

**DECISION
of the First Board of Appeal
of 3 October 2022**

In case R 658/2022-1

Klädarkivet Holding AB

Nybrogatan 44

114 40 Stockholm

Sweden

Applicant / Appellant

represented by TIME DANOWSKY Advokatbyrå AB, Box 590, 114 11 Stockholm,
Sweden

v

ALVARO MORENO SLU

Calle Aguilucho Cenizo

(Pol. Industrial Las Vegas)

41640 Osuna

Spain

Opponent / Defendant

represented by NEWPATENT, Puerto 34, 21001 Huelva, Spain

APPEAL relating to Opposition Proceedings No B 3 133 899 (European Union trade
mark application No 18 269 652)

THE FIRST BOARD OF APPEAL

composed of G. Humphreys (Chairperson), A. González Fernández (Rapporteur) and
C. Bartos (Member)

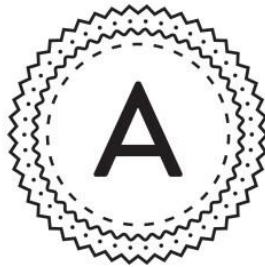
Registrar: H. Dijkema

gives the following

Decision

Summary of the facts

- 1 By an application filed on 7 July 2020, Klädarkivet Holding AB ('the applicant') sought to register the figurative mark



for the following list of goods and services:

Class 25 – Clothing; footwear; shoes; headgear;

Class 35 – Retail services, in store and online, in relation to clothing, second hand clothing, jewellery, costume jewellery, clothing accessories, sunglasses, watches, bags, handbags, shoes, footwear, headgear, perfumed candles, aromatherapy fragrance candles, clothing care products such as lint rollers and patches for clothing, leather grease, leather wax;

Class 45 – Personal shopper services; personal fashion consulting services; advice relating to clothing, accessories and fashion; providing personal shopping services for others in store and online; rental of clothing; rental of jewellery; online social networking services.

The applicant claimed the colours: black and white.

- 2 The application was published on 31 July 2020.
- 3 On 3 November 2020, ALVARO MORENO SLU ('the opponent') filed an opposition against the registration of the published trade mark application for all the above goods and services.
- 4 The grounds of opposition were those laid down in Article 8(1)(b) and Article 8(5) EUTMR.
- 5 The opposition was based on the following earlier rights:
 - a) EU trade mark No 18 032 097 (fig.) ('earlier mark 1');



filed on 5 March 2019 and registered on 5 September 2019 for the following goods and services:

Class 9 – Sunglass nose pads; anti-glare glasses; eyewear pouches; chains for sunglasses; pince-nez chains; chains for spectacles and for sunglasses; clip-on sunglasses; cords for sunglasses; eyeglass lanyards; sunglass cords; spectacle straps; straps for sunglasses; spectacle lenses; spectacle lenses; spectacle cases; cases for children's eye glasses; cases for sunglasses; cases for spectacles and sunglasses; covers for glasses; covers for sunglasses; spectacles [optics]; alidades; anti-glare glasses; dustproof glasses; anti-glare glasses; pince-nez chains; prescription eyeglasses; antireflection coated eyeglasses; spectacle cords; corrective eyewear; spectacle lenses; magnifying eyeglasses; diving goggles; scuba goggles; sports glasses; snow goggles; reading glasses; fashion eyeglasses; motorcycle goggles; swim goggles; prescription goggles for swimming; camera goggles; sight glasses [optical]; virtual reality glasses; goggles; safety glasses for protecting the eyes; sunglasses; fashion sunglasses; prescription sunglasses; welding goggles; theatre glasses; shooting glasses [optical]; night vision goggles; sports glasses; snow goggles; smartglasses; spectacles [optics]; spectacles [optics]; cyclists' glasses; snow goggles; glacier eyeglasses; make up goggles; children's eye glasses; polarizing spectacles; goggles; 3d spectacles; 3d spectacles for television receivers; 3d spectacles; replacement lenses for glasses; optical lenses for use with sunglasses; spectacle lenses; lenses for sunglasses; spectacle lens blanks; spectacle frames; frames for sunglasses; unmounted spectacle frames; spectacle frames made of metal or of a combination of metal and plastic; spectacle frames made of metal and of synthetic material; frames for spectacles and sunglasses; spectacle frames made of metal; spectacle frames made of a combination of metal and plastics; spectacle frames made of plastic; frames for sunglasses; eyeglass shields; spectacle temples; bars for spectacles; sunglass temples; parts for spectacles; spectacle nose pads; nose pads for eyewear; side guards for eyeglasses; smart phones in the form of eyewear; spectacle holders; spectacle holders; spectacle lenses; cases adapted for mobile phones; mobile telephone cases made of leather or imitations of leather; carrying cases for cellular phones; mobile telephone covers made of cloth or textile materials; cell phone covers; carriers adapted for mobile phones; covers for tablet computers; flip covers for tablet computers; software for tablet computers; stands adapted for tablet computers; tablet holders adapted for use in cars; bags adapted for laptops; downloadable electronic newsletters; laptop covers; bags adapted for laptops; carrying cases for portable music players; leather cases for mobile phones; cases adapted for notebook computers; downloadable mobile applications for use with wearable computer devices; jewellery that communicates data; portable telecommunications apparatus; radios incorporating clocks; watchbands that communicate data to smartphones; wearable communications devices in the form of wristwatches; carrying cases for mobile computers; mobile software; computer software; embedded operating software; mobile apps; computer software applications, downloadable; computer application software; flip covers for smart phones; labels with integrated rfid chips; apparatus for the transmission of data; hands-free kits for cell phones; hands-free headsets for cell phones; data suits; smart bracelets;

Class 14 – Jewelry; paste jewellery [costume jewelry (Am.)]; key chains as jewellery [trinkets or fobs]; jewellery in the form of beads; enamelled jewellery; jewellery for personal adornment; jewellery, clocks and watches; lockets [jewellery]; pins being jewelry; clips of silver [jewellery]; bracelets [jewellery, jewelry (Am.)]; bracelets made of embroidered textile [jewellery]; jewellery,

clocks and watches; rings [jewellery, jewelry (Am.)]; cuff links; cuff links coated with precious metals; cuff links made of imitation gold; cuff links of precious metal; cuff links made of precious metals with precious stones; cuff links made of precious metals with semi-precious stones; cuff links made of gold; cuff links made of porcelain; cuff links made of precious metals with semi-precious stones; cuff links made of silver plate; tie bars; key rings [split rings with trinket or decorative fob]; leather key fobs; key fobs of common metal; key rings comprising reel mechanisms; fancy keyrings of precious metals; key fobs of precious metals; key rings of leather; badges of precious metal; lapel badges of precious metal; watches bearing insignia; jewellery rope chain for anklets; ankle bracelets; jewel cases; cases [fitted] for jewels; cuff links; amulets [jewellery, jewelry (Am.)]; decorative articles [trinkets or jewellery] for personal use; tie bars; friendship bracelets; charity bracelets; trophies made of precious metals; clocks and watches; dress watches; digital clocks; clocks and watches in general; watchstraps; wristwatches with gps apparatus; pocket watches; watches made of precious metals; desk clocks; bracelets of precious metal; parts for clocks; parts and fittings for jewellery; ornaments, made of or coated with precious or semi-precious metals or stones, or imitations thereof; metal key fobs; key fobs of imitation leather; jewellery boxes and watch boxes; jewelry boxes of metal; key rings [split rings with trinket or decorative fob]; key rings and key cords; commemorative medals; key fobs, not of metal; jewelry cases [caskets or boxes]; jewellery, including imitation jewellery and plastic jewellery; paste jewellery [costume jewelry (Am.)]; paste jewellery [costume jewelry (Am.)]; jewelry; time instruments; metal badges for wear [precious metal]; cuff links and tie clips; electronic alarm clocks; diadems; necklaces [jewellery]; pendants; presentation boxes for horological articles; presentation boxes for jewelry; paste jewellery [costume jewelry (Am.)]; bracelets; brooches [jewellery]; chains [jewelry]; horological articles; paste jewellery [costume jewelry (Am.)]; articles of jewellery coated with precious metals; rings [jewellery] made of non-precious metal; rings [jewellery] made of precious metal; rings [jewellery, jewelry (Am.)]; imitation jewellery ornaments; pins being jewelry; ornamental hat pins; lapel pins [jewellery]; cases [fitted] for jewels; housings for clocks and watches; watch straps of plastic; watchstraps; watch crystals; electronic alarm clocks; statues and figurines, made of or coated with precious or semi-precious metals or stones, or imitations thereof;

Class 18 – Umbrellas and parasols; purse frames; casual bags; wheeled bags; ladies' handbags; small clutch purses; handbags, purses and wallets; shoulder bags; straps for handbags; luggage, bags, wallets and other carriers; toiletry bags; cross-body bags; travelling sets [leatherware]; suitcases; wheeled suitcases; leather suitcases; travelling bags made of imitation leather; leather bags and wallets; card wallets [leatherware]; key cases; clutches [purses]; leather wallets; combination walking sticks and umbrellas; travelling sets [leatherware]; semi-worked fur; imitation leather; worked or semi-worked hides and other leather; key-cases of leather and skins; coin holders; carriers for suits, shirts and dresses; travelling sets; vanity cases, not fitted; coin purses, not of precious metal; leather cases; suitcases; luggage tags [leatherware]; plastic luggage tags; travel cases; leather, unworked or semi-worked; multi-purpose purses; evening handbags; card wallets [leatherware]; clothing for pets; animal carriers [bags]; clothing for pets; blankets for animals; leads for animals; all-purpose athletic bags; general purpose sport trolley bags; bags for sports clothing; sports packs; school knapsacks; daypacks; gentlemen's handbags, satchels, small rucksacks, umbrellas for children, children's shoulder bags, satchels, satchels, key cases, key bags, key-cases of leather and skins, duffel bags, shoe bags for travel, bags for umbrellas, towelling bags, shoe bags for travel; shoulder belts; bumbags; wallets for attachment to belts; bags for umbrellas; telescopic umbrellas; portmanteaus; travel baggage; wash bags for carrying toiletries; gym bags; beach bags; clutch bags; travelling bags; umbrella sticks; roll bags; ankle-mounted wallets; wrist-mounted wallets; travel garment covers; key bags; pouches; wallets; backpacks; back frames for carrying children; sling bags; hiking rucksacks; bags for climbers; bags for climbers; casual bags; bags for campers; sport bags; duffel bags; carry-on bags; travel bags made of plastic materials; travelling sets [leatherware]; flexible bags for garments; shoe bags; bags for climbers; hipsacks; shoe bags; gentlemen's handbags; hiking bags; waterproof bags; slouch handbags; bags for climbers; briefcases [leather goods]; travelling sets [leatherware]; luggage tags [leatherware]; small rucksacks; rainproof parasols; straps for luggage; belt bags and hip bags; kit bags; harnesses; rattan canes; hiking poles; wading staffs; walking staffs; folding walking sticks; walking stick seats; walking stick seats; speciality holsters adapted for carrying folding walking sticks; baby backpacks; straps for luggage;

Class 25 – Shirts for suits; suit coats; suits; men's suits; leisure suits; suits; dinner jackets; men's suits; suits; three piece suits [clothing]; jackets [clothing]; dress shirts; silk ties; ascots (ties); bowties; pocket squares; kerchiefs [clothing]; morning coats; gilets; dress pants; dress shoes; belts [clothing]; leather belts [clothing]; cummerbunds; cummerbunds; infants' boots, socks for infants and toddlers, children's footwear, snap crotch shirts for infants and toddlers, overalls for infants and toddlers, trousers for children, children's wear, children's outerclothing, swim wear for children, clothing, footwear, headgear; lingerie, underwear, foundation garments; swimming costumes; bathing suit cover-ups; bath sandals; bath slippers; loungewear; nightwear; pyjamas; robes; outerclothing; ready-to-wear clothing; tee-shirts; sweat shirts; coats; jumpers; long and short trousers; thermal underwear; men's underwear; beach robes; beach shoes; beachwear; beach hats; beachwear; sandals and beach shoes; tops [clothing]; vest tops; trunks; swimming costumes; swimming costumes; gussets for bathing suits [parts of clothing]; swimming costumes; bathing drawers; bathing caps; swim shorts; bath slippers; bathing suit cover-ups; bathwraps; bathing drawers; swimming costumes; swim wear for gentlemen and ladies; sarongs; beach wraps; blouses; halter tops; chemise tops; caps [headwear]; visors; ankle socks; men's socks; trouser socks; slipper socks; socks and stockings; fabric belts [clothing]; gloves [clothing]; jumpers; knitted gloves; sports shoes, winter gloves; men's and women's jackets, coats, trousers, vests; cravats; footwear for men; training shoes; leather shoes; weatherproof clothing; swim wear for children; shoe soles; turtleneck sweaters; suspenders; fur hats; fashion hats; sportswear; polo knit tops; denims [clothing]; baby bodysuits; windproof clothing; sportswear; one-piece clothing for infants and toddlers; babies' undergarments; sweaters; baby clothes; polo shirts; insoles [for shoes and boots]; denim jeans; sweatpants; trousers shorts; gym shorts; camouflage pants; sports pants; stretch pants; trousers for children; cuffs; ear muffs [clothing]; jumper suits; coveralls; mittens; athletic tights; maillots; unitards; sports caps and hats; gloves with conductive fingertips that may be worn while using handheld electronic touch screen devices; jumpers; caps with visors; scarves; jogging sets [clothing]; shoe covers, other than for medical purposes; sports jackets; waist belts; leather jackets; printed t-shirts; undershirts; baby boots; wrist warmers; infants' footwear; stuff jackets [clothing]; flip-flops; fleece vests; leather waistcoats; blousons; shirt-jacs; long-sleeved shirts; neck scarves; silk scarves; blazers; bodies [clothing]; rain boots; ankle boots; winter boots; mountaineering boots; booties; smoking jackets; burnouses; fur coats and jackets; parkas; sweat bands for the wrist; shoulder straps for clothing; lounging robes, suspenders; belts made from imitation leather; belts [clothing]; gloves including those made of skin, hide or fur; dresses made from skins; underwear; sweat-absorbent underwear; thong sandals; cap peaks; knitted caps; sports headgear [other than helmets]; tank tops; bra straps; leisurewear; sports socks; footwear not for sports; casual shirts; sports shirts with short sleeves; sports jerseys and breeches for sports; clothing for men, women and children; outerclothing for men; slipovers [clothing]; sleepsuits; boys' clothing; long underwear; clothing made of fur; oilskins [clothing]; leisurewear; clothing of imitations of leather; casualwear; knitted underwear; clothing of imitations of leather; knitwear [clothing]; bottoms [clothing]; outerclothing for boys; woven clothing;

Class 35 – Sales promotions at point of purchase or sale, for others; providing business marketing information; business advice relating to marketing management consultations; provision of information relating to marketing; market analysis and research; internet marketing; product marketing; arranging and conducting marketing promotional events for others; advice relating to marketing management; development of marketing strategies and concepts; dissemination of commercial information; dissemination of advertisements via the internet; dissemination of advertisements; distribution of promotional matter; production of advertising material; demonstration of goods for promotional purposes; preparation of advertising material; demonstration of goods for promotional purposes; production of advertising material; compilation, production and dissemination of advertising matter; management on behalf of industrial and commercial enterprises in terms of supplying them with office requisites; provision of information and advice to consumers regarding the selection of products and items to be purchased; business management of wholesale and retail outlets; dissemination services of advertisement matter; customer loyalty services for commercial, promotional and/or advertising purposes; issuing of publicity leaflets; publication of advertising literature; publication of printed matter for advertising purposes; publication of publicity materials on-line; publication of publicity materials and texts; electronic publication of printed matter for advertising purposes; arranging of displays for advertising purposes; arranging of presentations for advertising purposes; organisation of customer

loyalty programs for commercial, promotional or advertising purposes; prize draws (organising of -) for promotional purposes; organisation and holding of fairs for commercial or advertising purposes; arranging and conducting of fairs and exhibitions for advertising purposes; arranging and conducting of art exhibitions for commercial or advertising purposes; planning and conducting of trade fairs, exhibitions and presentations for economic or advertising purposes; distribution of publicity materials (flyers, prospectuses, brochures, samples, particularly for catalogue long distance sales) whether cross border or not; distribution of advertising material by post; distribution of publicity materials (flyers, prospectuses, brochures, samples, particularly for catalogue long distance sales) whether cross border or not; distribution and dissemination of advertising materials [leaflets, prospectuses, printed material, samples]; distribution and dissemination of advertising materials [leaflets, prospectuses, printed material, samples]; dissemination of advertising matter online; issuing and updating of advertising texts; organization of exhibitions for commercial or advertising purposes; provision of advertising space by electronic means and global information networks; arranging of demonstrations for advertising purposes; dissemination of advertising matter; dissemination of advertising via online communications networks; dissemination of advertising matter by mail; dissemination of advertising, marketing and publicity materials; direct mail advertising; distribution of advertising material by post; dissemination of advertising and promotional materials; conducting, arranging and organizing trade shows and trade fairs for commercial and advertising purposes; design of advertising brochures; design of advertising logos; design of advertising materials; design of advertising flyers; distribution of advertising announcements; distribution of advertising mail and of advertising supplements attached to regular editions; distribution of prospectuses for advertising purposes; handbill distribution; distribution of flyers, brochures, printed matter and samples for advertising purposes; distribution of advertising material; distribution of promotional matter; distribution of samples for publicity purposes; distribution of products for advertising purposes; distribution of publicity texts; organization of exhibitions for commercial or advertising purposes; bill-posting; advertising business especially in the field of telematic and telephone networks; personnel recruitment advertising; advertising the goods and services of online vendors via a searchable online guide; advertising of the services of other vendors, enabling customers to conveniently view and compare the services of those vendors; advertising of business web sites; advertising relating to transport and delivery; direct mail advertising; banner advertising; advertisement for others on the internet; on-line advertising on a computer network; on-line advertising on a computer network; on-line advertising on a computer network; on-line advertising on a computer network; on-line advertising on a computer network; online advertisements; on-line advertising on a computer network; on-line advertising on a computer network; advertising particularly services for the promotion of goods; advertising in the popular and professional press; advertising in periodicals, brochures and newspapers; magazine advertising; electronic billboard advertising; bill-posting; advertising, including on-line advertising on a computer network; advertising, marketing and promotional services; advertising by transmission of on-line publicity for third parties through electronic communications networks; advertising, marketing and promotional services; personnel recruitment advertising; advertising for others; direct mail advertising; direct mail advertising to attract new customers and to maintain the existing customer base; advertising by mail order; direct marketing; promotional services provided by telephone; radio advertising; television advertising; advertising; radio advertising; advertising and marketing; on-line advertising and marketing services; publicity and sales promotion services; collection of information relating to advertising; advertising agencies; consultancy relating to advertising; organisation of events for commercial and advertising purposes; online retailing of clothing accessories, accessories for clothing, perfumery, eyeglasses and optical goods, clocks and watches, travel articles, umbrellas, travelling bags (leatherware), wallets for cards (leatherware), wallets of leather (leatherware), travelling sets (leatherware), luggage tag holders (leatherware), bags and wallets of leather, semi-processed leather, imitations of leather, worked and semi-worked hides and leather, key cases of leather and hide, travelling bags of leather, bags, backpacks, wallets, clothing, footwear and headwear, suits, ceremonial clothing, polo shirts, dress shoes, trainers, parkas, blazers, jerseys, hosiery, underclothing, waistcoats, trousers, sweatshirts, wallets, belts, sports shoes, ties, cuff links, braces, handkerchiefs for suits, bow-ties, arranging and conducting of promotional marketing events, for others; organization of events, exhibitions, fairs and shows for commercial, promotional and advertising purposes; mediation of agreements regarding the sale and purchase of goods; promoting the sale of goods and services of others through the distribution of printed material and

promotional contests; sales promotion for others provided through the distribution and the administration of privileged user cards; issuing of publicity leaflets; promotion, advertising and marketing of on-line websites; publication of advertising literature; publication of publicity materials; market campaigns; publication of publicity texts; advertising; advertising via electronic media and specifically the internet; advertisement via mobile phone networks; advertising through all public communication means; electronic commerce services, namely, providing information about products via telecommunication networks for advertising and sales purposes; administration relating to sales methods; advisory services relating to sales promotion; advisory services relating to sales promotion; arranging business introductions relating to the buying and selling of products; presentation of goods on communication media, for retail purposes; presentation of goods via communication media for retail and advertising purposes, including promotion relating to the sale of goods and services for others by means of the distribution of advertising material and the dissemination of advertising messages on computer networks, advertising and sales promotion relating to goods and services offered and requested via telecommunications or electronic means; administrative processing and organising of mail order services; sales promotion; business administration services for processing sales made on the internet; sales promotion for others; presentation of goods on communication media, for retail purposes; clerical services for the taking of sales orders; provision of space on web-sites for advertising goods and services; compilation of advertisements for use as web pages on the internet; promotion, advertising and marketing of on-line websites; franchising, relating to consultancy and assistance in business management, organisation and promotion; publicity and sales promotion services; import and export services, sales promotion; online promotion via computer networks and websites; promotional marketing, demonstration of goods for promotional purposes, advertising, in particular promotion of goods, dissemination of promotional leaflets, business administration, promotion of goods and services via the dissemination of discount cards, import and export of goods; assistance in business management within the framework of a franchise contract; services rendered by a franchisor, namely, assistance in the running or management of industrial or commercial enterprises; import-export agencies for clothing, footwear, headgear, clothing accessories, accessories for clothing, leatherware; modelling agency services relating to sales promotions; provision of models for advertising; provision of models for advertising; promoting the goods and services of others by means of a loyalty rewards card scheme; administration of a discount program for enabling participants to obtain discounts on goods and services through use of a discount membership card; administration of the business affairs of franchises; business advice relating to franchising; business advice and consultancy relating to franchising; assistance in product commercialization, within the framework of a franchise contract; provision of assistance [business] in the operation of franchises; services rendered by a franchisor, namely, assistance in the running or management of industrial or commercial enterprises; business advisory services relating to the establishment and operation of franchises; advisory services relating to publicity for franchisees; business management assistance in the field of franchising; business advertising services relating to franchising; computerized on-line ordering services; on-line promotion of computer networks and websites; business information services provided on-line from a computer database or the internet; online ordering services; online data processing; presentation of goods on communication media, for retail purposes; presentation of goods on communication media, for retail purposes; retailing and wholesaling in shops and via the internet of clothing, footwear and headwear, perfumery, cosmetics, hosiery and underclothing, wallets, backpacks, bags, hardware, computer bags, covers for telephones and tablets, covers and bags for laptops, umbrellas, fashion and clothing accessories, accessories for clothing, suitcases, tie clips, key chains, suits, jackets (clothing), cuff links, jewellery, clocks and watches, eyeglasses, sunglasses, travel articles, travel accessories, suitcases, waistcoats, trousers, sweatshirts, wallets, belts, shirts, sports shoes, ties, cuff links, braces, handkerchiefs for suits, bow ties, travelling bags (leatherware), wallets for cards (leatherware), wallets of leather (leatherware), travelling sets (leatherware), luggage tag holders (leatherware), luggage tags [leatherware], bags and wallets of leather, semi-processed leather, imitations of leather, worked and semi-worked hides and leather, key cases of leather and hide, travelling bags of leather, braces.

b) EU trade mark No 18 032 098 (fig.) ('earlier mark 2'):



filed on 5 March 2019 and registered on 3 September 2019 for the same goods and services as earlier mark 1.

- 6 By decision of 25 February 2022 ('the contested decision'), the Opposition Division partially upheld the opposition and rejected the trade mark application for the goods and services below on the grounds that there was a likelihood of confusion. It ordered the parties to bear their own costs.

Class 25 – Clothing; Footwear; Shoes; Headgear;

Class 35 – Retail services, in store and online, in relation to clothing, second hand clothing, jewellery, costume jewellery, clothing accessories, sunglasses, watches, bags, handbags, shoes, footwear, headgear, perfumed candles, aromatherapy fragrance candles, clothing care products such as lint rollers and patches for clothing, leather grease, leather wax;

Class 45 – Personal shopper services; Personal fashion consulting services; Advice relating to clothing, accessories and fashion; Providing personal shopping services for others in store and online; rental of clothing; Rental of jewellery.

- 7 The Opposition Division gave, in particular, the following grounds for its decision.
- The evidence submitted by the opponent does not demonstrate that the earlier trade marks have a reputation. Therefore, one of the necessary conditions contained in Article 8(5) EUTMR is not fulfilled and the opposition cannot be successful under this ground of refusal.
 - The goods and services found to be identical or at least similar target the public at large. The degree of attention of the relevant public is average.
 - The contested goods in Class 25 are identical, the contested services in Class 35 are at least similar, and most of the contested services in Class 45 are similar to the goods and services covered by the earlier marks. Only the contested 'online social networking services' are dissimilar to the goods and services covered by the earlier marks.
 - The signs at issue are figurative marks. The earlier mark 1 is the letter 'A' in a standard bold white typeface within a blue shield. The contested sign is the letter 'A' in a standard bold typeface within a dotted and zigzagged circular label.
 - The letter 'A' has no immediate and concrete relation with the relevant goods and services and is, therefore, distinctive to a normal degree.
 - The shield of the earlier mark 1 and the label shape of the contested sign are decorative, as is the standard typeface of the marks and the colours.

- The signs have no element that could be considered clearly more dominant than other elements.
 - Visually, the contested sign and the earlier mark 1 coincide in the depiction of a distinctive upper-case letter ‘A’ in a standard typeface placed in a central position on a label. They differ in the shape of their labels and colours. These, however, are decorative. Therefore, these differences are not major and do not constitute elements that will be easily remembered by the relevant public. Therefore, the signs are visually similar to an average degree.
 - The differences between the signs arising from the respective labels and colours are not sufficient to give the consumer a different overall visual impression, especially considering that they are merely decorative. Furthermore, the signs do not have any further verbal and figurative elements that would differentiate them.
 - Aurally, the signs are identical since they contain the same single letter.
 - Since the signs coincide in the concept of their common letter ‘A’, and their figurative components do not convey any particular concept, the signs are conceptually highly similar.
 - In the evidence submitted by the opponent, there is no or very little information for earlier mark 1. Therefore, the opponent failed to demonstrate that its trade mark has an enhanced distinctiveness through its use in the eyes of relevant consumers. The distinctiveness of earlier mark 1 must be seen as normal.
 - The fact that several trade mark registrations that contain the letter ‘A’ exist does not in itself render earlier mark 1 distinctive to a low degree due to widespread use. The trade mark register does not reflect the situation on the market.
 - Considering all the above, there is a likelihood of confusion on the part of the public and, therefore, the opposition is partly well founded on the basis of earlier mark 1. Since earlier mark 2 is less similar to the contested sign and covers the same goods and services as earlier mark 1, the outcome cannot be different with respect to this earlier right.
- 8 On 21 April 2022, the applicant 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 10 June 2022. In its statement of grounds of the appeal, the applicant clarified its claim and requested that the contested decision be partly annulled and that the contested sign be allowed to proceed to registration for all goods and services.
- 9 In its response received on 10 August 2022, the opponent requested that the trade mark application be entirely rejected, and that the applicant be ordered to bear the costs of the opposition and the appeal proceedings.

Submissions and arguments of the parties

- 10 The arguments raised in the statement of grounds may be summarised as follows.
- The conditions of Article 8(5) EUTMR are not fulfilled and there is no likelihood of confusion between the contested sign and the earlier marks.
 - The Opposition Division’s finding that the goods and services in conflict are partly identical, partly similar and partly dissimilar is correct.
 - The letter ‘A’ fulfils the function of an abbreviation in the earlier marks and in the contested sign, namely for ‘Arkivet’ in the contested sign and for ‘Alvaro’ in the earlier marks. It does not have a specific meaning in connection with the relevant goods and services. Contrary to the Opposition Division’s findings, the blue shield of the earlier marks and the circular label of the contested sign should not be regarded as merely decorative.
 - The signs coincide only in the letter ‘A’ in the centre of the signs. However, the marks evoke a different overall visual impression (28/11/2016, B 813 594). Even though both the earlier marks and the contested sign contain the letter ‘A’, their font and colour differ. The graphical depiction as well as their remaining elements are clearly different.
 - In line with the reasoning provided by the Second Board of Appeal in its decision of 12 June 2007, R 1418/2006-2, F (fig.) / F regarding the word mark ‘F’, the opponent should not be able to monopolise all possible depictions of a single letter of the alphabet, especially when the letter ‘A’ is the only element that the marks in question have in common.
 - Although there is some aural similarity due to the presence of the letter ‘A’, this can be disregarded. Insofar as single letters are used as abbreviations of names (‘Arkivet’ and ‘Alvaro’), it is quite likely that the average consumer will not pronounce the respective letter as a letter of the alphabet (23/10/2003, R 663/2002-1, K (fig.) / K (fig.), § 30; 12/06/2007, R 1418/2006-2, F (fig.) / F, § 24). Therefore, the aural comparison is of limited importance. There are no aural similarities between the contested sign and earlier mark 2.
 - Conceptually, the presence of the letter ‘A’ in the marks in conflict has no relevance. Signs perceived as a letter of the alphabet are only capable of conveying the ‘generic concept’ of the specific letter. The mere fact that the same letter could serve to describe the signs is not in itself sufficient to establish a conceptual identity or even similarity between those signs. Another conclusion could only be drawn if the single letter in question had a specific meaning in connection with the goods and services, which is not the case here (14/03/2017, T-276/15, e (fig.) / e (fig.), EU:T:2017:163, § 27; 26/03/2021, R 551/2018-G, Device (fig.) / Device (fig.), § 78-85).
 - When purchasing some of the relevant goods, such as clothing, the visual aspect plays a greater role in the global assessment of the likelihood of

confusion (06/10/2004, T-117/03 – T-119/03 & T-171/03, NL, EU:T:2004:293, § 50). In addition, for the rest of the goods and services concerned, the visual aspects predominate, since the relevant public will perceive the signs visually, for example in stores, on bags or on the clothes themselves. Therefore, the considerable visual differences between the signs are particularly relevant.

- In the assessment of a likelihood of confusion between signs comprising the same single letter, the visual comparison is, in principle, decisive. Even aural and conceptual identity may be overridden by sufficient visual differences (12/12/2007, R 1655/2006-4, M (fig.) / M (fig.); Guidelines, Part C, Section 2, Chapter 4, 3.4.1.7 Signs consisting of a single letter).
- In the present case, the visual aspects compensate for any aural similarities between the signs, if any such similarities exist. A likelihood of confusion can safely be excluded even for identical goods and services.
- In July 2021, there were at least 170 EU trade marks registered in the trade mark register for goods in Classes 25 and 35. Considering the high number of similar marks that already exist, it would be unreasonable if the opponent could successfully object to every trade mark application for a figurative mark containing the letter ‘A’.

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

- There is a likelihood of confusion between the marks in conflict.
- The coinciding letter ‘A’ is the most important element in the visual comparison between the contested sign and the earlier marks and it catches the consumer’s attention. The signs’ figurative elements are merely decorative and have a minor impact on the signs’ overall impression on the relevant public.
- The signs will be perceived and pronounced identically as the letter ‘A’, which renders the signs conceptually identical (C-341/12 P, G, EU:C:2013:206; 10/11/2011, T-22/10, e (fig.) / e (fig.), EU:T:2011:651, § 99; 08/05/2012, T-101/11, G, EU:T:2012:223, § 56; 21/03/2013, 11/07/2014, T-425/12, e (fig.) / e (fig.), EU:T:2014:626, § 38; 07/10/2014, T-531/12, T, EU:T:2014:855, § 72-73; 15/03/2016, T-645/13, E (fig.) / E (fig.), EU:T:2016:145, § 101; 20/07/2017, T-521/15, D (fig.) / D (fig.) et al., EU:T:2017:536, § 55). The opponent stated ‘[i]t is clear that there are not phonetical similarities between the contested EUTM and the earlier marks of the opponent’ (see comments made by the Board at paragraph 37 in this respect).
- Due to their high visual similarity, the signs are similar overall (08/05/2012, T-101/11, G, EU:T:2012:223, § 62).
- The General Court has stated in a number of cases that a trade mark containing a single letter or a single numeral is indeed capable of being inherently distinctive (06/10/2011, T-176/10, Seven for all mankind, EU:T:2011:577,

§ 36; 08/05/2012, T-101/11, G, EU:T:2012:223, § 50; 05/11/2013, T-378/12, X, EU:T:2013:574, § 37-51; 20/07/2017, T-521/15, D (fig.) / D (fig.) et al., EU:T:2017:536, § 61).

- The relevant public rarely has a chance to make a direct comparison between the signs but must place its trust in its imperfect recollection of the marks in question.
- The applicant did not prove that the relevant public will actually encounter relevant similar trade marks on the market.
- The Boards of Appeal are not bound by previous decisions of the Office.

Reasons

- 12 The appeal is admissible, but not well founded. The Opposition Division correctly found that there is a likelihood of confusion pursuant to Article 8(1)(b) EUTMR.

Article 8(5) EUTMR

- 13 The parties did not contest the Opposition Division's correct assessment that the evidence submitted by the opponent does not demonstrate that the earlier trade marks have a reputation. The evidence does not provide sufficient information about the extent of use of the earlier marks, such as sales volumes, market share, promotional activities, etc., or any indication of the degree of recognition of the marks by the relevant public. Therefore, one of the necessary conditions contained in Article 8(5) EUTMR is not fulfilled, and the Opposition Division was right to conclude that the opposition cannot be successful under this ground of refusal.

Article 8(1)(b) EUTMR

- 14 Under Article 8(1)(b) EUTMR, upon opposition by the proprietor of an earlier trade mark, the trade mark applied for will not be registered if, because of its identity with, or similarity to, the earlier trade mark and the identity or similarity between the goods or services covered by the trade marks, there is 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. In addition, under Article 8(2)(a)(i) and (ii) EUTMR, 'earlier trade mark' means EU trade marks and trade marks registered in a Member State with a date of application for registration that is earlier than the date of application for registration of the EU trade mark.
- 15 According to settled case-law, the likelihood of confusion is to be understood as being the risk that the public might believe that the goods or services covered by the earlier mark and those covered by the mark applied for come from the same undertaking or, as the case may be, from economically linked undertakings. The existence of this risk must be assessed globally, taking into account all factors relevant to the particular case (22/06/1999, C-342/97, Lloyd Schuhfabrik,

EU:C:1999:323, § 17, 18; 05/03/2020, C-766/18 P, BBQLOUMI (fig.) / HALLOUMI, EU:C:2020:170, § 63, 67; 11/06/2020, C-115/19 P, CCB (fig.) / CB (fig.) et al, EU:C:2020:469, § 54).

- 16 Those factors include, inter alia, the degree of similarity between the signs at issue and the goods or services in question and also the strength of the earlier mark's reputation and its degree of distinctive character, whether inherent or acquired through use (24/03/2011, C-552/09 P, TiMiKinderjoghurt, EU:C:2011:177, § 64; 04/03/2020, C-328/18 P, BLACK LABEL BY EQUIVALENZA (fig.) / LABELL (fig.) et al., EU:C:2020:156, § 57; 11/06/2020, C-115/19 P, CCB (fig.) / CB (fig.) et al, EU:C:2020:469, § 55).

Relevant territory / Relevant public / Degree of attention

- 17 Since the earlier trade mark is an EUTM, the relevant territory for the assessment of the likelihood of confusion is the territory of the European Union as a whole. However, it follows from the unitary character of the EU trade mark laid down in Article 1(2) EUTMR that a trade mark application may be refused registration if a relative ground for refusal exists only in part of the European Union (23/10/2002, T-6/01, Matratzen + Matratzenmarkt Concord (fig.), EU:T:2002:261, § 59; 14/12/2006).
- 18 As has been correctly found by the Opposition Division, and not contested by the parties, the relevant goods and services target the public at large, who have an average degree of attention.

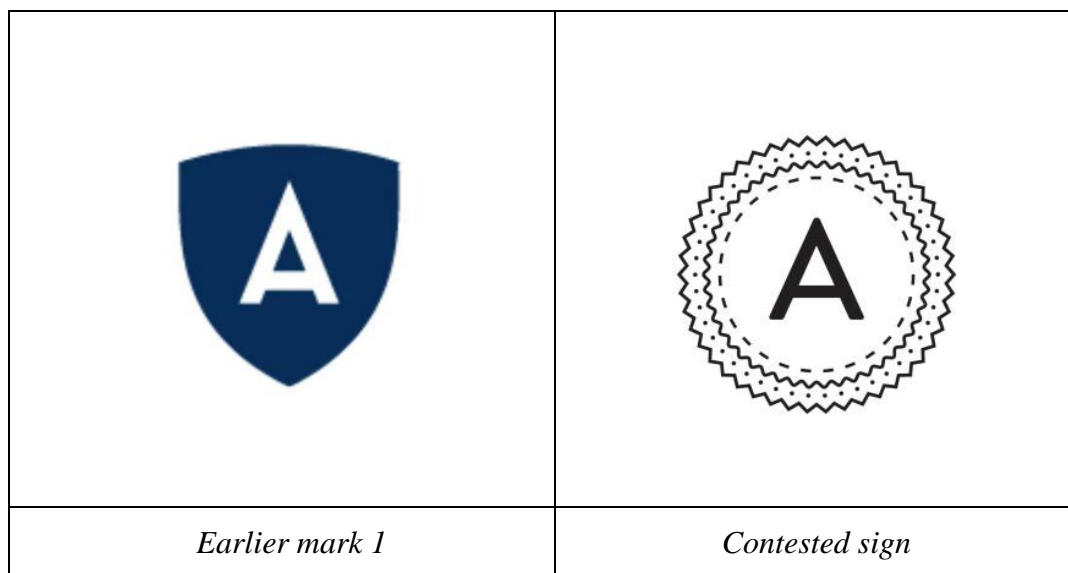
Comparison of the goods and services

- 19 The parties did not contest the Opposition Division's correct finding that the contested goods in Class 25 are identical, the contested services in Class 35 are at least similar and the contested services in Class 45, except the dissimilar 'online social networking services', are similar to the goods and services covered by the earlier marks. The Board does not see any reason to alter this assessment.

Comparison of the signs

- 20 The global assessment of the likelihood of confusion must, so far as concerns the visual, aural or conceptual similarities between the signs at issue, be based on the overall impression given by those signs, bearing in mind, in particular, their distinctive and dominant elements. The perception of the signs by the average consumer of the goods or services in question plays a decisive role in the global assessment of that likelihood of confusion. The average consumer normally perceives a mark as a whole and does not engage in an analysis of its various details (11/11/1997, C-251/95, Sabèl, EU:C:1997:528, § 23; 22/06/1999, C-342/97, Lloyd Schuhfabrik, EU:C:1999:323, § 25; 08/05/2014, C-591/12 P, Bimbo Doughnuts, EU:C:2014:305, § 21; 22/10/2015, C-20/14, BGW / BGW, EU:C:2015:714, § 35).

- 21 Two marks are similar when, from the point of view of the relevant public, they are at least identical as regards one or more relevant aspects, namely, the visual, aural and conceptual aspects (23/10/2002, T-6/01, Matratzen + Matratzenmarkt Concord (fig.), EU:T:2002:261, § 30; 15/12/2010, T-331/09, Tolposan, EU:T:2010:520, § 43; 17/03/2021, T-186/20, The time / Timehouse, EU:T:2021:147, § 21).
- 22 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. Although the overall impression conveyed to the relevant public by a composite trade mark may, 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 similarity can be carried out solely on the basis of the dominant element (12/06/2007, C-334/05 P, Limoncello, EU:C:2007:333, § 41-42; 20/09/2007, C-193/06 P, Quicky, EU:C:2007:539, § 42, 43; 03/09/2009, C-498/07 P, La Española, EU:C:2009:503, § 61-62; 22/10/2015, C-20/14, BGW / BGW, EU:C:2015:714, § 36-37). That could be the case, in particular, where that component is capable, on its own, of dominating the image of that mark that the relevant public retains, with the result that all the other components are negligible in the overall impression created by that mark (20/09/2007, C-193/06 P, Quicky, EU:C:2007:539, § 43; 12/11/2015, T-449/13, WISENT / ŻUBRÓWKA BISON BRAND VODKA, EU:T:2015:839, § 56).
- 23 The signs to be compared are:



- 24 The contested sign is the standard black letter 'A' inside four different black circles (i.e. formed by a broken line, a rounded zigzag line, a dotted line, and a larger pointed zigzag line).

- 25 Earlier mark 1 consists of the white letter ‘A’ in a slightly different standard font, depicted against a blue triangular label that has curved edges.
- 26 For reasons of procedural economy, the Board endorses the Opposition Division’s approach of focusing on the comparison between the contested sign and earlier mark 1 because earlier mark 2 is less similar to the contested sign.
- 27 Irrespective of whether the letters ‘A’ in the signs in conflict are to be seen as abbreviations of ‘Arkivet’ and ‘Alvaro’, as the applicant argues, they do not have a meaning in connection with the relevant goods and services. They are, therefore, distinctive to a normal degree.
- 28 The decision of the Second Board of Appeal of 12 June 2007, R 1418/2006-2, F (fig.) / F, which the applicant cites, has been rendered before the more recent case-law developed by the General Court that will be followed by the Board in the present case.
- 29 The fact that a mark consists mainly of a single letter does not mean that it is *per se* weak. Article 4 EUTMR states that a European Union trade mark may consist of any signs capable of being represented graphically, particularly words and letters, provided that they are capable of distinguishing the goods or services of one undertaking from those of other undertakings. The legislature expressly included signs composed of a letter or a letter combination in the list of examples in Article 4 EUTMR of signs that may constitute a European Union trade mark, subject to any absolute or relative grounds for refusal upon which an opposition to registration may be based. Articles 7 and 8 EUTMR concerning the refusal of a registration do not lay down specific rules for signs composed of a letter or letter combination not forming a word. It follows that the global assessment of the likelihood of confusion between these signs pursuant to Article 8(1)(b) EUTMR in principle follows the same rules as those for word signs comprising a word, a name, an invented term, a letter combination or a single letter (14/03/2017, T-276/15, e (fig.) / e (fig.), EU:T:2017:163, § 59; 08/09/2020, R 2856/2019-5, C (fig.) / C (fig.), § 35). Consequently, the letter ‘A’ in the marks in conflict is distinctive to a normal degree.
- 30 In the applicant’s view, the figurative elements in the signs in conflict cannot be qualified as merely decorative. The Board does not share this view. The figurative elements will be perceived by the relevant public as typical label shapes that serve to decorate and highlight the most distinctive element of both signs, which is the letter ‘A’ (07/06/2018, T-807/16, N & NF TRADING / NF ENVIRONNEMENT (fig.) et al., EU:T:2018:337, § 39; 05/11/2019, T-361/18, SIR BASMATI RICE (fig.), EU:T:2019:777, § 64; 08/09/2020, R 2856/2019-5, C (fig.) / C (fig.), § 28; 02/06/2021, R 2789/2019-4, R (fig.) / R (fig.), § 29). The same is true for the colour blue of earlier mark 1 and the standard font of the signs in conflict.
- 31 Before examining whether there are any visual, aural and conceptual similarities, assessment must be made of the greater or lesser capacity of an element to identify them.

- 32 In the present case, neither of the signs has any element that could be considered more dominant than other elements. In fact, since the signs in question are short signs, it is easier for the public to perceive all of their elements.
- 33 Visually, the signs coincide in the letter 'A'. As regards the graphic elements contained in the signs in conflict, where a mark is composed of verbal and figurative elements, the former should, in principle, be considered more distinctive than the latter, because the average consumer will more easily refer to the goods in question by quoting their name than by describing the figurative element of the mark (14/07/2005, T-312/03, Selenium-Ace, EU:T:2005:289, § 37; 18/02/2016, T-364/14, B!O / BO, EU:T:2016:84, § 24; 08/09/2020, R 2856/2019-5, C (fig.) / C (fig.), § 27).
- 34 Overall, and bearing in mind the figurative elements and aspects of the marks in conflict, the Board endorses the Opposition Division's view that the conflicting signs are visually similar to an average degree.
- 35 This finding cannot be called into question by the Opposition Division's decision 28/10/2016, No B 813 594, on which the applicant relies. Since the Boards of Appeal are the independent appeal bodies of the Office, they cannot, by their nature, be bound by decisions of the first instance.
- 36 Aurally, the signs are identical since they will both be pronounced as the letter 'A'.
- 37 Although the opponent claimed both that the signs are aurally identical and that there are no aural (phonetical) similarities, it can be assumed that the latter statement in the statement of grounds of appeal is due to a clerical error. The statement directly contradicts what the opponent has said immediately beforehand and also the legal arguments that the opponent presents in support.
- 38 The Board does not follow the applicant's argument that the letters 'A' in the signs in conflict are to be seen as abbreviations of 'Arkivet' and 'Alvaro', and therefore pronounced differently. According to case-law, the assessment of the likelihood of confusion is to be carried out by comparing the two signs as they were registered or as they appear in the trade mark application, regardless of whether they are used alone or together with other elements. The verbal element of the signs at issue will therefore be perceived by the relevant public as the letter 'A' (25/06/2020, T-114/19, B (fig.) / b (fig.), EU:T:2020:286, § 70). The marks will therefore be pronounced identically.
- 39 Conceptually, as explained in the paragraph above, the signs in conflict will not be understood as abbreviations of 'Arkivet' and 'Alvaro'. Even if that were the case, the General Court has already held that the fact that signs are understood as abbreviations [does] not, on its own, make it possible to ascertain whether there is any conceptual similarity or difference between those signs (04/05/2018, T-241/16, EW (fig.) / WE, EU:T:2018:255, § 45).

- 40 As regards the conceptual similarity between the signs, due to their common element ‘A’, the Board disagrees with the findings of the Opposition Division and the arguments of the opponent. As correctly pointed out by the applicant, recent case-law of the General Court and the Grand Board of Appeal holds that the semantic content of a common generic letter, like the letter ‘A’, is not sufficient to establish their conceptual similarity (10/06/2020, T-646/19, e (fig.) / e (fig.), EU:T:2020:253, § 38; 11/07/2014, T-425/12, e (fig.) / e (fig.), EU:T:2014:626, § 40; 26/03/2021, R 551/2018-G, Device (fig.) / Device (fig.), § 89). Another conclusion could only be drawn if the letter ‘A’ had a specific meaning in connection with the relevant goods and services (14/03/2017, T-276/15, e (fig.) / e (fig.), EU:T:2017:163, § 27; 26/03/2021, R 551/2018-G, Device (fig.) / Device (fig.), § 80-81). However, there is nothing to suggest that this is the case.
- 41 As regards the judgements cited by the opponent in this respect, firstly, not all of them support the opponent’s statement that identical single letters have to be regarded as being conceptually identical or similar. To the contrary, some of them expressly state that generic letters without specific meaning in the given case do not have a concept (11/07/2014, T-425/12, e (fig.) / e (fig.), EU:T:2014:626, § 40; 07/10/2014, T-531/12, T, EU:T:2014:855, § 81; T-645/13, E (fig.) / E (fig.), EU:T:2016:145, § 101).
- 42 Secondly, regarding the other judgments cited by the opponent, the General Court noted in its ‘T’ judgment (07/10/2014, T-531/12, T, EU:T:2014:855), that the Court’s case-law had not unambiguously answered the question of whether an individual letter of the alphabet may convey a concept (§ 78). The Court, however, concluded that irrespective of whether it was possible to give a general answer to that question, the way in which the signs at issue were perceived from a conceptual point of view was not relevant for the purposes of comparing the signs at issue (§ 81). In that judgment, the General Court held that ‘in the context of comparing signs in order to assess the likelihood of confusion between two signs, the term ‘concept’ covers any meaning in which it is likely that the relevant public will associate with a sign or with one of its elements’ (07/10/2014, T-531/12, T, EU:T:2014:855, § 77).
- 43 Nevertheless, where the graphic arrangement of a figurative sign is such that the public would perceive it as corresponding to a particular letter, that sign is undoubtedly capable of generating the clear idea of that letter in the mind of the consumer. Therefore, those signs have the ability to evoke and convey a particular idea, namely that of a specific letter, using the same process of evocation as signs that convey any other ideas, such as the concept of a particular fruit or of a tree. In that sense, even signs recognised as a letter have a certain meaning, and as such, a concept, even where that letter has no further meaning (26/03/2021, R 551/2018-G, Device (fig.) / Device (fig.), § 78).
- 44 However, where two figurative signs are conceptually identical only insofar as they are both recognised as referring to the same letter of the alphabet, that aspect alone can by not automatically result in a conceptual identity or even in an overall similarity between the signs. Indeed, as the General Court has expressly held, the mere fact that there is a common generic term or word that serves to describe the

graphic elements of both signs under comparison is not sufficient to establish any conceptual similarity, in particular if that generic concept is invoked in only an indirect manner (30/01/2020, T-559/19, *DEVICE OF A WHITE DECIDUOUS TREE AGAINST A BLUE BACKGROUND (fig.) / DEVICE OF A FIR TREE SILHOUETTE ON A BASE (fig.)* et al., EU:T:2020:19, § 39). Furthermore, the mere fact that there is a generic term that includes the terms used to describe the semantic content of the signs at issue is not a relevant factor in the context of the conceptual comparison (31/01/2019, T-215/17, *PEAR (fig.) / APPLE BITE (fig.)* et al., EU:T:2019:45, § 69).

- 45 Overall, it must be concluded that, despite the presence of the letter ‘A’ in both signs, the contested sign and earlier mark 1 are visually similar to an average degree and aurally identical while a conceptual comparison is not possible.

Overall assessment of the likelihood of confusion

- 46 The global assessment of the likelihood of confusion implies some interdependence between the relevant factors, 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 trade marks, and vice versa (29/09/1998, C-39/97, *Canon*, EU:C:1998:442, § 17; 18/12/2008, C-16/06 P, *Mobilix*, EU:C:2008:739, § 46; 05/03/2020, C-766/18 P, *BBQLOUMI (fig.) / HALLOUMI*, EU:C:2020:170, § 69).
- 47 It is settled case-law that the more distinctive the earlier mark, the greater will be the likelihood of confusion, and therefore marks with a highly distinctive character, either per se or because of the recognition they possess on the market, enjoy broader protection than marks with a less distinctive character (11/11/1997, C-251/95, *Sabèl*, EU:C:1997:528, § 24; 29/09/1998, C-39/97, *Canon*, EU:C:1998:442, § 18; 22/06/1999, C-342/97, *Lloyd Schuhfabrik*, EU:C:1999:323, § 20).
- 48 The Opposition Division was right in finding that, due to a lack of evidence, the opponent failed to demonstrate that its trade mark has gained an enhanced distinctiveness through use in the eyes of relevant consumers. This finding has not been contested by the parties.
- 49 As rightly pointed out by the opponent, a trade mark containing a single letter is capable of being inherently distinctive (08/05/2012, T-101/11, *G*, EU:T:2012:223, § 50; 20/07/2017, T-521/15, *D (fig.) / D (fig.)* et al., EU:T:2017:536, § 61). A fortiori, the same is true for earlier mark 1, which does not only consist of a single letter but also contains additional figurative elements, although they are merely decorative and non-distinctive.
- 50 The fact that several trade mark registrations exist that contain the letter ‘A’ does not in itself render earlier mark 1 distinctive to a low degree due to widespread use. The trade mark register does not necessarily reflect the situation on the market and cannot be assumed to do so.

- 51 Overall, the inherent distinctive character of earlier mark 1 is normal.
- 52 The goods and services that are still relevant in the appeal have been found to be partly identical, partly similar to an average degree and partly similar to a low degree. The signs, taken as a whole, are visually similar to an average degree and aurally identical while a conceptual comparison is not possible. The relevant public is the public at large, who have an average degree of attention.
- 53 The applicant claims that, in the present case, the visual aspects compensate for any aural similarities between the signs. It relies on the Examination Guidelines of the Office and on the earlier decision 12/12/2007, R 1655/2006-4, M (fig.) / M (fig.) of the Fourth Board of Appeal.
- 54 Firstly, the Examination Guidelines are not binding for Boards of Appeal, due to the nature of the Boards of Appeal as an independent appeal body in the second instance.
- 55 Secondly, the decision mentioned in paragraph 53 concerns a case that is not comparable to the case at issue. Contrary to the case at issue, in the earlier decision of the Fourth Board of Appeal, the letter ‘m’ was regarded to be non-distinctive. The Board held that the letter ‘m’ will, in the context of clothing in Class 25, be perceived by the relevant public as a reference to the size ‘m’ of the respective items of clothing. Therefore, the additional figurative elements and the stylisation of the letter ‘m’ were crucial for the assessment that there was no likelihood of confusion between the signs. Since those elements cannot be pronounced, an aural comparison between the signs was not possible and therefore irrelevant (12/12/2007, R 1655/2006-4, M (fig.) / M (fig.), § 19). However, in the present case, the letter ‘A’ does not have a meaning and is distinctive to a normal degree, whereas the figurative elements are merely decorative and have a weak distinctive character.
- 56 As regards the overall assessment of a likelihood of confusion, the General Court made it clear that the fact that two trade marks consisting of the same letter are found to be identical from an aural and a conceptual point of view is relevant when it comes to assessing the existence of a likelihood of confusion. In these cases a likelihood of confusion can be safely ruled out when the later trade mark produces a sufficiently different visual impression (10/05/2011, T-187/10, G, EU:T:2011:202, § 60).
- 57 Consequently, a likelihood of confusion can, in principle, be safely excluded when two conflicting signs, albeit containing or consisting of the same single letter, are stylised in a sufficiently different way or contain sufficiently different figurative elements so that their different overall graphical depiction outweighs the impact of the common verbal element.
- 58 As explained in paragraph 30 above, the figurative elements of the signs at issue will be perceived as labels and as mere backgrounds that serve to highlight the letter ‘A’. The figurative elements will therefore not be of particular importance for the relevant public. Since the letter ‘A’ in each of the signs is written in clearly

legible standard font without any stylisation, the letter ‘A’ can easily be perceived and recognised by the relevant public. This leads to the conclusion that the figurative elements are not sufficient to outweigh the common verbal element ‘A’.

- 59 The same reasoning applies to the applicant’s argument that the visual comparison is more relevant when purchasing clothes. Additional figurative elements can only serve to better distinguish the signs visually if they have at least some degree of distinctiveness, which is not the case in the conflicting signs at issue.
- 60 Moreover, the relevant public only rarely has the chance to compare the various marks directly and must therefore rely on its imperfect recollection of them (19/04/2016, T-326/14, *Hot Joker/Joker*, EU:T:2016:221, § 80; 28/05/2020, T-333/19, *GN Genetic Nutrition Laboratories*, EU:T:2020:232, § 59).
- 61 Therefore, the abovementioned circumstances and the normal degree of inherent distinctiveness of the earlier mark lead the Board to conclude that there is a risk that the relevant public will be confused when encountering the signs on the relevant goods.
- 62 For all the above-mentioned reasons, the Opposition Division’s conclusion that the opposition is upheld for all the goods under appeal must be confirmed.
- 63 Accordingly, the appeal is dismissed.

Costs

- 64 Pursuant to Article 109(1) EUTMR and Article 18 EUTMIR, the applicant, as the losing party, must bear the opponent’s costs of the appeal proceedings.
- 65 As to the appeal proceedings, these consist of the opponent’s costs of professional representation of EUR 550.
- 66 As to the opposition proceedings, the Opposition Division ordered each party to bear its own costs. This decision remains unaffected. The total amount for both proceedings is therefore EUR 550.

Order

On those grounds,

THE BOARD

hereby:

- 1. Dismisses the appeal;**
- 2. Orders the applicant to bear the costs incurred by the opponent in the appeal proceedings amounting to EUR 550.**

Signed

G. Humphreys

Signed

A. González Fernández

Signed

C. Bartos

Registrar:

Signed

p.o. M. Chaleva

