

JUDGMENT OF THE COURT OF FIRST INSTANCE (Fourth Chamber)  
20 April 2005\*

In Case T-273/02,

**Krüger GmbH & Co. KG**, established in Bergisch Gladbach (Germany),  
represented by S. von Petersdorff-Campen, lawyer,

applicant,

v

**Office for Harmonisation in the Internal Market (Trade Marks and Designs)**  
**(OHIM)**, represented by G. Schneider, acting as Agent,

defendant,

\* Language of the case: German.

the other party to the proceedings before the Board of Appeal of OHIM, intervener before the Court of First Instance, being

**Calpis Co. Ltd**, established in Tokyo (Japan), represented by O. Jüngst and M. Schork, lawyers,

ACTION brought against the decision of the First Board of Appeal of OHIM of 25 June 2002 (Case R 484/2000-1), concerning opposition proceedings between Calpis Co. Ltd and Krüger GmbH & Co. KG,

THE COURT OF FIRST INSTANCE  
OF THE EUROPEAN COMMUNITIES (Fourth Chamber),

composed of H. Legal, President, P. Mengozzi and I. Wiszniewska-Białecka, Judges,

Registrar: I. Natsinas, Administrator,

having regard to the application lodged at the Registry of the Court of First Instance on 6 September 2002,

having regard to the response lodged at the Registry of the Court of First Instance on 18 December 2002,

having regard to the response of the intervener lodged at the Registry of the Court of First Instance on 27 December 2002,

further to the hearing on 17 November 2004,

gives the following

## **Judgment**

### **Background to the dispute**

- 1 On 1 April 1996 The Calpis Food Industry Co. Ltd, now Calpis Co. Ltd ('the intervener') filed an application for a Community trade mark at the Office for Harmonisation in the Internal Market (Trade Marks and Designs) ('OHIM'), pursuant to Council Regulation (EC) No 40/94 of 20 December 1993 on the Community trade mark (OJ 1994 L 11, p. 1), as amended.
- 2 The trade mark in respect of which registration was sought is the word sign CALPICO.
- 3 The goods in respect of which registration was sought are in Classes 29, 30 and 32 within the meaning 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 correspond, for Class 32, to the following description: 'mineral and aerated waters and other non-alcoholic drinks, in particular physiologically functional drinks; fruit drinks and fruit juices as well as beverages with a fruit juice base; syrups and other preparations for making beverages'.

4 On 28 September 1998 the trade mark application was published in *Community Trade Marks Bulletin* No 74/98.

5 On 11 November 1998 Krüger GmbH & Co. KG ('the applicant') brought an opposition against registration of the CALPICO sign, pleading likelihood of confusion, within the meaning of Article 8(1)(b) of Regulation No 40/94, with the earlier national word mark CALYPSO, registered in Germany, of which it is the holder. The goods in respect of which the earlier mark was registered are in Class 32 within the meaning of the Nice Agreement and correspond to the following description: 'fruit powders and non-alcoholic fruit preparations for making non-alcoholic beverages (all the aforesaid goods also in instant form)'.

6 By decision of 13 March 2000, the Opposition Division rejected the opposition on the ground that the two conflicting marks had sufficient differences on the visual, aural and conceptual levels to rule out any likelihood of confusion within the meaning of Article 8(1)(b) of Regulation No 40/94.

7 On 5 May 2000 the applicant brought an appeal before OHIM against the decision of the Opposition Division.

- 8 By decision of 25 June 2002 ('the contested decision'), the First Board of Appeal of OHIM dismissed the appeal. The Board of Appeal considered, essentially, that although the goods in question are in part identical (preparations for beverages) and in part highly similar (other goods), the visual, aural and conceptual differences between the conflicting signs did not support the conclusion that there was a likelihood of confusion.

### **Forms of order sought**

- 9 The applicant claims that the Court should:

- annul the contested decision;
  
- order OHIM to pay the costs.

- 10 OHIM contends that the Court should:

- dismiss the action;
  
- order the defendant to pay the costs.

**Law**

- 11 In support of its action, the applicant puts forward two pleas. The first plea relates to infringement of Article 8(1)(b) of Regulation No 40/94. The second plea relates to infringement of the right to be heard, referred to in Article 61(2) of Regulation No 40/94, read in conjunction with the first sentence of Rule 20(2) of Commission Regulation (EC) No 2868/95 of 13 December 1995 implementing Council Regulation (EC) No 40/94 on the Community trade mark (OJ 1995 L 303, p. 1), and Article 6(1) of the European Convention for Protection of Human Rights and Fundamental Freedoms.

*The first plea: infringement of Article 8(1)(b) of Regulation No 40/94*

**Arguments of the parties**

- 12 The applicant considers, first, that by analysing the similarities between the conflicting signs on the visual, aural and conceptual levels at the same time, the Board of Appeal carried out a cumulative analysis of the likelihood of confusion which is manifestly incorrect. According to the applicant, where one of those similarities, for example a visual similarity, is found and that similarity is of decisive importance, examination of the conceptual similarity between the conflicting signs is not required, even if no aural similarity was found. However, by carrying out a cumulative examination, the Board of Appeal failed to have regard to the case-law of the Court cited in Case C-251/95 *SABEL* [1997] ECR I-6191 and in Case C-342/97 *Lloyd Schuhfabrik Meyer* [1999] ECR I-3819, paragraph 27.

- 13 The applicant asserts, secondly, that the Board of Appeal did not assess the facts correctly and that it was not in a position to conclude that there was no similarity between the conflicting signs.
- 14 It maintains, first, that the Board of Appeal wrongly considered that, on account of the extensive choice in the fruit juices and beverages sector, the level of attention of the average consumer was not to be regarded as low. The applicant does not dispute that there is extensive choice in the fruit juices and beverages sector, but takes the view that the reasoning of the Board of Appeal is contradictory. If, as the latter noted, it were a question in this case of goods which are purchased quickly, the level of attention of consumers cannot be high. Moreover, the extensive choice favours the likelihood of confusion between brands. In addition, the Board of Appeal itself noted that the price of the goods was low. In the applicant's opinion, the average consumer pays less attention to goods which are cheap than to those which are more expensive.
- 15 Next, the applicant submits that there is a visual similarity between the CALYPSO and CALPICO signs. Both are made up of seven letters and include the letter 'p' in the middle of the word. Moreover, the letters common to the two signs ('cal' and 'o') are at the beginning and the end of the sign. The applicant maintains that it is the elements at the beginning and end of a word sign which are the decisive ones in the visual impression made by it. The Board of Appeal's statement that there are visual differences between the two series of letters 'pic' and 'yps' is therefore irrelevant, since they are in the middle of the word. The applicant also states that the signs in question are first perceived visually, and are only perceived aurally by consumers if they examine them more closely. As their level of attention is low, the signs are most often perceived only visually. For that reason greatest importance should be attached to the visual similarity.

- 16 According to the applicant, the likelihood of confusion arising from the visual similarity is reinforced by the aural similarity between the signs. They both have the series of vowels 'a-i-o', the letter 'y' in the CALYPSO sign being pronounced like an 'i'. The vowel series is thus the decisive factor in the aural perception of the words in question. In addition, the applicant submits that, as the CALPICO sign is regarded in Germany as a foreign word, a large number of consumers pronounce it as if it were an Italian or Spanish word, namely 'kalpitscho' or 'kalpizo'. For German consumers there is therefore uncertainty as to the pronunciation of the word sign CALPICO, which prompts consumers to pronounce it in the same way as the CALYPSO sign which they have already heard. The Board of Appeal's assertion that the letter 'c' in CALPICO is pronounced 'k', because in German 'c' is always pronounced in that way when it comes before an 'o', is therefore irrelevant because CALPICO is not a German word.
- 17 Further, the applicant believes that the absence of conceptual similarity between the two signs does not support the conclusion that there is no likelihood of confusion. To the extent that the word 'calypso' has several meanings in German — it denotes a rhythmic dance originating from the Antilles, a nymph in Greek mythology or a moon of the planet Saturn — and that the word 'calpico' has none, consumers may, on account of the visual and aural similarities between the two signs, attribute to the word 'calpico' the meanings of the word 'calypso'. In addition, the Board of Appeal did not show why, among the different meanings of the word 'calypso', consumers associate it with the Caribbean, the South and swaying rhythms.
- 18 Finally, the applicant claims that the Board of Appeal did not take account of the interdependence between the similarity of the signs and that of the goods in the assessment of likelihood of confusion. Having found a similarity between the goods, the Board of Appeal should have concluded that there was a likelihood of confusion by relying on the visual and aural similarities between the signs.

- 19 Thirdly, the applicant maintains that the decision which is challenged is contrary to OHIM's practice in previous decisions, in particular to the decisions of 28 February 2002 in *Robert Krups/Lidl Stiftung* (Case R 488/2000-4), 3 April 2001 in *Almirall Prodesfarma/Mundipharma* (Case R 622/1999-3) and 12 February 2001 in *Karlsberg Brauerei/Mystery Drinks* (Case R 251/2000-3).
- 20 OHIM counters by saying, first, that the Board of Appeal did not state that, to find that there is a likelihood of confusion, there must be simultaneous visual, aural and conceptual similarity.
- 21 Secondly, OHIM maintains that the Board of Appeal correctly assessed the facts and rightly concluded that there was no likelihood of confusion.
- 22 First of all, OHIM submits that, even in respect of the purchase of staple goods, it is necessary to start from the assumption of an average level of attention on the part of the consumer, not a low level. The applicant should therefore have shown that, in this instance, that was not the case for fruit juices. The simple assertion that practical experience supports that cannot be regarded as sufficient proof. In fact in OHIM's opinion, German consumers are very sensitive to brands of fruit juices. The considerable success of certain brands on the German market and the frequent advertising campaigns broadcast on radio and television indicate, according to OHIM, that consumers pay, at the very least, average attention to the brand when they choose such a beverage.
- 23 Next, OHIM believes that the two signs can clearly be distinguished on the conceptual, aural and visual levels, which precludes the existence of a likelihood of confusion between the marks.

- 24 The intervener states, first, that it does not see any cumulative approach in the contested decision. According to the intervener, the applicant confused two examinations. The first examination is the assessment of the similarity between the signs. It follows from the judgments in *SABEL* and *Lloyd Schuhfabrik Meyer*, cited above, that the degree of visual, aural or conceptual similarity must be examined in order to determine the similarity between the conflicting signs. The second examination is the assessment of the likelihood of confusion. It suffices for there to be similarity on only one of the three levels to prove likelihood of confusion. According to the intervener, if the Board of Appeal finds, at the stage of examining the similarity between the signs, that the signs can be distinguished from one another, it does not have to ask itself whether only one of those three similarities may give rise to a likelihood of confusion. In the intervener's view, that was what the Board of Appeal did in the present case.
- 25 Moreover, the intervener rejects the applicant's argument that aural similarity should be accorded less importance than visual similarity between the signs on the ground that the word marks are perceived principally through their written form. According to the intervener, the aural impression made by marks is fundamental. They are heard in the media well before they are read.
- 26 Secondly, the intervener maintains that the Board of Appeal was justified in concluding that there was no likelihood of confusion.
- 27 In that regard, it believes, first, that in the present case the level of attention of the average consumer is not low. The Board of Appeal's statement that consumers, because they are accustomed to having a large choice of fruit juices, accord importance to packaging and brands, is consistent with the case-law of the Court which requires that account be taken of the fact that 'the average consumer's level of attention is likely to vary according to the category of goods or services in question' (*Lloyd Schuhfabrik Meyer*, cited above, paragraph 26). It is therefore necessary to categorise the attention of consumers on a product-by-product basis, even if the products are staple products, instead of laying down the principle that the average

consumer's level of attention is low for all staple products, whatever they are. Since the beverages in question are manufactured by many undertakings, consumers examine them relatively closely. The conclusion reached by the Board of Appeal regarding consumers' level of attention is therefore not 'opposed' to the Opposition Division's, the latter simply assessing the facts differently from the former.

- 28 Next, as regards comparison of the signs, the intervener essentially shares the position expressed by OHIM.
- 29 Finally, in respect of the applicant's argument that the Board of Appeal did not, in the assessment of likelihood of confusion, take account of the interdependence between the similarity of the marks and that of the goods, the intervener considers likewise that that argument is not valid.

### Findings of the Court

- 30 Under Article 8(1)(b) of Regulation No 40/94, upon opposition by the proprietor of an earlier trade mark, the trade mark applied for is not to be registered if because of its identity with or similarity to the earlier trade mark and the identity or similarity of the goods or services covered by the two marks there exists a likelihood of confusion on the part of the public in the territory in which the earlier trade mark is protected.
- 31 It is settled case-law that the risk that the public might believe that the goods or services in question come from the same undertaking or, as the case may be, from economically-linked undertakings, constitutes a likelihood of confusion.

- 32 According to the same line of case-law, the likelihood of confusion must be assessed globally, according to the perception of the signs and of the goods and services in question in the mind of the relevant public, taking into account all factors relevant to the circumstances of the case, in particular interdependence between the similarity of the signs and the similarity of the goods or services designated (see Case T-162/01 *Laboratorios RTB v OHIM — Giorgio Beverly Hills (GIORGIO BEVERLY HILLS)* [2003] ECR II-2821, paragraphs 31 to 33, and the case-law cited).
- 33 It is also clear from case-law that the global assessment of the likelihood of confusion, as far as concerns the visual, aural or conceptual similarity of the conflicting signs, must be based on the overall impression given by them, bearing in mind, inter alia, their distinctive and dominant components (see Case T-292/01 *Phillips-Van Heusen v OHIM — Pash Textilvertrieb und Einzelhandel (BASS)* [2003] ECR II-4335, paragraph 47, and the case-law cited).
- 34 In this case, the action concerns the comparison of signs. The characteristics of the goods designated by the conflicting marks, which are partly identical and partly similar, are not in dispute.
- 35 As the earlier mark is registered in Germany, the relevant public is the average German consumer.
- 36 It should first be noted that, contrary to the applicant's claims, the existence of a likelihood of confusion cannot be found without carrying out a preparatory examination of the similarity of the signs on the visual, aural and conceptual levels. The applicant's argument that a likelihood of confusion can be found when similarity between the signs has been shown on one of the three abovementioned levels is contrary to the Community case-law, cited in paragraph 33 above, to the effect that the global assessment of the likelihood of confusion, as far as concerns the

visual, aural or conceptual similarity of the conflicting signs, must be based on the overall impression created by them, bearing in mind, inter alia, their distinctive and dominant components. It is in the context of that global comparison that the differences and the similarities between the signs must, if necessary, be weighed up.

37 In those circumstances, it is necessary to determine whether the Board of Appeal has infringed Article 8(1)(b) of Regulation No 40/94 in finding that there is no visual, aural or conceptual similarity between the signs in question, making it possible to preclude, in the presence of identical or highly similar goods, any likelihood of confusion between the conflicting marks.

38 As to the visual comparison between the signs in question, the Board of Appeal stated in paragraph 20 of the contested decision:

‘Both marks contain seven letters of which the first three (“CAL”) and the last (“O”) are identical. The same letter (“P”) appears in central position in both marks. However, the two marks produce an overall visual impression which is clearly different. The series of letters “PIC” in the mark applied for can clearly be distinguished from the series of letters “YPS” of the opponent’s mark.’

39 That assessment cannot be invalidated. In general, in respect of word marks which are relatively short, such as those in this case, the central elements are as important as the elements at the beginning and end of the sign (see, to that effect, Case T-117/02 *Grupo El Prado Cervera v OHIM — Héritiers Debuschewitz (CHUFAPIT)* [2004] ECR II-2073, paragraph 48). The conflicting signs do have differences on the

visual level, owing to the series of letters ‘pic’ in the Community mark applied for and ‘yps’ in the earlier national mark, which do not support a finding of visual similarity between the conflicting signs.

40 Regarding the aural comparison, the Board of Appeal stated, in paragraph 21 of the contested decision:

‘Unlike the opponent, the Board of Appeal does not see any ground for inferring that in Germany the mark applied for is pronounced “KALPITZO” or “KALPISO”. In German, when the letter “C” comes before an “O”, it is always pronounced like a “K” as in the words “Collage”, “Computer”, “Container”, “Coburg” or “Coca-Cola”. It is therefore a hard consonant. In linguistic terms, the mark applied for can be subdivided into three syllables: CAL-PI-CO (pronounced “KAL-PI-KO”), the main stress falling on the first syllable. While the opponent’s mark also contains three syllables in linguistic terms, namely CA-LY-PSO (pronounced “KA-LU-PSO”), here it is the second syllable which has the main stress. In conclusion, the two conflicting marks are clearly different on the aural level.’

41 That assessment must be upheld. The conflicting signs have two syllables which are clearly different on the aural level, the main stress in the two signs does not fall on the same syllable and the letter ‘y’ is not pronounced in German in the same way as the letter ‘i’. Moreover, as to the applicant’s argument that German consumers pronounce the word sign CALPICO ‘kalpitscho’ or ‘kalpizo’, as it is pronounced in Italian or Spanish, it should be noted that, even if the relevant public had sufficient knowledge of Italian and Spanish, CALPICO is not pronounced ‘kalpitscho’ or ‘kalpizo’ in either Italian or Spanish. Further, even assuming that, as the applicant submits, German consumers, recognising the sign CALPICO as a foreign word,

adopt an unorthodox and unpredictable pronunciation corresponding to that which they assume is correct in Italian or Spanish, those consumers will not be prompted to pronounce that word in a similar way to the CALYPSO word sign, the pronunciation of which is settled in the German language. That difference helps to preclude any aural similarity between the two signs.

42 In respect of the conceptual comparison carried out by the Board of Appeal, the latter noted, in paragraph 22 of the contested decision, that the word 'calpico' is a 'purely fanciful word having no semantic content', whereas the word 'calypso' calls to mind either 'the Caribbean, the South and rhythmic swaying', or the nymph in Greek mythology with whom Ulysses finds shelter after he has been shipwrecked. In those circumstances, it concluded that the conflicting signs have 'no conceptual similarity'.

43 It suffices to state that, for the relevant public, the word 'calypso' effectively has, at the very least, the two meanings called to mind by the Board of Appeal, whereas it is undisputed that the word 'calpico' has none. From a conceptual point of view, the relevant public will therefore clearly be able to distinguish the two conflicting signs, regardless of which exact meaning, of the two mentioned by the Board of Appeal, it attributes to the word 'calypso'. Further, even if the relevant public associates the word 'calypso' with one of the satellites of the planet Saturn, as the applicant claims, that would not give rise to any conceptual similarity with the word 'calpico'.

44 The Board of Appeal therefore legitimately concluded that there was no visual, aural or conceptual similarity between the conflicting signs.

45 In those circumstances, despite the fact that the goods designated by the conflicting marks are partly identical and partly highly similar, the visual difference and the clear aural and conceptual differences between the conflicting marks make it possible to preclude any likelihood of confusion between those marks on the part of the relevant public.

46 That conclusion is not affected by the applicant's other arguments.

47 As regards the applicant's contention that the overall impression of the conflicting marks is dominated by the visual impression, it suffices to point out that, even if it is valid, it does not prove that there is a likelihood of confusion between the conflicting marks in the absence of visual similarity between the signs.

48 The applicant's argument regarding OHIM's practice in previous decisions should also be rejected, since it is settled case-law that the legality of decisions of the Boards of Appeal is to be assessed purely by reference to Regulation No 40/94, and not to such practice in previous decisions (Case T-130/01 *Sykes Enterprises v OHIM (REAL PEOPLE, REAL SOLUTIONS)* [2002] ECR II-5179, paragraph 31, and Case T-129/01 *Alejandro v OHIM — Anheuser-Busch (BUDMEN)* [2003] ECR II-2251, paragraph 61).

49 Moreover, as regards the Board of Appeal's decision in *Karlsberg Brauerei v Mystery Drinks*, cited in paragraph 19 above, specifically discussed between the applicant and the intervener, and which was the subject of an appeal before the Court (Case T-99/01 *Mystery Drinks v OHIM — Karlsberg Brauerei (MYSTERY)* [2003] ECR II-43), the applicant has not shown that there is a situation which is comparable to that

case since, in this case, the conflicting signs have clear aural differences, while in the case giving rise to the *MYSTERY* judgment it was held that the signs in question were phonetically similar.

- 50 Finally, the applicant complains that the Board of Appeal took into account, for the purposes of the assessment of likelihood of confusion between the conflicting marks, the not insignificant level of attention of the relevant public, unlike the analysis carried out by the Opposition Division which considered that the relevant public bought the goods designated by the conflicting marks fairly carelessly.
- 51 In that respect, it should be stated that, in its decision dismissing the opposition on the ground that there was no likelihood of confusion, the Opposition Division stated:

‘Although identical goods are at issue in this case, the differences between the signs which are compared suffice to distinguish [the marks] with enough certainty. Admittedly, strict criteria should be applied in this case as regards the difference which must exist between the marks, in particular because the goods compared are staple goods which, as experience shows, are bought fairly carelessly and without particular attention being paid to the names of the goods.’

- 52 As for the Board of Appeal, it should be noted that in paragraph 23 of the contested decision it stated:

‘The goods covered by each of the marks are everyday goods that consumers generally buy as they go past in supermarkets and shops selling beverages. The price

of those articles is such that they may be described as low-cost articles. However, given the extensive choice in the fruit juices and beverages sector, the average customer's attention should not be regarded as insignificant. Accustomed to an extensive choice of fruit juices and goods of that kind, such as powders presented in similar packaging, consumers will pay attention to the packaging of each or will examine the marks more closely before making a purchase.'

53 Given that the goods designated by the conflicting marks are staple goods, both the Opposition Division and the Board of Appeal considered that the level of attention of the relevant public was not high. It is true that paragraph 23 of the contested decision differs from the Opposition Division's decision as regards assessment of the exact degree of attention which the relevant public may pay to the conflicting marks, on account of the effect of extensive choice on attention in the fruit juices and beverages sector. However, while the Board of Appeal took the view that extensive choice in the fruit juices and beverages sector may lead the relevant public to pay particular attention to the conflicting marks, it none the less did not consider that that attention was high.

54 In any event, the difference in the assessments in the decisions of the two bodies of OHIM does not imply any consequence as regards the absence of similarity between the conflicting signs and the absence of likelihood of confusion between the marks which were found by those bodies. Having regard to the visual, aural and conceptual differences between the conflicting signs noted in paragraphs 38 to 43 above, the average German consumer will not attribute the same commercial origin to the goods designated by the conflicting marks even if he pays no particular attention to those marks.

55 In those circumstances, the Board of Appeal correctly considered that there was no likelihood of confusion between the conflicting marks within the meaning of Article 8(1)(b) of Regulation No 40/94.

56 The first plea must therefore be rejected.

*The second plea: infringement of the right to be heard referred to in Article 61(2) of Regulation No 40/94, read in conjunction with the first sentence of Rule 20(2) of Regulation No 2868/95 and Article 6(1) of the European Convention for Protection of Human Rights and Fundamental Freedoms*

#### Arguments of the parties

57 The applicant maintains that, according to the Board of Appeal, the average consumer's level of attention is not low because of the variety and extensiveness of the choice in the fruit juices and beverages sector. However, the Board of Appeal did not invite the applicant to submit its observations on the Board's assessment of the average consumer's level of attention, which constitutes an infringement of its right to be heard within the meaning of Article 61(2) of Regulation No 40/94, read in conjunction with the first sentence of Rule 20(2) of Regulation No 2868/95 and Article 6(1) of the European Convention for Protection of Human Rights and Fundamental Freedoms.

58 OHIM contends that both the Opposition Division and the applicant had already expressed their view on the issue of the consumer's level of attention before that issue was examined by the Board of Appeal. The contested decision could therefore depart from the arguments that the parties had put forward to it without any requirement to inform them of that beforehand. OHIM contends that the plea regarding infringement of the right to be heard is therefore unfounded.

59 The intervener considers that the applicant refers to the second sentence of Article 73 of Regulation No 40/94, which requires OHIM to inform the parties if it intends to base its decision on reasons of fact or of law on which they have not taken a view.

According to the intervener, the issue of the consumer's level of attention falls within the scope of the assessment of the facts. While the Board of Appeal and the Opposition Division assess the facts in a slightly different manner, the facts are not new. In the intervener's view, those facts were set out exhaustively both in the Opposition Division's decision and in the contested decision. In those circumstances, the intervener is of the view that a new assessment of facts which are already known is not an infringement of the right to be heard. Moreover, the intervener submits that the applicant knew that the assessment of the likelihood of confusion was carried out in terms of the attention of the consumer. The applicant therefore had the opportunity to develop that argument, which it did not do.

### Findings of the Court

60 Under Article 61(2) of Regulation No 40/94, '[i]n the examination of the appeal, the Board of Appeal shall invite the parties, as often as necessary, to file observations, within a period to be fixed by the Board of Appeal, on communications from the other parties or issued by itself.' Furthermore, the first sentence of Rule 20(2) of Regulation No 2868/95 provides that, where the notice of opposition does not contain particulars of the facts, evidence and arguments as referred to in Rule 16(1) and (2) of that regulation, OHIM is to call upon the opposing party to submit such particulars within a period specified by OHIM.

61 In respect of the applicant's contention regarding the infringement of those two provisions by the Board of Appeal, it suffices to state that, first, the applicant has not shown that it was not invited to submit its observations on a 'communication' issued by the Board of Appeal or on a 'communication' from the intervener within the meaning of Article 61(2) of Regulation No 40/94, and secondly, it is not apparent from any document in the file that the notice of opposition did not contain the particulars referred to in the first sentence of Rule 20(2) of Regulation No 2868/95. The applicant's complaint regarding infringement of those provisions must therefore be rejected.

- 62 As for the infringement regarding Article 6(1) of the European Convention for Protection of Human Rights and Fundamental Freedoms, the Court has precluded the possibility of relying on a right to a fair 'hearing' before the Boards of Appeal of OHIM, since proceedings before the Boards of Appeal are administrative and not judicial in nature (see, to that effect, Case T-63/01 *Procter & Gamble v OHIM (Soap bar shape)* [2002] ECR II-5255, paragraphs 22 and 23).
- 63 None the less, as the intervener correctly considers, by its second plea regarding infringement of the right to be heard, the applicant in fact refers to the alleged disregard by the Board of Appeal of the second sentence of Article 73 of Regulation No 40/94, under which '[decisions of the Office] shall be based only on reasons or evidence on which the parties concerned have had an opportunity to present their comments', which is the expression, in Regulation No 40/94, of the general principle of respect of the rights of the defence.
- 64 In this case, the applicant complains that the Board of Appeal failed to have regard to its right to be heard, inasmuch as the latter did not invite it to submit its observations on the 'not insignificant' attention of the relevant public which the Board proposed to find in the contested decision. On the other hand, it is not disputed that the applicant is not complaining that the Board of Appeal did not invite it to submit its observations on the existence of extensive choice in the fruit juices and beverages sector, a fact which is, moreover, also not disputed, on which the level of attention of the relevant public found by the Board of Appeal is based.
- 65 Although the right to be heard, as laid down by the second sentence of Article 73 of Regulation No 40/94, covers all the factual and legal evidence which forms the basis for the act of making the decision, it does not apply to the final position which the administration intends to adopt (see, to that effect, Joined Cases T-129/95, T-2/96 and T-97/96 *Neue Maxhütte Stahlwerke and Lech-Stahlwerke v Commission* [1999] ECR II-17, paragraph 231, and Case T-16/02 *Audi v OHIM (TDI)* [2003] ECR II-5167, paragraphs 71 and 75).

66 Accordingly, since the factual assessment in question falls within the final position of the Board of Appeal, the latter was not required to hear the applicant concerning it.

67 It should be added that, as the examination of the first plea shows, the difference in the assessments of the two bodies of OHIM on the exact degree of attention of the relevant public does not imply any consequence as regards the absence of similarity between the signs in question and of likelihood of confusion between the conflicting marks which those bodies found.

68 It follows that, even if the Board of Appeal had been guilty of an infringement of the applicant's right to be heard, such an infringement could not have affected the legality of the contested decision.

69 Consequently, the second plea must be rejected and the action dismissed in its entirety.

### **Costs**

70 Under Article 87(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been asked for in the unsuccessful party's pleadings.

71 Since OHIM and the intervener have applied for costs and the applicant has been unsuccessful, the latter must be ordered to pay the costs.

On those grounds,

THE COURT OF FIRST INSTANCE (Fourth Chamber)

hereby:

- 1. Dismisses the action;**
- 2. Orders the applicant to pay the costs.**

Legal

Mengozi

Wiszniewska-Białecka

Delivered in open court in Luxembourg on 20 April 2005.

H. Jung

Registrar

H. Legal

President