The word elements 'eva' and 'evax' share their first three letters. Thus, the pronunciation of the final 'x' is not sufficient to offset the identity of the common part of the elements



‘eva’ and ‘evax’ (see, by analogy, judgment of 15 December 2010, *Epcos v OHIM – Epco Sistemas (EPCOS)*, T-132/09, not published, EU:T:2010:518, paragraph 83).

### ***The conceptual comparison***

76 The Board of Appeal found that, depending on the public’s understanding, either the signs at issue were not similar or the conceptual comparison remained neutral. Although it is stated in paragraph 92 of the first contested decision and paragraph 93 of the second contested decision that that comparison remains ‘natural’, EUIPO confirmed in response to a question from the Court that this was a clerical error.

77 According to the Board of Appeal, for the part of the public which makes a connection between the word ‘eva’ and the first woman on Earth (according to the Bible), that word is not similar to the sign EVAX. By contrast, for the part of the public which understands the word ‘eva’ merely as one female first name among others, the comparison with the sign EVAX remains neutral.

78 In order to examine the conceptual comparison between the word ‘eva’ and the sign EVAX as carried out by the Board of Appeal, it must be borne in mind that it is apparent from the findings in the contested decisions that the Board of Appeal understood the sign EVAX as a fanciful word.

79 The intervener, for its part, maintains that part of the public might understand that sign as referring to the first name Eva since it is not unusual to add a letter to a first name, like Tim/Timy or Rick/Ricky.

80 That argument must be rejected. Apart from the fact that the Board of Appeal did not accept that argument, it cannot succeed. Although, in some languages, the addition of a letter is not unusual and may constitute a diminutive form of the first name in question, the intervener has in no way established that this is the case in Spanish, and in particular as regards the first name Eva to which the final letter ‘x’ is added.

81 Accordingly, the conceptual comparison must start from the premiss, as stated in the contested decisions, that the sign EVAX is understood as a fanciful name.

82 As regards the word ‘eva’, the Board of Appeal considered, referring to paragraph 85 of the judgment of 27 June 2019 in *Sandrone v EUIPO – J. García Carrión (Luciano Sandrone)* (T-268/18, EU:T:2019:452), that, in principle, first names are devoid of semantic content and do not convey any concept, with the result that the conceptual comparison remains neutral.

83 Although it is true that paragraph 85 of the judgment of 27 June 2019 in *Luciano Sandrone* (T-268/18, EU:T:2019:452) may be understood in the manner referred to by the Board of Appeal, it is important to note that that case concerned a comparison of signs each of which consisted of a surname and a forename, namely Luciano Sandrone and DON LUCIANO. It was with regard to the comparison between those marks that the Court concluded that a conceptual comparison between two signs consisting only of such first names or surnames was not possible.

84 In this instance, unlike the case referred to by the Board of Appeal, it is a question of comparing a sign consisting of a female first name – Eva – with a sign consisting of a fanciful name – EVAX.

85 Consequently, the lessons from the judgment of 27 June 2019 in *Luciano Sandrone* (T-268/18, EU:T:2019:452), like those resulting from paragraph 143 of the judgment of 1 December 2021 in *Inditex v EUIPO – Ffauf Italia (ZARA)* (T-467/20, not published, EU:T:2021:842), to which EUIPO refers and which concerned a comparison of signs containing the name Zara, cannot be transposed to the present situation.

86 In those circumstances, it is necessary to examine whether the word ‘eva’, which is included in the marks applied for, differs conceptually from the sign EVAX by applying the criteria usually applied by the case-law.

87 Generally and usually, conceptual similarity implies, according to the case-law, that the signs at issue convey analogous semantic content (judgment of 11 November 1997, *SABEL*, C-251/95,

EU:C:1997:528, paragraph 24).

88 As regards the word ‘eva’, although the parties dispute whether it is understood by the relevant public as alluding to the first woman on Earth (according to the Bible), it is apparent from paragraph 30 of the applications, paragraph 29 of EUIPO’s responses and the intervener’s oral submissions at the hearing, that the parties share the understanding that that word is a female first name.

89 By contrast, as regards the sign EVAX, the main parties understand it as a fanciful name and the intervener’s argument that that sign could also be understood as referring to the first name Eva has been rejected in paragraph 80 above.

90 It follows that the word ‘eva’, as a female first name, conveys semantic content whereas the sign EVAX, being merely a fanciful name, is devoid of such content.

91 According to the case-law, where one of the marks at issue has a meaning from the perspective of the relevant public and the other mark has no meaning, it must be found that the marks in question are conceptually dissimilar (see, to that effect, judgment of 19 September 2017, *RP Technik v EUIPO – Tecnomarmi (RP ROYAL PALLADIUM)*, T-768/15, not published, EU:T:2017:630, paragraphs 88 and 89).

92 In those circumstances, it must be concluded that the signs at issue are conceptually different.

93 Accordingly, it must be found that the Board of Appeal erred in finding, in essence, that, conceptually, the signs at issue were only partially different.

#### **‘Neutralisation’**

94 The applicant submits not only that the signs at issue are conceptually different, but also that that difference is such as to counteract the similarities of those signs in other respects.

95 Contrary to the applicant’s assertions, according to which the conceptual difference is sufficient, in particular in the absence of enhanced distinctiveness of the earlier mark, to counteract the other similarities, counteraction is subject, in accordance with the case-law, to much more specific criteria.

96 According to the case-law, in a situation where at least one of the signs at issue has, from the perspective of the relevant public, a clear and specific meaning which can be grasped immediately by that public, it can be concluded that those signs produce a different overall impression, despite the existence, between them, of certain elements of similarity visually or phonetically (see judgment of 4 March 2020, *EUIPO v Equivalenza Manufactory*, C-328/18 P, EU:C:2020:156, paragraph 75 and the case-law cited).

97 However, in this instance, it cannot be argued that the marks applied for, in so far as they contain the word element ‘eva’, have such a clear and specific meaning which can be grasped immediately by that public.

98 As was held in the contested decisions without being convincingly challenged by the applicant, the relevant public does not understand the word ‘eva’ in a clear and uniform manner. While one part of the public understands it as a common female first name in the same way as other female first names, another part of the public understands it as alluding to the first woman on Earth (according to the Bible).

99 In those circumstances, it must be concluded that the only conceptual difference between the signs is not such that the signs at issue produce a different overall impression.

100 Consequently, the applicant’s complaint relating to counteraction must be rejected. However, the conceptual difference between the signs at issue must be taken into account in the global assessment of the likelihood of confusion.

#### ***The likelihood of confusion***

- 101 A global assessment of the likelihood of confusion implies some interdependence between the factors taken into account and, in particular, between the similarity of the trade marks and that of the goods or services covered. Accordingly, a low degree of similarity between those goods or services may be offset by a high degree of similarity between the marks, and vice versa (judgments of 29 September 1998, *Canon*, C-39/97, EU:C:1998:442, paragraph 17, and of 14 December 2006, *VENADO with frame and others*, T-81/03, T-82/03 and T-103/03, EU:T:2006:397, paragraph 74).
- 102 The Board of Appeal considered that the earlier marks did not enjoy enhanced distinctiveness on account of use, but that, as regards identical or similar goods, the marks at issue, taken as a whole, were sufficiently similar to give rise to a likelihood of confusion.
- 103 In particular, the Board of Appeal considered that the partial conceptual difference did not counteract the similarities in other respects, in particular on account of ‘a visual and, mainly, aural high similarity’ in the ‘most distinctive elements’ of the marks at issue. Furthermore, the Board of Appeal considered that the relevant public, when faced with the marks in question, would be likely to believe that the identical and similar goods come from the same undertaking or, as the case may be, from economically linked undertakings, which is the case, in particular, when the goods in question are ordered verbally in pharmacies.
- 104 The applicant challenges that assessment. It submits, in particular, that the Board of Appeal disregarded the importance of the conceptual differences and incorrectly assessed the various elements to be taken into account in the global assessment of the likelihood of confusion.
- 105 By contrast, EUIPO and the intervener contend that the Board of Appeal correctly refused to regard the phonetic and visual similarities as being counteracted by alleged conceptual differences. They also argue that the global assessment carried out by the Board of Appeal is not vitiated by error.
- 106 In this instance, the global assessment carried out by the Board of Appeal is based, in essence, on the consideration that the partial conceptual difference would not counteract the similarities in other respects, in particular because of ‘a visual and, mainly, aural high similarity’ in the ‘most distinctive elements’ of the marks at issue.
- 107 That assessment is vitiated by errors.
- 108 First, the Board of Appeal, instead of basing its global assessment on the results of the analysis of the visual, phonetic and conceptual similarities, focused its assessment on the ‘most distinctive elements’ of the marks at issue.
- 109 In accordance with the case-law referred to in paragraph 35 above, for the purposes of the comparison of the marks at issue, each must be considered as a whole and it is only if all the other components of a mark are negligible that the assessment of the similarity can be carried out solely on the basis of the dominant element.
- 110 By relying on the ‘most distinctive elements’ of the marks at issue, the Board of Appeal therefore, contrary to the case-law, failed to consider those marks as a whole.
- 111 Secondly, in its global assessment of the likelihood of confusion, the Board of Appeal departed from its own assessments, made at the stage of the visual and phonetic comparison.
- 112 As is apparent from the contested decisions, the Board of Appeal (i) starts from the premiss that a conceptual difference cannot prevail where there is a ‘very high’ visual and phonetic similarity between the signs and (ii) concludes that that is the situation in the cases before it.
- 113 It should be borne in mind that, in its previous examination, the Board of Appeal did not find that there was a ‘very high’ visual and phonetic similarity between the signs at issue.
- 114 As regards the first mark applied for, the Board of Appeal found that there was ‘an average degree’ of visual similarity, as well as phonetic similarity ‘at least to an average degree’, with the earlier signs.

- 115 As regards the second mark applied for, the Board of Appeal found that there was visual similarity ‘to a low degree’, as well as phonetic similarity ‘at least to an average degree’, with the earlier signs.
- 116 Thirdly, as is apparent from the previous examination and contrary to the findings of the Board of Appeal, the signs at issue are conceptually different, irrespective of whether the public recognises the word ‘eva’ as alluding to the first woman in the Bible.
- 117 Fourthly, it is held in the contested decisions that there is a likelihood of confusion, in particular, ‘when the goods in question [are to] be ordered verbally in pharmacies’.
- 118 However, in that regard, it should be noted that the Board of Appeal did not establish beforehand that the goods in question were usually sold in pharmacies and ordered verbally.
- 119 In the absence of prior identification of the marketing conditions, the Board of Appeal cannot give particular relevance to the phonetic comparison in the global assessment of the likelihood of confusion.
- 120 Thus, as regards the second mark applied for, it must be borne in mind that it is conceptually different from the earlier signs, to which it is visually similar only to a low degree and phonetically similar to an average degree.
- 121 While it is true that some of the goods covered are identical, the fact remains that, according to the case-law, there is nothing to prevent a finding that, in view of the circumstances of a particular case, there is no likelihood of confusion, even where identical goods are involved (see, to that effect, judgment of 27 June 2019, *Luciano Sandrone*, T-268/18, EU:T:2019:452, paragraph 96 and the case-law cited).
- 122 It must therefore be concluded that, in the light of all of the foregoing and even taking into account a partial identity of the goods covered, the second mark applied for is not similar to the earlier marks to such a degree as to give rise to confusion for the purposes of Article 8(1)(b) of Regulation 2017/1001.
- 123 The single plea in law in Case T-198/22 must therefore be upheld and the second contested decision must be annulled.
- 124 By contrast, as regards the first mark applied for, which is conceptually different, and phonetically and visually similar to an average degree, the existence of a likelihood of confusion must be determined by taking into account the similarity of the goods in question.
- 125 In that regard, it should be noted that the Board of Appeal found that one part of the goods covered by the first mark applied for was identical to the goods covered by the earlier marks whereas another part of the goods was only similar to a lower than average degree.
- 126 Thus, in so far as the goods covered by the first mark applied for are identical, it must be held that there is a likelihood of confusion.
- 127 The fact that the goods in question are identical in this instance offsets the conceptual differences. Contrary to the applicant’s assertions, the lack of enhanced distinctiveness of the earlier mark and the public’s level of attention are not such as to justify ruling out, as regards the identical goods, a likelihood of confusion.
- 128 By contrast, as regards the goods in respect of which the Board of Appeal found that their similarity with the goods covered by the earlier marks was below average, it must be concluded that that lower than average similarity is not such as to offset the conceptual difference between the signs in question, which is also not offset by a high degree of visual or phonetic similarity.
- 129 Accordingly, the single plea in law in Case T-197/22 must be upheld in part, the first contested decision must be annulled in so far as the ‘toiletries; body cleaning preparations; cleaning preparations’ in Class 3 and the ‘hygienic preparations; sanitary preparations for medical purposes’ in Class 5 are covered by the mark applied for, and the action must be dismissed as to the remainder.

**Costs**

- 130 Under Article 134(1) of the Rules of Procedure of the General Court, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Under Article 134(2) of the Rules of Procedure, where there is more than one unsuccessful party the Court is to decide how the costs are to be shared. Under Article 134(3) of the Rules of Procedure, where each party succeeds on some and fails on other heads, the parties are to bear their own costs.
- 131 As regards Case T-198/22, since EUIPO and the intervener have been unsuccessful, they must be ordered to pay the applicant's costs, in accordance with the form of order sought by the applicant.
- 132 As regards Case T-197/22, the parties are to bear their own costs.

On those grounds,

THE GENERAL COURT (Third Chamber)

hereby:

1. **Annuls the decision of the First Board of Appeal of the European Union Intellectual Property Office (EUIPO) of 1 March 2022 in Case R 1244/2021-1 in so far as the 'toiletries; body cleaning preparations; cleaning preparations' in Class 3 and the 'hygienic preparations; sanitary preparations for medical purposes' in Class 5 are concerned;**
2. **Dismisses the action in Case T-197/22 as to the remainder;**
3. **Annuls the decision of the First Board of Appeal of EUIPO of 1 March 2022 in Case R 1245/2021-1;**
4. **Orders the parties to bear their own costs in Case T-197/22;**
5. **Orders EUIPO and Arbora & Ausonia, SL to pay the costs incurred by Ioulia and Irene Tseti Pharmaceutical Laboratories SA in Case T-198/22.**

Schalin

Steinfatt

Kukovec

Delivered in open court in Luxembourg on 21 June 2023.

V. Di Bucci

M. van der Woude

Registrar

President

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\* Language of the case: English.