



LUXEMBOURG

ОБЩ СЪД НА ЕВРОПЕЙСКИЯ СЪЮЗ
TRIBUNAL GENERAL DE LA UNIÓN EUROPEA
TRIBUNÁL EVROPSKÉ UNIE
DEN EUROPÆISKE UNIONS RET
GERICHT DER EUROPÄISCHEN UNION
EUROOPA LIIDU ÜLDKOHUS
ΓΕΝΙΚΟ ΔΙΚΑΣΤΗΡΙΟ ΤΗΣ ΕΥΡΩΠΑΪΚΗΣ ΕΝΩΣΗΣ
GENERAL COURT OF THE EUROPEAN UNION
TRIBUNAL DE L'UNION EUROPÉENNE
CÚIRT GHINEARÁLTA AN AONTAIS EORPAIGH
OPĆI SUD EUROPSKE UNIJE
TRIBUNALE DELL'UNIONE EUROPEA

EIROPAS SAVIENĪBAS VISPĀRĒJĀ TIESA
EUROPOS SĄJUNGOS BENDRASIS TEISMAS
AZ EURÓPAI UNIÓ TÖRVÉNYSZÉKE
IL-QORTI GENERALI TAL-UNJONI EWROPEA
GERECHT VAN DE EUROPESE UNIE
SĄD UNII EUROPEJSKIEJ
TRIBUNAL GERAL DA UNIÃO EUROPEIA
TRIBUNALUL UNIUNII EUROPENE
VŠEOBECNÝ SÚD EURÓPSKEJ ÚNIE
SPLOŠNO SODIŠČE EVROPSKE UNIJE
EUROOPAN UNIONIN YLEINEN TUOMIOISTUIN
EUROPEISKA UNIONENS TRIBUNAL

ORDER OF THE GENERAL COURT (Sixth Chamber)

- 1102475 -

21 December 2022 *

- 26 -

(EU trade mark – Invalidity proceedings – EU figurative mark MK MARKTOMI
MARKTOMI – Earlier EU figurative mark MK MICHAEL KORS – Relative
ground for invalidity – Likelihood of confusion – Article 8(1)(b) and
Article 60(1)(a) of Regulation (EU) 2017/1001 – Action manifestly lacking any
foundation in law)

In Case T-264/22,

Lin Suicha, residing in Wenxi (China), represented by J. Donoso Romero,
lawyer,

applicant,

v

European Union Intellectual Property Office (EUIPO), represented by D. Gája
and I. Stoycheva, acting as Agents,

defendant,

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

Michael Kors (Switzerland) International GmbH, established in Manno
(Switzerland), represented by J. van Manen, E. van Gelderen and L. Fresco,
lawyers,

THE GENERAL COURT (Sixth Chamber),

composed of M.J. Costeira (Rapporteur), President, M. Kancheva and E. Tichy-
Fisslberger, Judges,

* Language of the case: English.

EN

Registrar: E. Coulon,
having regard to the written part of the procedure,
makes the following

Order

- 1 By her action based on Article 263 TFEU, the applicant, Ms Lin Suicha, seeks annulment of the decision of the First Board of Appeal of the European Union Intellectual Property Office (EUIPO) of 10 March 2022 (Case R 1899/2021-1) ('the contested decision').

Background to the dispute

- 2 On 16 June 2020, the intervener, Michael Kors (Switzerland) International GmbH, filed with EUIPO an application for a declaration of invalidity of the EU trade mark that had been registered following an application filed on 23 August 2018 by the applicant in respect of the following figurative sign:



- 3 The goods covered by the contested mark in respect of which a declaration of invalidity was sought were in Classes 18 and 25 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 corresponded, for each of those classes, to the following description:
 - Class 18: 'Saddlery, whips and apparel for animals; Walking sticks; Luggage, bags, wallets and other carriers; Umbrellas and parasols; Reins for guiding children; Shoulder belts; Shoulder belts [straps] of leather; Chin

straps, of leather; Toiletry bags sold empty; Kid; Boxes made of leather; Boxes of leather or leatherboard; Imitation leather hat boxes; Leatherboard; Girths of leather; Leather laces; Straps for soldiers' equipment; Straps made of imitation leather; Leather luggage straps; Straps for skates; Shoulder straps; Leather sold in bulk; Imitation leather; Imitation leather sold in bulk; Polyurethane leather; Leather and imitations of leather; Leather, unworked or semi-worked; Leather for harnesses; Leather for furniture; Leather for shoes; Butts [parts of hides]; Cases of leather or leatherboard; Document cases of leather; Labels of leather; Tefillin [phylacteries]; Casings, of leather, for springs; Chamois leather, other than for cleaning purposes; Harness fittings; Trimmings of leather for furniture; Leather twist; Sheets of leather for use in manufacture; Sheets of imitation leather for use in manufacture; Moleskin [imitation of leather]; Rawhide chews for dogs; Faux fur; Semi-worked fur; Furs sold in bulk; Curried skins; Animal skins; Cattle skins; Fur; Worked or semi-worked hides and other leather; Industrial packaging containers of leather; Furniture coverings of leather; Studs of leather; Card holders made of leather; Card holders made of imitation leather; Leather cloth; Leather straps; Goldbeaters' skin; Valves of leather';

– Class 25: 'Headgear; Footwear; Clothing'.

4 The application for a declaration of invalidity was based, inter alia, on the earlier EU figurative mark, reproduced below, registered on 17 June 2015, for goods in Classes 18 and 25 and corresponding, for each of those classes, to the following description:

– Class 18: 'Leather and imitations of leather; animal skins; animal hides; umbrellas; parasols and walking sticks; whips; harness and saddlery; canes; cases; trunks; travelling bags; luggage; suitcases; garment bags for travel and backpacks; bags; crossbody bags; handbags; pocketbooks; purses; school bags; clutches; wristlets; evening bags; tote bags; cosmetic bags (sold empty); sports bags; beach bags; boxes of leather; small leather articles; billfolds; wallets; coin purses; credit card cases and holders; carrying cases; business card cases; briefcases and attaché cases; document holders and cases; key cases; passport holders; checkbook holders; travel organizers; and tie holders; key fobs; key chains; pet clothing and accessories; pet leashes; pet collars; leather envelopes; slings for carrying infants; wine carrying cases; cases, covers and carrying cases for electrical goods, computers, computer tablets, mobile phones, portable media players and personal digital assistants';

– Class 25: 'Clothing; aprons; bathing suits; beach clothes; bath robes; blazers; blouses; body linen (garments); bodysuits; boxer shorts; bras; bustiers; camisoles; capes; clothing of leather; clothing of imitations of leather; coats; [cut-and-sewn] specialty tights for stocking and socks; dresses; dressing gowns; halter tops; hosiery; jackets (clothing); jumper dresses; knee-high stockings; lingerie; jeans; leggings; leg warmers; night clothes; nightgowns;

nightshirts; outerclothing; overalls; pajamas; panties; pants; pantyhose; ponchos; pullovers; raincoats; shirts; shirts and casual tops with long and short sleeves; shirt yokes; shorts; skirts; ski wear and snowboard wear; ski jackets; ski pants; ski suits; ski trousers; slacks; sleeveless shirts; snowboard pants; snowboard trousers; snowboard jackets; sport coats; sport shirts; stockings; suits; sweaters; sweater vests; sweatpants; sweatshirts; swimsuits; thigh-high stockings; tops for exercise; trousers; T-shirts; tuxedos; underwear; waterproof clothing; undergarments; undershirts; vests; warm up suits; clothing accessories; belts (clothing); bowties; braces; cravats; ear muffs (clothing); gloves; mittens; neckerchiefs; neckwear; sashes (for wear); scarves; shower caps; socks; suspenders; ties; tights; wristbands for clothing; footwear; ankle boots; athletic shoes; beach shoes; booties; boots; boots for motorcycling; boot uppers; climbing boots (mountaineering boots); espadrilles; flats; flip-flops; football boots; gym boots; half boots; heels; hiking boots; insoles for boots; leather boots; platforms; pumps; rain boots; riding boots; sandals; shoes; ski boots; slippers; snow boots and snowboard boots; sporting and gymnastic shoes; studs for football boots (shoes); soccer boots; thonged and strapped sandals; tennis shoes; trekking boots; water proof boots; waterproof leather boots; water repelling boots; water repelling leather boots; wedges; welts for boots; wedge boots; winter boots; work boots; headwear; bandannas; baseball caps; berets; caps; fedoras; hats; headbands; hoods (clothing) and head coverings with canopy of sunshield; turbans; visors’:



- 5 The grounds relied on in support of the application for a declaration of invalidity were those referred to in Article 59(1)(b) and Article 60(1)(a), read in conjunction with Article 8(1)(b) and (5), 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).

- 6 On 14 September 2021, the Cancellation Division granted the application for a declaration of invalidity on the basis of Article 60(1)(a), read in conjunction with Article 8(1)(b), of Regulation 2017/1001.
- 7 On 11 November 2021, the applicant filed a notice of appeal with EUIPO against the decision of the Cancellation Division.
- 8 By the contested decision, the Board of Appeal dismissed the appeal on the ground that there was a likelihood of confusion within the meaning of Article 8(1)(b) of Regulation 2017/1001.

Forms of order sought

- 9 The applicant claims that the Court should:
 - annul the contested decision;
 - dismiss the application for a declaration of invalidity in its entirety;
 - order EUIPO and the intervener to pay the costs.
- 10 EUIPO contends that the Court should:
 - declare the second head of claim inadmissible;
 - dismiss the application for annulment as unfounded;
 - order the applicant to pay the costs, in the event that a hearing is held.
- 11 The intervener contends that the Court should:
 - dismiss the action;
 - order the applicant to pay the costs.

Law

- 12 Under Article 126 of the Rules of Procedure of the General Court, where an action is manifestly inadmissible or manifestly lacking any foundation in law, the General Court may, on a proposal from the Judge-Rapporteur, at any time decide to give a decision by reasoned order without taking further steps in the proceedings.
- 13 In the present case, the Court considers that it has sufficient information from the material in the file and decides, pursuant to that article, to rule without taking any further steps in the proceedings (order of 6 October 2015, *GEA Group v OHIM (engineering for a better world)*, T-545/14, EU:T:2015:789, paragraph 13).

- 14 In support of the action, the applicant relies, in essence, on a single plea in law, alleging infringement of Article 60(1)(a), read in conjunction with Article 8(1)(b), of Regulation 2017/1001. By this single plea, she criticises the Board of Appeal, in the first place, for having made errors in the assessment of the dominant and distinctive elements and of the visual and phonetic similarity of the signs at issue and, in the second place, for having made errors in the global assessment of the likelihood of confusion.
- 15 EUIPO and the intervener dispute the applicant's arguments.
- 16 Under the combined provisions of Article 60(1)(a) and Article 8(1)(b) of Regulation 2017/1001, an EU trade mark is to be declared invalid if, because of its identity with, or similarity to, an earlier trade mark and the identity or similarity of the goods or services covered by the 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.
- 17 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).
- 18 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).

The relevant public and the comparison of the goods at issue

- 19 In paragraphs 17 and 18 of the contested decision, the Board of Appeal found that, in the assessment of the existence of a likelihood of confusion, it was necessary to take into consideration the perception of the general public as well as that of the professional public residing in the territory of the European Union as a whole, displaying an average level of attention when purchasing the goods concerned.
- 20 Furthermore, in paragraph 20 of the contested decision, the Board of Appeal found that the goods at issue, in Classes 18 and 25, were identical or similar to varying degrees.

- 21 Those findings of the Board of Appeal – which, moreover, are not disputed by the applicant – must be upheld.

The comparison of the signs at issue

- 22 In accordance with settled case-law, two marks are similar when, from the point of view of the relevant public, they are at least partially identical as regards one or more relevant aspects (see, to that effect, judgment of 1 March 2016, *BrandGroup v OHIM – Brauerei S. Riegele, Inh. Riegele (SPEZOOMIX)*, T-557/14, not published, EU:T:2016:116, paragraph 29 and the case-law cited).
- 23 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).
- 24 In the present case, the marks to be compared are as follows:
- the contested mark is a figurative mark consisting of the group of bold, white capital letters ‘MK’ against a black circular background with a black frame, in the lower part of which appears the group of words in capital letters ‘MARKTOMI MARKTOMI’ in a smaller font size than that of the group of letters ‘MK’:



- the earlier mark is a figurative mark consisting of the group of bold, black capital letters ‘MK’ against a white circular background with a black frame, in the lower part of which appears the group of words in capital letters ‘MICHAEL KORS’ in a smaller font size than that of the group of letters ‘MK’:



The dominant and distinctive elements of the marks at issue

- 25 The applicant criticises, in essence, the Board of Appeal for having found that, in respect of the two marks at issue, the word element ‘mk’ was the most eye-catching or striking component and, consequently, the group of capital letters ‘MK’ was the distinctive and dominant element of the signs at issue. She submits in that regard, in the first place, that neither the group of capital letters ‘MK’ nor the mere combination and reproduction of those letters within a circle could constitute, by themselves, a dominant element, particularly since the element ‘mk’ is present in a significant number of EU trade marks. In the second place, she claims that the word element ‘marktomi marktomi’ is visible in the contested mark, that it has distinctive character and that the Board of Appeal did not provide sufficient reasons for its conclusion that that element would not be perceived by the relevant public.
- 26 EUIPO and the intervener dispute those arguments.
- 27 As a preliminary point, it should be recalled that 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 (see judgment of 12 June 2007, *OHIM v Shaker*, C-334/05 P, EU:C:2007:333, paragraph 41 and the case-law cited).
- 28 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, paragraph 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 (judgment of 20 September 2007, *Nestlé v OHIM*, C-193/06 P, not published, EU:C:2007:539, paragraph 43).

- 29 With regard to the assessment of the dominant character of one or more given components of a complex 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 the complex mark (judgment of 23 October 2002, *Matratzen Concord v OHIM – Hukla Germany (MATRATZEN)*, T-6/01, EU:T:2002:261, paragraph 35).
- 30 For the purpose of assessing the distinctive character of an element making up a mark, an assessment must be made of the greater or lesser capacity of that element to identify the goods or services for which the mark was registered as coming from a particular undertaking, and thus to distinguish those goods or services from those of other undertakings. In making that assessment, account should be taken, in particular, of the inherent characteristics of the element in question in the light of whether it is at all descriptive of the goods or services for which the mark has been registered (see judgment of 13 June 2006, *Inex v OHIM – Wiseman (Representation of a cowhide)*, T-153/03, EU:T:2006:157, paragraph 35 and the case-law cited).
- 31 In the present case, the Board of Appeal found, in paragraphs 26, 29, 32 and 33 of the contested decision, that the element ‘mk’, which is common to the two marks at issue, was the most visually eye-catching and most striking element for each of the two marks. It noted that the group of capital letters ‘MK’ occupied a central position within each of the signs at issue, whereas the groups of words in capital letters ‘MICHAEL KORS’ and ‘MARKTOMI MARKTOMI’, present in the earlier mark and in the contested mark, respectively, while not negligible, occupied a secondary position and were less striking. In addition, it took the view that, in respect of the two marks at issue, the figurative elements consisting of simple geometric circles, despite their lack of distinctive character, were significant in the overall scheme of the signs.
- 32 Furthermore, as regards the contested mark, in paragraph 30 of the contested decision, the Board of Appeal found that the element ‘mk’ had no connection either with the goods at issue or with the group of words in capital letters ‘MARKTOMI MARKTOMI’, which was a fanciful expression.
- 33 Moreover, as regards the earlier mark, in paragraph 31 of the contested decision, the Board of Appeal considered that the elements ‘mk’ and ‘michael kors’ in the earlier mark had average distinctive character as a result of the last element referring to the name of a well-known fashion designer and the group of capital letters ‘MK’ being the initial letters of that name.
- 34 In that regard, the group of capital letters ‘MK’ in the two marks at issue must be considered to be visually dominant. First, the group of capital letters ‘MK’, which is common to both signs, is of a significantly larger size than that of the expressions in capital letters ‘MARKTOMI MARKTOMI’ and ‘MICHAEL KORS’, appearing in the contested mark and in the earlier mark, respectively. In

addition, that group of capital letters ‘MK’ occupies, in each of the signs at issue, a primary position, in the centre of the circular background of each sign. Second, the expressions in capital letters ‘MARKTOMI MARKTOMI’ and ‘MICHAEL KORS’ are smaller in size and appear, in each of the signs, in the lower part of the respective circular frame (see paragraph 24 above).

- 35 Accordingly, the Board of Appeal was entitled to find that the element ‘mk’ was, for each of the marks at issue, the most visually striking element, given its size and position in the signs.
- 36 That conclusion is not called into question by the applicant’s arguments. In the first place, even if, as she submits, the element ‘mk’ were present in a significant number of EU trade marks – which has not been established in the present case – the fact remains that that circumstance is irrelevant for the determination of the dominant element of the signs at issue, in accordance with the case-law cited in paragraphs 27 and 29 above.
- 37 In the second place, it is necessary to reject the applicant’s arguments based on the visibility and distinctive character of the word element ‘marktomi marktomi’ and on the fact that the contested decision does not contain sufficient reasons to support the conclusion that that element would not be perceived by the relevant public.
- 38 As regards the visibility of the element ‘marktomi marktomi’, it should be noted that the applicant’s line of argument is based on a misunderstanding of the contested decision. The Board of Appeal did not take the view that the element ‘marktomi marktomi’ would not be perceived by the relevant public, as the applicant submits. Instead, the Board of Appeal found that that element was visually less striking because it was of a significantly smaller size than that of the group of capital letters ‘MK’ and occupied a secondary position, in the lower part of the sign (see paragraph 31 above). It follows that, contrary to what the applicant claims, the contested decision is sufficiently reasoned in that regard.
- 39 As regards the distinctive character of the signs at issue, it should be noted that, in paragraph 27 of the contested decision, the Board of Appeal found that the elements ‘mk’ and ‘michael kors’ in the earlier mark had an average degree of distinctiveness. That assessment, which is not disputed by the applicant, must be upheld.
- 40 Furthermore, in paragraph 28 of the contested decision, the Board of Appeal took the view that the elements ‘mk’ and ‘marktomi marktomi’ in the contested mark had no meaning for the relevant public, given that the first element did not correspond to the initials of the second element and that that would instead be interpreted as a repetition of two meaningless words, since it was unlikely that a significant part of the relevant public would divide the word ‘marktomi’ into two separate words, suggesting a concrete meaning.

- 41 The applicant does not put forward any specific argument capable of calling the latter assessment into question which, in any event, must be upheld.
- 42 It is true that the weak distinctive character of an element of a complex mark does not necessarily imply that that element cannot constitute a dominant element since, because, in particular, of its position in the sign or its size, it may make an impression on consumers and be remembered by them (judgment of 13 June 2006, *Representation of a cowhide*, T-153/03, EU:T:2006:157, paragraph 32). However, that is not true of the element ‘marktomi marktomi’, which occupies a secondary position within the contested mark (see paragraph 31 above).
- 43 The Board of Appeal was therefore entitled to find that the group of capital letters ‘MK’ was the dominant element of the two signs at issue and that the elements ‘michael kors’ and ‘marktomi marktomi’ were not such as to divert the public’s attention away from those letters.

The similarity of the signs at issue

– *Visual similarity*

- 44 The applicant submits, in essence, that the term ‘marktomi marktomi’ cannot be regarded as irrelevant and that, on the contrary, the relevant public will perceive the difference between the word element ‘mk marktomi marktomi’ in the contested mark and the word elements ‘mk’ and ‘mk michael kors’ in the earlier mark.
- 45 EUIPO and the intervener dispute those arguments.
- 46 In paragraph 36 of the contested decision, the Board of Appeal considered that the signs at issue were visually similar to an average degree. It found that the relevant public would, at first sight, perceive that the signs at issue had the same structure, image and overall composition, in which the group of capital letters ‘MK’ was striking and visually eye-catching. In addition, the divergent elements, namely the background colours of the circles and the expressions in capital letters ‘MICHAEL KORS’ and ‘MARKTOMI MARKTOMI’, were not sufficient to eclipse that similarity, those expressions being significantly smaller and positioned in the lower part of the signs.
- 47 In that regard, it should be noted, as the Board of Appeal did, that the two signs at issue have the same structure and image, as well as similar figurative elements, consisting of simple geometric circles and the capital letters ‘MK’ placed in the centre of those circles and written in the same size and font. Those two letters are also, contrary to what the applicant claims, the most striking and dominant element of the two signs at issue.
- 48 It should be borne in mind that, according to the case-law, where the dominant element of the earlier mark is included in its entirety in the contested mark, as in

the present case (see paragraph 43 above), there is some visual similarity between the signs at issue (see, to that effect, judgment of 19 April 2016, *100% Capri Italia v EUIPO – IN.PRO.DI (100% Capri)*, T-198/14, not published, EU:T:2016:222, paragraph 99).

- 49 Moreover, although it is true that there are differences between the signs at issue, those differences do not however lead to the conclusion, as the applicant submits, that the signs are different. First, the differences between the background colours of the circles are limited to a different position of the same white and black colours. Second, the differences between the groups of words in capital letters ‘MICHAEL KORS’ and ‘MARKTOMI MARKTOMI’ are, on account of the size and position of those words within the sign, difficult to discern, even if they are not negligible, and, therefore, are not capable of differentiating the signs.
- 50 In addition, contrary to what the applicant claims, the Board of Appeal did not find that the expressions in capital letters ‘MARKTOMI MARKTOMI’ were irrelevant, but it took the view that, although they were not negligible, they occupied a secondary position within the contested mark (see paragraphs 25 and 42 above).
- 51 It is therefore without making an error of assessment that the Board of Appeal found that the signs at issue were visually similar to an average degree.

– *Phonetic similarity*

- 52 The applicant claims that the Board of Appeal should have found that the signs at issue were phonetically similar to a lower degree, since they coincide only in the sound of the group of capital letters ‘MK’, the pronunciation of the expressions in capital letters ‘MICHAEL KORS’ and ‘MARKTOMI MARKTOMI’ being different.
- 53 EUIPO and the intervener dispute those arguments.
- 54 In paragraph 37 of the contested decision, the Board of Appeal found that the signs at issue were phonetically similar to an average degree. It noted that, although the word elements of the signs at issue coincided only partially, when speaking, the average consumer would tend to abbreviate a mark comprising a number of terms, and he or she would take more note of the beginning of a sign than of its end. Consequently, it was likely that the elements ‘michael kors’ and ‘marktomi marktomi’ would be omitted when the marks at issue were pronounced and that they would be referred to by the group of capital letters ‘MK’.
- 55 It must be considered, as did the Board of Appeal, that, notwithstanding the fact that the expressions in capital letters ‘MICHAEL KORS’ and ‘MARKTOMI MARKTOMI’ are different, there are similarities in the pronunciation of the signs given that, in both signs, the word element ‘mk’ is the dominant element placed in

the centre of the signs, whereas the divergent word elements are placed last and in a secondary position.

56 As was correctly mentioned in the contested decision, when speaking, the average consumer will tend to abbreviate a mark comprising a number of terms in order to make it easier to pronounce and, moreover, generally take more note of the beginning of a sign than of its end (see judgment of 24 February 2016, *Tayto Group v OHIM – MIP Metro (REAL HAND COOKED)*, T-816/14, not published, EU:T:2016:93, paragraph 76 and the case-law cited).

57 Consumers tend to omit certain word elements of a mark when pronouncing it, in particular, in order simply to economise on words, if those elements are easily separable (see, to that effect, judgment of 6 October 2017, *Kofola ČeskoSlovensko v EUIPO – Mionetto (UGO)*, T-176/16, not published, EU:T:2017:704, paragraph 62 and the case-law cited).

58 In the present case, the relevant public will tend, simply to economise on words, not to pronounce the expressions in capital letters ‘MARKTOMI MARKTOMI’ and ‘MICHAEL KORS’, those fairly long expressions being easily separable from the more striking word element, common to the marks at issue, namely the group of capital letters ‘MK’.

59 Therefore, the Board of Appeal was entitled to find that the signs at issue were phonetically similar to an average degree.

– *Conceptual similarity*

60 In paragraph 38 of the contested decision, the Board of Appeal found that the signs at issue were not conceptually similar, given that the contested mark had no meaning as a whole and that the earlier mark would be perceived as referring to a person called Michael Kors.

61 That assessment by the Board of Appeal – which, moreover, is not disputed by the applicant – must be upheld.

62 In the light of all of the foregoing, it must be concluded that the signs at issue are visually and phonetically similar to an average degree and that they are conceptually dissimilar.

63 Consequently, the signs at issue must be considered similar overall, such that the applicant’s line of argument manifestly lacks any foundation in law.

The global assessment of the likelihood of confusion

64 The applicant submits that, on the basis of the overall impression produced by the signs at issue, the dissimilarity of the signs at issue should be sufficient to rule out

a likelihood of confusion within the meaning of Article 8(1)(b) of Regulation 2017/1001.

- 65 EUIPO and the intervener dispute those arguments.
- 66 It should be recalled that 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, *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 74).
- 67 In paragraph 47 of the contested decision, the Board of Appeal, taking into account the identity or similarity of the goods covered by the signs at issue, their average visual and phonetic similarity and the average distinctiveness of the earlier mark, found that there was a likelihood of confusion in respect of those goods within the meaning of Article 8(1)(b) of Regulation 2017/1001.
- 68 In the present case, it follows from the foregoing that, first, the goods at issue are aimed at the general public and at the professional public displaying an average level of attention. Second, the goods at issue are identical or similar. Third, the signs at issue are similar overall. Fourth, the earlier mark had an average degree of distinctiveness.
- 69 It follows that, in the context of the global assessment of the likelihood of confusion, there is, in the present case, a likelihood of confusion within the meaning of Article 8(1)(b) of Regulation 2017/1001. Therefore, the Board of Appeal did not make an error of assessment in finding that there was a likelihood of confusion.
- 70 That conclusion is not invalidated by the applicant's line of argument that the dissimilarity of the signs at issue should be sufficient to rule out a likelihood of confusion. As follows from paragraphs 51 and 59 above, the difference between the expressions in capital letters 'MARKTOMI MARKTOMI' and 'MICHAEL KORS' is not capable of eliminating the visual and phonetic similarity of the signs at issue.
- 71 In the light of all of the foregoing considerations, the present plea in law must be rejected as manifestly unfounded and, consequently, the action must be dismissed in its entirety, without it being necessary to rule on the admissibility of the second head of claim, contested by EUIPO.

Costs

- 72 Under Article 134(1) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings.
- 73 Since the applicant has been unsuccessful, she must be ordered to pay the costs, in accordance with the form of order sought by the intervener.
- 74 However, since EUIPO has requested that the applicant be ordered to pay the costs only in the event that a hearing is scheduled, the applicant should not be ordered to pay the costs incurred by it.

On those grounds,

THE GENERAL COURT (Sixth Chamber)

hereby orders:

- 1. The action is dismissed.**
- 2. Ms Lin Suicha shall bear her own costs and pay those incurred by Michael Kors (Switzerland) International GmbH.**
- 3. The European Union Intellectual Property Office (EUIPO) shall bear its own costs.**

Luxembourg, 21 December 2022.

E. Coulon

M.J. Costeira

Registrar

President

