

OFFICE FOR HARMONIZATION IN THE INTERNAL  
MARKET  
(TRADE MARKS AND DESIGNS)

The Boards of Appeal

**DECISION**  
**of the Second Board of Appeal**  
**of 16 November 2010**

In Case R 148/2010-2

Applicant / Appellant

represented by Res Media-Kanzlei für IT- und Medienrecht, Fischtorplatz 21, D-55116  
Mainz, Germany

v

Opponent / Respondent

represented by Javier Ungria López, Avda. Ramón y Cajal, 78, E-28043 Madrid, Spain

APPEAL relating to Opposition Proceedings No B 1 404 864 (Community trade mark  
application No 6 910 467)

THE SECOND BOARD OF APPEAL

composed of T. de las Heras (Chairperson), H. Salmi (Rapporteur) and  
G. Bertoli (Member)

Registrar: C. Bartos

gives the following

## Decision

### Summary of the facts

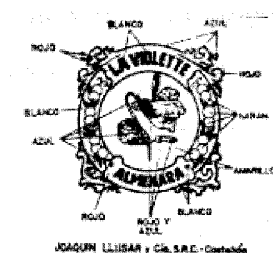
- 1 By an application filed on 6 June 2008, (hereinafter ‘the applicant’) sought to register the word mark

### Biolette

for the following list of goods:

Class 31 – Agricultural, horticultural and forestry products and grains, included in class 31; fresh fruits and vegetables; seeds, natural plants and flowers.

- 2 The application was published in the Community Trade Marks Bulletin No 27/2008 of 7 July 2008.
- 3 On 3 October 2008, S.A. (hereinafter ‘the opponent’) filed a notice of opposition against the registration of the published trade mark. The opposition was based on the following earlier right:
- Spanish trade mark registration No 862 140 of the figurative mark (in colour)



filed on 14 November 1977 and registered on 21 May 1979 for the following goods:

Class 31 – Agricultural, horticultural and forestry products, live animals; fresh fruits and vegetables; seeds, natural plants and flowers; foodstuffs for animals; malt.

- 4 The opponent based its opposition on all the goods covered by its Spanish trade mark registration and directed it against all the goods of the mark applied for.
- 5 The opponent invoked Article 8(1)(b) of Council Regulation (EC) No 207/2009 of 26 February 2009 on the Community trade mark (‘CTMR’) (OJ EC L 78 of 24 March 2009, p. 1) – codified version of Council Regulation (EC) No 40/94 of 20 December 1993 on the Community trade mark (OJ EC 1994 No L 11, p. 1; OJ OHIM 1/95, p. 52).
- 6 The applicant was given until 1 May 2009 to file observations in reply to the opponent’s submissions (further facts, evidence and arguments).
- 7 On 25 November 2009, the Opposition Division issued a decision ruling on Opposition No B 1 404 864 (hereinafter ‘the contested decision’). The Opposition

Division accepted the opposition in its entirety and ordered the applicant to bear the costs. The reasoning underlying the contested decision was, in essence, the following:

- Since the opponent’s trade mark is registered for the class heading in Class 31, it is deemed to cover all goods that are to be classified in Class 31. It follows that all goods of the application in the above mentioned class are deemed to be equally covered by the earlier mark. Thus, the goods are identical. They are directed at both the public at large and at professionals.
  - The relevant territory is Spain.
  - Visually, the signs are dissimilar. Aurally, the marks have a medium degree of similarity. Conceptually, the term ‘LA’ in the earlier trade mark is the definite article in Spanish and Almenara is a place in Spain. The word ‘VIOLETTE’ does not have a meaning in Spanish. The expression ‘Biolette’, contained in the mark applied for does not have any meaning either. Geographical indications do not have a meaning. Therefore, the conceptual comparison does not influence the assessment of similarity of the signs.
  - The signs are similar to a certain degree.
  - The opponent did not explicitly claim that its mark is particularly distinctive by virtue of intensive use or reputation.
  - There is a likelihood of confusion.
- 8 On 19 January 2010, the applicant filed a notice of appeal against the decision. A statement of grounds of appeal was received on 16 March 2010.
- 9 The appeal was forwarded to the Opposition Division for consideration pursuant to Article 62 (previously Article 60a) CTMR and was remitted to the Boards of Appeal on 30 April 2010.
- 10 The opponent did not file observations.

### **Submissions and arguments of the applicant**

- 11 The applicant requests the Board to annul the contested decision. The arguments in the statement of grounds are summarized as follows:
- The vast majority of the public even in Spain does not associate the term ALMENARA with a town in Spain since it is a fairly small village (5926 inhabitants). Thus, the element ‘VIOLETTE’ is not the most distinctive part of the trade mark. The word ‘ALMENARA’ should also be regarded as a distinctive element.
  - The argument that the element ‘Biolette’ and ‘VIOLETTE’ are phonetically identical in Spanish is not compelling. The ‘b’ will not be pronounced strongly

in Spanish. It is rather a silent mixture 'b' and 'v'. Even a mere phonetic similarity between the element 'VIOLETTE' of the entire earlier figurative right and the term 'Biolette' is not sufficient to justify a likelihood of confusion.

- The opponent may prove use of its earlier right which has been registered in 1979. There is no evidence on the Internet that it has used its trade mark for goods in Class 31 in Spain.
- The earlier mark is not distinctive enough to justify a likelihood of confusion based only on a phonetic similarity between the words 'VIOLETTE' and 'Biolette'.
- There is no likelihood of confusion.

### **Reasons**

- 12 The appeal complies with Articles 58, 59 and 60 CTMR (previously Articles 57, 58 and 59) and Rule 48 of Commission Regulation (EC) No 2868/95 of 13 December 1995 implementing Council Regulation (EC) No 40/94 on the Community trade mark ('CTMIR') (OJ EC 1995 L 303, p. 1; OJ OHIM 2-3/95, p. 258) as amended. It is therefore admissible.

#### *Request for proof of use*

- 13 Insofar as the applicant's alleges that the proprietor of the earlier mark may prove use of its earlier mark and that '[f]or the lack of evidence this has to be contested by pleading ignorance...', even if this were to be understood as a request for proof of use of the earlier mark, it is inadmissible.
- 14 Rule 22(1) CTMIR determines that '[a] request for proof of use pursuant to Article 43(2) or (3) of the Regulation shall be admissible only if the applicant submits such a request within the period specified by the Office pursuant to Rule 20(2)'.
- 15 Rule 20(2) CTMIR determines that: '... the Office shall communicate the submission of the opposing party to the applicant and shall invite him to file his observations within a period specified by the Office'.
- 16 The period mentioned in the previous paragraph expired on 10 May 2009. However, the applicant did not submit any request for proof of use on or before this date. The request for proof of use made for the first time before the Boards of Appeal is clearly outside the set time-limit and is therefore inadmissible.

#### *Likelihood of confusion*

- 17 Article 8 CTMR provides:

‘1. Upon opposition by the proprietor of an earlier trade mark, the trade mark applied for shall not be registered:

...

(b) If because of its identity with or similarity to the earlier trade mark and the identity or similarity of the goods and 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.

...’

- 18 A likelihood of confusion lies in the risk that the public might believe that the goods or services in question come from the same undertaking or, as the case may be, from economically-linked undertakings (see judgment of 29 September 1998 in Case C-39/97 *Canon Kabushiki Kaisha v Metro-Goldwyn-Mayer, Inc., formerly Pathe Communications Corporation* (‘Canon’) [1998] ECR I-5507, at paragraph 29 and judgment of 22 June 1999 in Case C-342/97 *Lloyd Schuhfabrik Meyer & Co. GmbH v Klijsen Handel BV* (‘Lloyd Schuhfabrik’) [1999] ECR I-3819, at paragraph 17)..
- 19 A likelihood of confusion on the part of the public must be assessed globally, taking into account all factors relevant to the circumstances of the case (see judgment of 11 November 1997 in Case C-251/95 *Sabèl BV v Puma AG, Rudolf Dassler Sport* (‘Sabèl’) [1997] ECR I-6191, at paragraph 22; ‘Canon’, at paragraph 16 and ‘Lloyd Schuhfabrik’, at paragraph 18).
- 20 That assessment entails certain interdependence between the factors taken into account and, in particular, the similarity between the trade marks and between the goods or services covered. Accordingly, a lesser degree of similarity between those goods or services may be offset by a greater degree of similarity between the marks, and vice versa (see ‘Canon’, at paragraph 17 and ‘Lloyd Schuhfabrik’, at paragraph 19).

*Relevant public / territory*

- 21 The perception of the marks in the mind of the relevant public for the goods in question plays a decisive role in the global assessment of the likelihood of confusion. In the present case, the earlier mark is a Spanish trade mark. Therefore, the relevant public is to be found in Spain.
- 22 Furthermore, where the goods with which the registration application is concerned are intended for all consumers, the relevant public must be deemed to be composed of the average consumer (see judgment of 26 April 2007 in Case C-412/05 P *Alcon Inc. v OHIM* (‘Travatan’) [2007] ECR I-3569, at paragraph 62 and case-law cited therein). The Board considers this to be the case (see also judgment of 15 April 2010 in Case T-488/07 *Cabel Hall Citrus Ltd. v OHIM* (‘Eglèfruit’) [2010] ECR publication pending, at paragraph 30), although some of the goods could be aimed at professionals as well.

- 23 In the light of the foregoing, the targeted public of the goods at issue is composed of the average consumer in Spain who is reasonably well-informed and reasonably observant and circumspect.
- 24 The average consumer normally perceives a mark as a whole and does not proceed to analyse its various details (see, for example, judgment of 28 June 2005 in Case T-301/03 *Canali Ireland Ltd v OHIM* ('Canal Jean') [2005] ECR II-2479, at paragraph 50). Furthermore, account should be taken of the fact that the average consumer only rarely has the chance to make a direct comparison between the different marks but must place his trust in the imperfect picture of them that he has kept in his mind (see 'Lloyd Schuhfabrik', at paragraph 26).
- 25 It should also be borne in mind that the average consumer's level of attention is likely to vary according to the category of goods or services in question (see judgment of 7 October 2010 in Case T-244/09 *Accenture Global Services GmbH. v OHIM* ('acsensa') [2010] ECR publication pending, at paragraph 18 and case law cited therein).
- 26 Concerning the class heading in Class 31 the Court has considered: '...the applicant's claim that the relevant public has a particularly low level of attention cannot be accepted. According to settled case-law, although the average consumer of everyday consumer goods is less observant than a specialised or professional public, he is deemed to be reasonably well informed and reasonably observant and circumspect' (see 'Eglèfruit', at paragraph 49 and case-law cited therein).
- 27 In the light of the foregoing, the average consumer's level of attention with respect to the goods at issue is, in general, neither particularly high, nor low.

#### *Comparison of the goods*

- 28 The applicant alleges that the opponent has not used its trade mark for goods in Class 31. However, as also considered above, this allegation cannot be taken into account because the applicant did not submit the request for proof of use within the set time-limit. Therefore, the allegation that the opponent has not used its trade mark for Class 31 goods is irrelevant for the purpose of the present proceedings; the comparison of the goods must concern the description of the goods covered by the marks at issue.
- 29 The goods of the trade mark applied for are:
- Class 31 – Agricultural, horticultural and forestry products and grains, included in class 31; fresh fruits and vegetables; seeds, natural plants and flowers.
- 30 They have to be compared with the following goods of the earlier mark:
- Class 31 – Agricultural, horticultural and forestry products, live animals; fresh fruits and vegetables; seeds, natural plants and flowers; foodstuffs for animals; malt.
- 31 The Opposition Division considered that since the opponent's trade mark is registered for the class heading in Class 31, it is deemed to cover all goods that

are to be classified in Class 31. However, it is to be noted that the earlier mark does not cover the Class 31 heading.

32 The Class 31 heading of the Nice classification is as follows:

Class 31 – Agricultural, horticultural and forestry products and grains, live animals; fresh fruits and vegetables; seeds, natural plants and flowers; foodstuffs for animals; malt (emphasis added).

33 Thus, the Opposition Division could not come to the conclusion that the opponent's trade mark is deemed to cover all goods that are to be classified in Class 31 because of the earlier mark being registered for the class heading in Class 31.

34 Nonetheless, the contested goods *agricultural, horticultural and forestry products included in Class 31; fresh fruits and vegetables; seeds, natural plants and flowers* are equally included in the earlier trade mark. Therefore, these goods are identical.

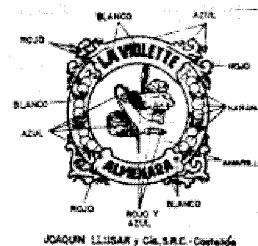
35 As to the contested goods '*grains*' in Class 31, these are, from a semantic point of view, 'agricultural products'. Nonetheless, it can be argued that there is no 'identity' under Article 8(1)(a) or (b) CTMR, between *agricultural products* and *grains*. The justification for this would be that both categories, 'agricultural products' and 'grains', are mentioned as separate categories within the Nice Classification (see also The Manual concerning Opposition, Part 2, Chapter 1: Identity, 2.3.1. p 8 concerning non-identity of clothing and footwear in Class 25; [http://oami.europa.eu/ows/rw/resource/documents/CTM/legalReferences/partc\\_identity.pdf](http://oami.europa.eu/ows/rw/resource/documents/CTM/legalReferences/partc_identity.pdf). In the present case, there is no need for the Board to pronounce on this issue. As follows from the assessment hereunder, even if the goods were to be considered identical, rather than similar or even dissimilar, it would not change the outcome of the case.

### *Comparison of the signs*

36 The marks to be compared are:

**Biolette**

*Mark applied for*



*Earlier Spanish trade mark*

37 The Opposition Division gave the following visual description of the earlier mark:

'...the earlier mark is figurative and it has been registered in colour white, blue, red, yellow and orange. The mark has images of fruit placed within a double circle, also placed inside this circle are more fruits in orange colour. On

the top of the circle stand the words “LA VIOLETTE” and on the bottom of the circle the word “ALMENARA”.

- 38 As to the figurative elements which are described as ‘fruits’, this might be the case, but in the Board’s view the figurative component in the inner circle could also very well represent and be perceived as the flower ‘violet’, especially taking into account that the sign contains the word ‘VIOLETTE’ the meaning of which, as will be discussed hereunder, is likely to be understood as the flower ‘violet’. In any event, this element is not easily and immediately identifiable as such in any of the representations (including an original colour representation) submitted by the opponent. For the remaining part, the Board can concur with the description as made in the contested decision.
- 39 The trade mark applied for consists of the mere word ‘Biolette’ in a normal typeface.
- 40 As to the figurative elements in the opponent’s trade mark, they are quite noticeable in the outer circle and the figurative component in the inner circle is in a central position within the mark and is relatively large in size. It stands out visually.
- 41 The word components ‘LA VIOLETTE’ and ‘ALMENARA’ are also immediately perceptible, because they are clearly separate from and placed either above or under the figurative element. Furthermore, they are immediately comprehensible, because they are depicted in a large sized font which is easy to read. Even if the word component ‘LA VIOLETTE’ might be slightly larger in size than the word ‘ALMENARA’, this is hardly perceptible and will go unnoticed.
- 42 Comparing the signs visually, it is evident that the words ‘VIOLETTE’ and ‘Biolette’ have a total of seven letters in common, namely the combination ‘IOLETTE’ which includes, as regards the Spanish language, the unusual double ‘TT’ combination. However, visually, they also have clearly noticeable differences. Firstly, the earlier trade mark contains large and noticeable figurative elements which stand out and which are not present in the mere word mark of the applicant. Secondly, the earlier mark contains the additional words ‘LA’ and ‘ALMENARA’ and therefore the marks differ significantly in length. Thirdly, the words ‘Biolette’ and ‘VIOLETTE’ clearly differ in their initial letter, namely the letter ‘V’ and the letter ‘B’ and consumers normally pay more attention to the first letters in a mark (see, for example, ‘Egléfruit’, at paragraph 33). Whereas the letter ‘V’ consists basically of two diagonal lines, the capital letter ‘B’ contains one vertical line attached to which are two semi-oval shapes.
- 43 Taking into account the abovementioned significant visual differences the Board agrees with the finding of the Opposition Division that the signs are visually dissimilar despite the presence of certain common letters.
- 44 From a phonetic point of view, the figurative components of the earlier trade mark are not pronounced. The applicant stresses the difference in pronunciation between the consonants ‘V’ and ‘B’. However, and in spite of some Internet



extracts submitted by the applicant, it is a well-known fact that the consonants 'B' and 'V' are pronounced identically by the relevant public in Spain. Therefore 'VIOLETTE' and 'Biolette' are identically pronounced at least in most parts of Spain. However, the earlier mark also contains the components 'LA' and 'ALMENARA' which are not present in the mark applied for. In conclusion the Board agrees with the finding of the Opposition Division that the signs have a medium degree of phonetical similarity.

- 45 Conceptually, as considered in the contested decision, 'Almenara' is a place in Spain. However, as correctly pointed out by the applicant, it is a rather small village (less than 6000 inhabitants) belonging to the province of Castellon. There is no indication in the file, nor can it be considered a well-known fact, or is it likely that more than an insignificant part of the relevant public in Spain is aware of the existence of this village.
- 46 As to the words 'LA VIOLETTE', the Board agrees with the Opposition Division that the word 'LA' will be understood as a Spanish definite article. The word 'LA', being a definite article, introduces a noun and specifies it as the particular noun that is being considered, in the present case 'VIOLETTE'. 'Violette' is a French word meaning 'violet' in English. Even if it were to be considered that only an insignificant part of the relevant public in Spain were to understand French, the word 'violette' has a very close resemblance with its Spanish equivalent 'violeta'. Therefore, it is likely that the word 'violette' will be understood by the relevant public in Spain as 'violeta' meaning 'violet' in English. This understanding will be reinforced if the figurative element in the inner circle will be perceived as a violet flower. The other figurative elements in the earlier mark are not easily and immediately identifiable and do not play a notable role.
- 47 On the other hand, when visually perceiving the sign 'Biolette', the Spanish public would not think of the flower or colour 'violet'. In fact, although the sign as a whole, and this is how the relevant public will perceive the sign, has no meaning, the first three letters 'BIO' form a commonly used abbreviation in Spain to indicate that the goods bearing this term are biological products. Taking into account this common use in Spain of the term 'BIO' for Class 31 goods, as well as the fact that it forms the beginning of the mark 'BIOLETTE', the relevant public might very well perceive the 'BIO'-message in the trade mark applied for.
- 48 Therefore, the Board comes to the conclusion that insofar as the marks can be understood to have a meaning or be related to a concept, the marks are not similar conceptually.

*Distinctive character of the earlier mark*

- 49 The earlier mark as a whole has a normal inherent distinctive character in relation to the goods in Class 31. No enhanced, or diminished, distinctive character has been proven.

*Overall assessment*

- 50 The Board stresses that the likelihood of confusion must be determined by means of a global appraisal of the visual, aural and conceptual similarity of the marks, on the basis of the overall impression given by the marks, bearing in mind, in particular, their distinctive and dominant components (see ‘Sabèl’, at paragraph 23).
- 51 The comparison must be made by examining the marks in question, each considered as a whole. However, that does not mean that the overall impression created in the mind of the relevant public by a complex trade mark may not, in certain circumstances, be dominated by one or more of its components (see, to that effect, judgment of 23 October 2002 in Case T-6/01 *Matratzen Concord GmbH v OHIM* (‘Matratzen’) [2002] ECR II-4335, at paragraph 34). It should be noted in this regard that, whilst the average consumer normally perceives a mark as a whole and does not proceed to analyse its various details, the fact remains that, when perceiving a word sign, the consumer will break it down into word elements which, for him, suggest a concrete meaning or which resemble words known to him (see judgment of 27 February 2008 in Case T-325/04 *Citigroup, Inc. v OHIM* (‘Worldlink’) [2008] ECR II-29\*, at paragraph 80 and the case-law cited therein) and in general it is the dominant and distinctive features of a sign which are more easily remembered (see, to that effect, for example, judgment of 6 October 2004 in Joined Cases T-117/03 to T-119/03 and T-171/03 *New Look Ltd v OHIM* (‘NL’) [2004] ECR II-3471, at paragraph 39 and the case-law cited therein).
- 52 With regard to the assessment of the dominant character of one or more given component 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 (see judgment of 16 January 2008 in Case T-112/06 *Inter-Ikea Systems BV v OHIM* (‘Idea’) [2008] ECR II-6\*, at paragraph 47 and the case cited therein ‘Matratzen’ at paragraph 35).
- 53 Generally, the average consumer will not consider a descriptive or allusive element forming part of a complex mark as the distinctive and dominant element of the overall impression conveyed by that mark (see judgment of 3 July 2003 in Case T-129/01 *José Alejandro, SL v OHIM* (‘Budmen’) [2003] ECR II-2251, at paragraph 53 and ‘NL’, at paragraph 34).
- 54 According to settled case-law, the assessment of the similarity between two marks means more than taking just one component of a composite trade mark and comparing it with another mark. On the contrary, the comparison must be made by examining each of the marks in question as a whole, which does not mean that the overall impression conveyed to the relevant public by a composite trade mark may not, in certain circumstances, be dominated by one or more of its components. It is only if all the other components of a composite mark are negligible that the assessment of the similarity can be carried out solely on the basis of the dominant element (see judgment of 12 June 2007 in Case C-334/05 P

*OHIM v Shaker di L. Laudato & C. Sas* ('Limoncello') [2007] ECR I-4529, at paragraphs 41 and 42).

*Visual and phonetical similarity*

- 55 As to the intrinsic value of the various word components, as concluded above, the word 'ALMENARA' would be perceived as a meaningless and, already on the basis of this, as a distinctive word. As to the word 'LA' on its own, it is a Spanish definite article and as such non-distinctive (see also judgment of 24 September 2008 in Case T-116/06 *Oakley, Inc. v OHIM* ('O Store') [2008] ECR II-2455, at paragraphs 68 and 71).
- 56 As to the word 'VIOLETTE', as noted above, it has a close resemblance with its Spanish equivalent 'violeta'. Therefore, it is likely that the word 'violette' will be understood by the relevant public in Spain as 'violeta' meaning 'violet' in English. This understanding will be reinforced if the figurative element in the inner circle will be perceived as a violet flower. In such a case the words 'LA VIOLETTE' for the goods 'flowers' as well as 'seeds' and 'natural plants' in the earlier mark would be seen as descriptive.
- 57 A complex trade mark generally cannot be regarded as being similar to another trade mark which is identical or similar to one of the components of the complex mark unless that component forms the dominant element within the overall impression created by the complex mark. That is the case where that component is likely to dominate, by itself, the image of that mark which the relevant public keeps in mind, with the result that all the other components of the mark are negligible within the overall impression created by it (see, to that effect, 'Matratzen', at paragraph 33). Generally, the average consumer will not consider a descriptive or allusive element forming part of a complex mark as the distinctive and dominant element of the overall impression conveyed by that mark; an invented word is more likely to draw the attention of the consumer (see judgment of 3 July 2003 in Case T-129/01 *José Alejandro, SL v OHIM* ('Budmen') [2003] ECR II-2251, at paragraph 53). With respect to 'flowers' as well as 'seeds' and 'natural plants', the component 'ALMENARA' is intrinsically stronger than the descriptive or at least allusive component 'LA VIOLETTE' and therefore the element 'LA VIOLETTE' cannot be considered as forming the dominant element within the overall impression created by the mark applied for.
- 58 Taking all of the above into account the Board comes to the conclusion that, when taking also into account what the distinctive and dominant components of the mark applied for are, the visual differences between the marks mentioned in paragraphs 40-43 are even more pronounced, with the result that the marks must be considered as being visually dissimilar overall with respect to 'flowers', as well as 'seeds' and 'natural plants'.
- 59 As to the phonetic comparison, as noted above, the terms 'VIOLETTE' and 'Biolette' are identically pronounced at least in most parts of Spain. However, the earlier mark also contains the components 'LA' and 'ALMENARA' which are not present in the mark applied for and which create a fairly clear distinction

between them. Although the terms 'VIOLETTE' and 'Biolette' are identically pronounced, decisive weighting cannot be given to the element 'VIOLETTE' due to the descriptive or, at least, allusive nature of this element. Therefore the element 'ALMENARA', which does not exist in the earlier mark, is likely to have a greater impact aurally. The word 'VIOLETTE' is overshadowed by the more dominant element 'ALMENARA', which is undoubtedly what consumers find striking and where the public's attention will be drawn to. Thus, if there is a phonetical similarity overall, it must be regarded as, at the most, weak, for these goods.

- 60 In relation to the remaining goods that are considered identical to those of the trade mark applied for, namely 'agricultural, horticultural and forestry products; fresh fruits and vegetables', the Board notes that whereas it can be considered that the word 'ALMENARA' might be perceived by the relevant public to be a meaningless word, the words 'LA VIOLETTE' do have a meaning, but they are not descriptive or allusive in relation to these goods.
- 61 Although the consumer often pays more attention to the initial part of a trade mark, it is settled case-law that that argument cannot hold in all cases (see judgment of 16 May 2007 in Case T-158/05 *Trek Bicycle Corp. v OHIM* ('Alltrek') [2007] ECR II-49\*, at paragraph 70, and the case-law cited). It does not, in any event, cast doubt on the principle that the assessment of the similarity of marks must take account of the overall impression created by those marks, since the average consumer normally perceives a trade mark as a whole and does not analyse the different aspects of it (see judgment of 9 September 2008 in Case T-363/06 *Honda Motor Europe Ltd v OHIM* ('Magic seat') [2008] ECR II-2217, at paragraph 38). Further, the Board notes that both the elements 'LA VIOLETTE' and 'ALMENARA' are situated within a circle and is therefore of the opinion that, when situated liked this, they are equally noticeable, notwithstanding that one element is 'higher up' than the other.
- 62 In addition, for the goods 'agricultural, horticultural and forestry products; fresh fruits and vegetables', neither the element 'ALMENARA' or the element 'LA VIOLETTE' of the mark can be said to have an especially low or a high degree of inherent distinctiveness. Therefore, taking into account the intrinsic value and, accessorially, the position and size of the word components 'LA VIOLETTE' and 'ALMENARA', the Board attributes equal weight to the word elements 'LA VIOLETTE' and 'ALMENARA' in the mark applied for in the overall comparison of the conflicting marks for the goods 'agricultural, horticultural and forestry products; fresh fruits and vegetables'.
- 63 Taking all of the above into account the Board comes to the conclusion that as there are no elements which could be considered as clearly less distinctive and/or dominant components in the mark applied for and which would therefore influence the overall comparison of the marks, the visual differences between the marks mentioned in paragraphs 40-43 above remain equally relevant for the comparison of the marks as a whole, with the result that the marks must be considered as being visually dissimilar overall for the goods 'agricultural, horticultural and forestry products; fresh fruits and vegetables' as well.

64 As to the phonetic comparison concerning these goods, as noted above, the terms ‘VIOLETTE’ and ‘Biolette’ are identically pronounced at least in most parts of Spain. However, the earlier mark also contains the components ‘LA’ and ‘ALMENARA’ which are not present in the mark applied for and which create a fairly clear distinction between them. As for the goods ‘agricultural, horticultural and forestry products; fresh fruits and vegetables’ there are no elements which could be considered as clearly less distinctive and/or dominant components in the mark applied for and which would therefore influence the overall comparison of the marks. The phonetical similarities and differences between the marks mentioned in paragraph 44 above remain equally relevant for the comparison of the marks as a whole, with the result that the marks must be considered as having a medium degree of phonetical similarity overall for the goods ‘agricultural, horticultural and forestry products; fresh fruits and vegetables’.

*Conceptual similarity*

65 As to the conceptual comparison of the signs, as noted earlier, the Board is of the opinion that the relevant public will not see the word ‘ALMENARA’ as relating to a particular concept. In addition, when the relevant public is visually confronted with the signs they will see the terms ‘LA VIOLETTE’ and ‘Biolette’ as referring to different concepts (a ‘violet’, as opposed to something referring to biological products).

66 However, as to the words ‘biolette’ and ‘VIOLETTE’, due to their identical pronunciation, their concept is identical when it is perceived aurally by the relevant public. But even then, at least as far as the term ‘VIOLETTE’ would be perceived as descriptive or allusive, the conceptual similarity between the signs at issue would be only of minor significance (see, to that extent, judgment of 13 September 2010 in Case T-149/08 *Abbott Laboratories v OHIM* (‘Sorvir’) [2010] not yet published, at paragraph 40).

67 In the light of the foregoing, insofar as the relevant public is visually confronted with the signs, the signs are conceptually clearly dissimilar. Insofar as the relevant public is aurally confronted with the signs, the signs could be seen as conceptually partially identical. However, as far as ‘seeds, flowers and natural plants’ are concerned this conceptual similarity between the signs at issue is of only minor significance.

68 Therefore, taking into account all of the above mentioned factors the Board comes to the conclusion that, overall, the marks are conceptually dissimilar for ‘seeds, flowers and natural plants’ and as the conceptual similarity for ‘agricultural, horticultural and forestry products; fresh fruits and vegetables’ would only be perceptible when the relevant public is aurally confronted with the signs, the marks are conceptually similar overall for these goods only at a very low level.

*Conclusion*

- 69 The visual, phonetic or conceptual aspects of the opposing signs do not always have the same weight (see ‘Budmen’, at paragraph 57, and ‘NL’, at paragraph 49).
- 70 The degree of phonetic similarity between two marks is of less importance in the case of goods which are marketed in such a way that, when making a purchase, the relevant public usually also perceives visually the mark designating those goods (see judgment of 14 October 2003 in Case T-292/01 *Phillips-Van Heusen Corp. v OHIM* (‘Bass’) [2003] ECR II-4335, at paragraph 56 and judgment of 3 March 2004 in Case T-355/02 *Mülhens GmbH & Co. KG v OHIM* (‘Zirh’) [2004] ECR II-791, at paragraph 51).
- 71 This occurs in the case at hand. The Board refers to the following considerations made by the Court in the ‘Eglèfruit’ judgment at paragraphs 53-54 which are also applicable in the present case:
- ‘In the present case, the Board of Appeal, without being challenged on this point by the applicant, held that the consumers at issue are faced with the marks covering goods in Classes 29 and 31 both visually, when they examine those goods on supermarket shelves, and phonetically, in so far as they are potentially liable to refer to those marks orally. Thus, there is no particular feature of the present case which allows greater weight to be given to phonetic similarity, such that the existence of a certain degree of similarity in that regard would suffice, in the context of a global assessment, to lead to the conclusion that there is a likelihood of confusion in the present case.
- On the contrary, as OHIM submits, it is likely that visual contact with the marks predominates in respect of everyday consumer goods. In that context, it is necessary to take into consideration, in particular, the very clear visual differences which have been established’.
- 72 Taking into account that more weight has to be given to the visual and corresponding visually perceptible conceptual differences between the signs, the degree of phonetic similarity and conceptual similarity which is based on the aural perception of the signs established does not support the finding that there is a likelihood of confusion on the part of the relevant public in Spain. Given the differences between the marks in question, that assessment is not undermined by the fact that the goods covered by the trade mark applied for are (partially or entirely) identical to the goods covered by the earlier trade mark.
- 73 It follows that the Opposition Division erred in its finding that there was a likelihood of confusion in the sense of Article 8(1)(b) CTMR between the mark applied for and the earlier mark.
- 74 The appeal is upheld and the contested decision annulled.

**Costs**

- 75 Pursuant to Article 85(1) CTMR, the opponent, as the losing party, shall bear the fees and costs incurred by the applicant in the appeal proceedings. Pursuant to Article 85(6) CTMR and Rule 94(3) last sentence CTMIR, the opponent is, therefore, ordered to reimburse to the applicant the appeal fee (EUR 800), as well as the costs of professional representation for the appeal proceedings at the level laid down in Rule 94(7)(d) CTMIR (EUR 550). As the decision of the Opposition Division has been annulled and the result is that the applicant succeeds on all heads, the Board must also fix the costs of the opposition proceedings. These are fixed at EUR 300 in respect of the applicant's representation costs.

**Order**

On those grounds,

THE BOARD

hereby:

- 1. Annuls the contested decision;**
- 2. Rejects the opposition and accepts the contested Community trade mark application for all the goods applied for;**
- 3. Orders the opponent to bear the total amount of EUR 1650 in respect of the applicant's fees and costs in the appeal and opposition proceedings.**

Signed

T. De Las Heras

Signed

H. Salmi

Signed

G. Bertoli

Registrar:

Signed

C. Bartos

