

JUDGMENT OF THE COURT OF FIRST INSTANCE (Second Chamber)

13 February 2007*

In Case T-256/04,

Mundipharma AG, established in Basle (Switzerland), represented by F. Nielsen,
lawyer,

applicant,

v

**Office for Harmonization in the Internal Market (Trade Marks and Designs)
(OHIM)**, represented initially by B. Müller, and subsequently by G. Schneider, acting
as Agents,

defendant,

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

* Language of the case: German.

Altana Pharma AG, established in Konstanz (Germany), represented by H. Becker, lawyer,

ACTION brought against the decision of the Second Board of Appeal of OHIM of 19 April 2004 (Case R 1004/2002-2) relating to opposition proceedings between Mundipharma AG and Altana Pharma AG,

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

composed of J. Pirrung, President, A.W.H. Meij and I. Pelikánová, Judges,
Registrar: K. Andová, Administrator,

having regard to the application lodged at the Registry of the Court of First Instance on 28 June 2004,

having regard to the response of OHIM lodged at the Registry of the Court on 22 November 2004,

having regard to the response of the intervener lodged at the Registry of the Court on 22 November 2004,

further to the hearing on 24 January 2006,

gives the following

Judgment

Background to the case

- 1 On 7 October 1998, the intervener applied to the Office for Harmonization in the Internal Market (Trade Marks and Designs) (OHIM) for registration of the word mark RESPICUR ('the mark applied for') as a Community trade mark 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 goods in respect of which registration was sought are in Class 5 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 to the following description: '[t]herapeutic preparations for respiratory illnesses'.
- 3 That request was published in *Community Trade Marks Bulletin* No 45/1999 of 7 June 1999.
- 4 On 1 September 1999, the applicant, relying on Article 8(1)(b) of Regulation No 40/94, brought opposition proceedings against the registration application. The opposition was founded on German word mark No 1155003 RESPICORT, lodged on

21 August 1989 and registered on 1 March 1990 for goods in Class 5 of the Nice Agreement, corresponding to the following description: 'pharmaceutical and sanitary preparations; plasters' ('the earlier mark').

- 5 By decision of 30 October 2002, the Opposition Division rejected the opposition. It found that the applicant had not furnished proof of its ownership of the earlier mark or of its use. It also found that there was no likelihood of confusion between the mark applied for and the earlier mark.

- 6 On 12 December 2002, the applicant brought an action against the decision of the Opposition Division.

- 7 By decision of 19 April 2004 ('the contested decision'), the Second Board of Appeal set aside the decision of the Opposition Division on grounds of infringement of essential procedural requirements, but nevertheless dismissed the opposition in its entirety.

- 8 In the contested decision, the Board of Appeal found that the Opposition Division should not have dismissed the opposition on grounds of lack of proof of ownership of the earlier mark. It went on to hold that the applicant had not succeeded in proving use of the earlier mark, to the extent necessary, and that account should be taken only of the use for 'multi-dose dry powder inhalers containing corticoids, available only on prescription', which had not been contested by the intervener. As to the issue of whether there was a likelihood of confusion, the Board of Appeal found that the goods in question were identical and that there was a certain similarity, offset however by marked differences between the two opposing signs. It found that the relevant public groups in respect of the earlier mark and the mark applied for overlapped only in the professional sector, which was thus the relevant public in the present case. In the light of the differences found, the Board of Appeal found that there was no likelihood of confusion between the mark applied for and the earlier mark.

Procedure and forms of order sought

9 On 10 November 2005, the Court requested the parties to reply to certain questions. The parties replied to the questions put by the Court within the prescribed periods.

10 The applicant claims that the Court should:

— annul the contested decision;

— order OHIM to pay the costs.

11 OHIM contends that the Court should:

— dismiss the action;

— order the applicant to pay the costs.

12 The intervener endorses the forms of order sought by OHIM.

Admissibility

- 13 In their submissions, both the applicant and the intervener refer explicitly to the written pleadings lodged by them in the opposition proceedings before OHIM. The intervener has also referred to the grounds contained in the decisions of the Opposition Division and the Board of Appeal.
- 14 The Court observes that, under Article 21 of the Statute of the Court of Justice and Article 44(1)(c) of the Rule of Procedure of the Court of First Instance, the application initiating the proceedings must contain a summary of the pleas in law relied on. According to the case-law, the summary of the pleas relied on must be sufficiently clear and precise to enable the defendant to prepare its defence and the Court to rule on the action, if necessary without any other supporting information. The Court has further held that, while the body of the application may be supported and supplemented by references to certain passages in extracts from documents annexed to it, a general reference to other documents, even those annexed to the application, cannot make up for the absence of the essential arguments in the application, and it is not for the Court to place itself in the parties' position and seek the relevant information in the annexes (see order in Case T-56/92 *Koelman v Commission* [1993] ECR II-1267, paragraphs 21 and 23, and judgment in Case T-231/99 *Joynson v Commission* [2002] ECR II-2085, paragraph 154, and case-law cited). That case-law can also be transposed to the response of the other party to opposition proceedings before a Board of Appeal who intervenes before the Court of First Instance, pursuant to Article 46 of the Rules of Procedure, which, by virtue of the second subparagraph of Article 135(1) thereof, applies in matters of intellectual property (Case T-115/02 *AVEX v OHIM — Ahlers (a)* [2004] ECR II-2907, paragraph 11).
- 15 The intervener's application and response, in so far as they refer to the written submissions lodged by the applicant and the intervener before OHIM and to the decisions delivered by OHIM in the opposition proceedings, are inadmissible

because the general reference they contain cannot be linked to the pleas in law and arguments developed in the intervener's application and response.

Substance

- ¹⁶ The applicant relies on a single plea in law, alleging that the Board of Appeal infringed Article 8(1)(b) of Regulation No 40/94 in finding that there was no likelihood of confusion between the mark applied for and the earlier mark. It relies essentially on five factors: the limitation of the goods taken into account for the earlier mark, the determination of the relevant public, the similarity of the signs, the distinctive character of the earlier mark and the fact that the Deutsches Patent- und Markenamt (German Patent and Trade Mark Office) had found that there was a likelihood of confusion between the signs.

The limitation of the goods considered as being covered by the earlier mark and the similarity of the goods

The contested decision

- ¹⁷ In paragraph 31 of the contested decision, the Board of Appeal held that, in response to the intervener's request put forward pursuant to Article 43(2) and (3) of Regulation No 40/94, the applicant had not furnished proof that the earlier mark had been put to genuine use in Germany. It concluded therefrom that, in order to

determine whether there is a likelihood of confusion, only the goods for which proof of genuine use had not been requested by the intervener, that is, ‘multi-dose dry powder inhalers containing corticoids, available only on prescription’, could be regarded as being covered by the earlier mark.

Arguments of the parties

- 18 The applicant does not challenge the Board of Appeal’s finding that genuine use of the earlier mark has not been proven. That being so, the Board of Appeal wrongly limited the applicant’s economic freedom of action by holding that the earlier mark could be taken into account only in so far as it covered ‘multi-dose dry powder inhalers containing corticoids, available only on prescription’. Such an approach limits the protection conferred by the earlier mark to goods actually marketed. In similar cases, German case-law has recognised that it was not necessary to restrict the protection to goods sold only on prescription.
- 19 The applicant submits in this connection that it should be considered that use of the earlier mark has been proven for the ‘therapeutic preparations for respiratory illnesses’. According to the reasoning in Case T-126/03 *Reckitt Benckiser (España) v OHIM — Aladin (ALADIN)* [2005] ECR II-2861, paragraphs 45 and 46, that group is a separate subcategory within the general category of ‘pharmaceutical preparations’.
- 20 OHIM endorses the applicant’s position, observing that, following the judgment in *ALADIN*, it is appropriate to identify sub-categories according to the therapeutic indications of the product concerned. It submits in this regard that ‘therapeutic preparations for respiratory illnesses’ is an appropriate subcategory.

- 21 The intervener observes that, in so far as the applicant may still market new products under the earlier mark in Germany, its economic freedom is not restricted. As for the application to the present case of the *ALADIN* judgment, it submits that the appropriate subcategory is 'glucocorticoids'.

Findings of the Court

- 22 Article 43(2) and (3) of Regulation No 40/94 provides:

'2. If the applicant so requests, the proprietor of an earlier Community trade mark who has given notice of opposition shall furnish proof that, during the period of five years preceding the date of publication of the Community trade mark application, the earlier Community trade mark has been put to genuine use in the Community in connection with the goods or services in respect of which it is registered and which he cites as justification for his opposition, or that there are proper reasons for non-use, provided the earlier Community trade mark has at that date been registered for not less than five years. In the absence of proof to this effect, the opposition shall be rejected. If the earlier Community trade mark has been used in relation to part only of the goods or services for which it is registered it shall, for the purposes of the examination of the opposition, be deemed to be registered in respect only of that part of the goods or services.

3. Paragraph 2 shall apply to earlier national trade marks referred to in Article 8(2)(a), by substituting use in the Member State in which the earlier national trade mark is protected for use in the Community.'

23 According to the case-law, it follows from the provisions cited above that, if a trade mark has been registered for a category of goods or services which is sufficiently broad for it to be possible to identify within it a number of sub-categories capable of being viewed independently, proof that the mark has been put to genuine use in relation to a part of those goods or services affords protection, in opposition proceedings, only for the sub-category or sub-categories to which the goods or services for which the trade mark has actually been used belong. However, if a trade mark has been registered for goods or services defined so precisely and narrowly that it is not possible to make any significant sub-divisions within the category concerned, then the proof of genuine use of the mark for the goods or services necessarily covers the entire category for the purposes of the opposition (*ALADIN*, paragraph 45).

24 Although the principle of partial use operates to ensure that trade marks which have not been used for a given category of goods are not rendered unavailable, it must not, however, result in the proprietor of the earlier trade mark being stripped of all protection for goods which, although not strictly identical to those in respect of which he has succeeded in proving genuine use, are not in essence different from them and belong to a single group which cannot be divided other than in an arbitrary manner. In that regard, it is in practice impossible for the proprietor of a trade mark to prove that the mark has been used for all conceivable variations of the goods concerned by the registration. Consequently, the concept of ‘part of the goods or services’ cannot be taken to mean all the commercial variations of similar goods or services but merely goods or services which are sufficiently distinct to constitute coherent categories or sub-categories (*ALADIN*, paragraph 46).

25 The Court notes that although, in the present case, the applicant has not demonstrated genuine use of the earlier mark for any goods, the fact remains that the intervener has not requested that proof of such use be adduced with respect to ‘multi-dose dry powder inhalers containing corticoids, available only on prescription’. Moreover, as the Board of Appeal observed in paragraph 25 of the contested decision, because under Article 43(2) of Regulation No 40/94 proof of use of the mark on which the opposition is founded need be furnished only when requested by

the applicant, it is for the latter to determine the scope of its request for proof. Accordingly, since the intervener's request for proof did not cover the 'multi-dose dry powder inhalers containing corticoids, available only on prescription', it is not necessary to explore whether the earlier mark has been put to genuine use in Germany for those products.

- 26 Next, it should be borne in mind that the earlier mark was registered for 'pharmaceutical and sanitary preparations; plasters'. That category of goods is sufficiently broad for it to be possible to identify within it a number of subcategories capable of being viewed independently. Consequently, the fact that the earlier mark must be regarded as having been used for 'multi-dose dry powder inhalers containing corticoids, available only on prescription' confers protection only on the sub-category within which those goods fall.
- 27 In the contested decision, the Board of Appeal held that the earlier mark was to be taken into consideration only in so far as it covered goods the genuine use of which was not contested. It thus defined a subcategory corresponding to those goods, namely 'multi-dose dry powder inhalers containing corticoids, available only on prescription'.
- 28 That definition is incompatible with Article 43(2) of Regulation No 40/94, as interpreted in the light of *ALADIN*, and applicable to earlier national marks pursuant to Article 43(3) of that regulation.
- 29 The Court notes in this respect that, since consumers are searching primarily for a product or service which can meet their specific needs, the purpose or intended use of the product or service in question is vital in directing their choices. Consequently, since consumers do employ the criterion of the purpose or intended use before making any purchase, it is of fundamental importance in the definition of a sub-category of goods or services.

- 30 The purpose and intended use of a therapeutic preparation are expressed in its therapeutic indication. However, the definition employed by the Board of Appeal is not based on that criterion as it does not state that the goods in question are intended for the treatment of health problems and does not specify the nature of those problems.
- 31 Moreover, the criteria chosen by the Board of Appeal, namely the dosage form, the active ingredient and the obligation to obtain a doctor's prescription, are, as a rule, inappropriate for defining a subcategory of goods as contemplated in *ALADIN*, as the application of those criteria does not fulfil the abovementioned criteria of purpose and intended use of the goods. In fact, a given medical condition can often be treated using a number of types of medication with different dosage forms and containing different active ingredients, some of which are available over-the-counter whilst others are available only on prescription.
- 32 It follows that, in failing to take into account the purpose and intended use of the goods in question, the Board of Appeal made an arbitrary choice of subcategory of goods.
- 33 For the reasons set out in paragraphs 29 and 30 above, the subcategory of goods covering those the genuine use of which has not been contested must be determined on the basis of the criterion of therapeutic indication.
- 34 The sub-category proposed by the intervener, namely 'glucocorticoids', cannot be accepted. That definition is based on the criterion of the active ingredient. As discussed in paragraph 31 above, such a criterion is not generally appropriate by itself for defining subcategories of therapeutic preparations.

35 By contrast, the definition proposed by the applicant and OHIM, namely ‘therapeutic preparations for respiratory illnesses’, is appropriate in two ways: first, it is based on the therapeutic indication of the goods in question and, second, it allows for the definition of a sufficiently specific subcategory, as contemplated in *ALADIN*.

36 In the light of the foregoing, the Court finds that the earlier mark must be deemed to have been registered, for the purposes of the present case, for ‘therapeutic preparations for respiratory illnesses’.

37 The Court also observes that that conclusion does not affect the Board of Appeal’s finding, expressed in paragraph 38 of the contested decision and not contested by the parties, that the goods covered by the two opposing marks are identical.

38 Accordingly, although the contested decision states that the protection conferred by the earlier mark applies only to ‘multi-dose dry powder inhalers containing corticoids, available only on prescription’, it is vitiated by an error the effects of which fall to be appraised in respect of the Board of Appeal’s assessment of the issue of whether there is a likelihood of confusion.

The relevant public

Arguments of the parties

39 The applicant maintains that therapeutic preparations for respiratory illnesses, which in its view are covered by the two opposing marks, include both over-the-

counter goods and goods available only on prescription. The relevant public is thus made up of health care professionals and the end consumers, that is, patients.

- 40 OHIM endorses the applicant's position in principle, adding, first, that German consumers are the ones who should be taken into account and, second, that the end consumers, who are patients suffering from a serious respiratory illness, will have a medium to high level of attention.
- 41 The intervener maintains that, since all glucocorticoids are provided on prescription, the public to whom the earlier mark is addressed is made up of health care professionals. Consequently, that same professional public is the relevant public in the present case. It adds that, in any event, patients tend to show a particularly high level of attention in choosing therapeutic preparations intended to treat serious health problems such as those at issue in the present case.

Findings of the Court

- 42 As a preliminary point, it must be borne in mind that, in the global assessment of the likelihood of confusion, account should be taken of the average consumer of the category of products concerned, who is reasonably well informed and reasonably observant and circumspect. 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, by analogy, Case C-342/97 *Lloyd Schuhfabrik Meyer* [1999] ECR I-3819, paragraphs 25 and 26).

43 Next, first of all, as OHIM observes, the relevant public comprises German consumers, since the earlier mark was registered in Germany.

44 Second, it has not been disputed in the present case that the relevant public for the goods covered by the mark applied for, namely therapeutic preparations for respiratory illnesses, is made up of patients in their capacity as end consumers, on the one hand, and healthcare professionals, on the other.

45 As to the goods for which the earlier mark is deemed to have been registered, it is apparent from the parties' written submissions and from their answers to the questions put at the hearing that some therapeutic preparations for respiratory illnesses are available only on prescription whilst others are available over the counter. Since some of those goods may be purchased by patients without a medical prescription, the Court finds that the relevant public for those goods includes, in addition to health care professionals, the end consumers.

46 Third, as pointed out by the intervener, since many respiratory illnesses are serious conditions, patients suffering from those illnesses are generally well informed and particularly attentive and circumspect in the choice of the medication that is appropriate for them.

47 The Court thus finds that the relevant public comprises German health care professionals, on the one hand, and German patients suffering from respiratory illnesses, on the other, the latter generally showing a higher than average level of attention.

The similarity of the signs

Arguments of the parties

- 48 The applicant maintains that the words 'respicort' and 'respicur' are highly similar because of their similar length and the fact that seven of their letters are identical and in the same order. Phonetically, there is little difference between the vowels 'o' and 'u' and the addition of the consonant 't' at the end of 'respicort' is hardly perceptible. The two vowels have a soft resonance and thus produce a similar effect. In addition, in German, the 't' at the end of 'respicort' is usually pronounced either not at all or only very softly, as the last letters are often 'swallowed'. The 't' at the end is thus often not heard, especially as 'respicort' is not a German word but rather an imaginary term, so that it will quite possibly be pronounced without the 't' at the end. The applicant submits that, conceptually, the relevant consumers will not tend to separate the opposing marks into two parts, namely 'respi', on the one hand, and 'cur' or 'cort' on the other. It adds that, in any event, the relevant end consumers will not be able to understand the meaning of those components.
- 49 OHIM maintains that the marks in question are only slightly similar. It states in this regard that the component 'respi' will be understood by the relevant public as being descriptive and will thus not be perceived as being an indication of commercial origin. Accordingly it cannot contribute to establishing a similarity between the signs in question. The component 'cort' will be perceived as being a reference to corticoids by the professional public and by some end consumers. Likewise, the component 'cur' will be construed by those same groups of the public as referring to the words 'cure' or 'heal'.
- 50 OHIM goes on to observe that, visually, the different vowels 'o' and 'u' and the presence of the letter 't' at the end of the earlier mark create a perceptible difference. Phonetically, the mark applied for ends with a long and low-pitched sound because

of the combination of the letters ‘u’ and ‘r’. By contrast, the component at the end of the earlier mark is characterised by the hard sound of the letter ‘t’, which is pronounced by the German public. Conceptually, the difference between the components at the ends of the two signs is such as to counteract any visual or phonetic similarities.

- 51 The intervener endorses, in principle, the arguments put forward by OHIM. It adds that, with respect to the component ‘respi’, which refers to the word ‘respiratory’, account must be taken of the need to leave that term free.

Findings of the Court

- 52 According to settled case-law, the global assessment of the likelihood of confusion, as far as concerns the visual, aural or conceptual similarity of the opposing signs, must be based on the overall impression given by the signs, 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 case-law cited).
- 53 In that respect, conceptual differences which distinguish the marks at issue may be such as to counteract to a large extent the visual and aural similarities existing between the marks. For there to be such a counteraction, however, at least one of the marks at issue must have, from the point of view of the relevant public, a clear and specific meaning so that the public is capable of grasping it immediately, and the other mark must not have such a meaning or must have a totally different meaning (*BASS*, paragraph 54).

- 54 It is in the light of those rules that it is appropriate to consider the issue of whether there is a similarity between the mark applied for (RESPICUR) and the earlier mark (RESPICORT).
- 55 First of all, the Court notes that the marks in question are visually similar for all of the relevant consumers because they comprise a single word, are of similar length and share the first six letters, 'respic', and the eighth letter 'r'. Neither the difference between the vowels 'u' and 'o', as the respective seventh letters, nor the addition of the ninth letter 't' at the end of the earlier mark is such as to eliminate that visual similarity.
- 56 Second, as to the phonetic comparison, the opposing marks will be pronounced as three syllables, with the pronunciation of the first two syllables 'respi' being identical in both cases. The pronunciation of the third syllable, 'cur' and 'cort' respectively, points both to similarities, caused by the presence of the consonants 'c' and 'r', and to differences, due to the distinction between the vowels 'u' and 'o', and the letter 't' in the earlier mark. That being so, those differences are not sufficient to offset the identical nature of the first two syllables and the similarity due to the presence of the consonants 'c' and 'r' in the pronunciation of the third syllable. The Court thus finds that there is a phonetic similarity.
- 57 Third, as to the conceptual similarity, the Court notes first that, although the average consumer normally perceives a mark as a whole and does not proceed to analyse its various details (*Lloyd Schuhfabrik Meyer*, paragraph 25), the fact remains that, when perceiving a verbal sign, he will break it down into elements which, for him, suggest a concrete meaning or which resemble words known to him (Case T-356/02 *Vitakraft-Werke Wührmann v OHIM — Krafft (VITAKRAFT)* [2004] ECR II-3445, paragraph 51). Accordingly, the applicant's argument that the opposing marks will not be broken down by consumers cannot be accepted outright, without an examination of the specific circumstances of the case.

- 58 Next, the Court notes that, in the present case, the conceptual perception of the opposing marks will be different for the two groups making up the relevant public. The professional public, because of its knowledge and experience, will generally be able to understand the conceptual meaning of the terms referred to by the different components of the opposing marks, namely 'respiratory' for 'respi', 'cure' or 'heal' for 'cur' and 'corticoids' for 'cort'. Thus, by breaking down the two marks into their respective components, they will interpret the mark applied for as corresponding to a 'cure for respiratory problems' and the earlier mark as designating 'corticoids intended for respiratory illnesses'. Those two interpretations indicate a degree of conceptual divergence, the earlier mark carrying a more specific meaning than the mark applied for, but they nevertheless share the general idea of being linked to respiratory issues. Accordingly, although the conceptual difference weakens the visual and phonetic similarity established above, it is not however sufficiently pronounced to counteract it in the minds of the professional public.
- 59 As to the end consumers, it has been noted above that their level of attention and knowledge is higher than average because of the serious nature of the illnesses from which they suffer. They will thus be able to distinguish the component 'respi' in the two marks in question and to understand its conceptual content, which refers generally to the nature of their health problems. However, their limited knowledge of medical terminology will prevent them from being able to discern the conceptual references of the components 'cur' and 'cort'. The opposing marks will thus be conceptually similar for them because of the identical component 'respi', the only component with a clear and definite conceptual content.
- 60 The above conclusions on the perception of the opposing marks are not affected by OHIM's argument that the component 'respi' cannot contribute to any similarity between the signs because of its descriptive character. In fact, in spite of that character, that component, which is placed at the beginning of the two marks, takes up two of their three syllables and is longer than the respective second components, makes a significant contribution to the overall impression produced by the two signs

in question. Moreover, with respect to the professional public, it was stated above that that public would perceive all the components of the opposing marks as being descriptive of the intended use of or active ingredient in the goods in question. Consequently, that public will not tend to accord any particular importance to a given component, but will perceive the two marks in their respective overall conceptual impressions.

61 Lastly, the intervener's argument discussed in paragraph 51 above concerning the need to leave the component 'respi' free also cannot affect the conclusions drawn above on the perception of the opposing marks. The finding that there is a similarity between the opposing marks taken as a whole cannot be regarded as leading to a monopolisation of the component 'respi'.

62 In the light of the foregoing, the Court finds that the opposing marks are somewhat similar for the professional public and highly similar for the end consumers. For the latter, the marks are visually, phonetically and conceptually similar. The professional public, by contrast, will perceive a certain conceptual difference between the two marks, which is not, however, sufficient to counteract fully the visual and phonetic similarity which has been established.

The distinctive character of the earlier mark and the likelihood of confusion

Arguments of the parties

63 The applicant maintains that the distinctive character of the earlier mark is average. It observes that 'respicort' is an imaginary term and that, although the component 'respi' refers to the term 'respiratory', the other component, 'cort', will not have any

descriptive value for the relevant consumers, all the more so because it is not separated from the other component and will therefore be less perceptible. The distinctive character of the earlier mark is reinforced by the fact that the use of ‘allusive signs’ is common in the medication sector.

- 64 The applicant submits overall that, in the present case, the goods are identical, the degree of similarity is very high and the distinctive character of the earlier mark is average. It concludes that there is a likelihood of confusion between the earlier mark and the mark applied for.
- 65 OHIM maintains that the earlier mark has a very weak distinctive character. It submits that the component ‘respi’ will generally be perceived as being a reference to the word ‘respiratory’ and that the component ‘cort’ will be perceived, at least by the professional public, as being a reference to ‘corticoids’. The earlier mark is thus composed solely of descriptive components. OHIM also notes that the applicant does not elaborate on its submission concerning the common use of ‘allusive signs’ in the medication sector.
- 66 It concludes that, due to the low similarity between the signs and the weak distinctive character of the earlier mark, there can be no likelihood of confusion in the present case.
- 67 The intervener endorses OHIM’s position. It adds that the weak distinctive character of the earlier mark is confirmed by the multitude of registered marks with the components ‘respi’ and ‘cort’.

Findings of the Court

- 68 According to settled case-law, 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.
- 69 According to that case-law, the likelihood of confusion must be assessed globally, according to the perception by the relevant public of the signs and the goods or services in question, and taking into account all factors relevant to the circumstances of the case, in particular the interdependence between similarity of the signs and 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 29 to 33, and Case T-185/02 *Ruiz-Picasso and Others v OHIM — DaimlerChrysler (PICARO)* [2004] ECR II-1739, paragraphs 49 and 50, and case-law cited).
- 70 It has been established above, first, that the goods in question were identical and, second, that the opposing marks were somewhat similar for the professional public and highly similar for the end consumers.
- 71 As to the distinctive character of the earlier mark, the Court observes that it will be understood as being descriptive by both types of relevant public, although to varying degrees. As mentioned above in the discussion of the conceptual similarity, the professional public will perceive both components as being descriptive of the purpose of the active ingredient of the product in question, whereas the end consumers will not ascribe any particular conceptual meaning to the component 'cort', but will be able to understand the reference made by the component 'respi'.

72 Accordingly, the earlier mark may be regarded as having a weak distinctive character for the relevant public, particularly health care professionals. In that regard, the applicant's submissions on the frequent use of 'allusive signs' in the sector of therapeutic preparations cannot be accepted, first, because they have not been developed any further and, second, because the applicant has not explained the relevance of that fact to the specific case of the earlier mark.

73 Moreover, although, because of the interdependence of the relevant factors for the assessment of the likelihood of confusion and the fact that the more distinctive the mark on which the opposition is based the greater will be the likelihood of confusion (*Lloyd Schuhfabrik Meyer*, paragraph 20), the weak distinctive character of the earlier mark precludes any likelihood of confusion for the professional public, that fact is not sufficient in respect of the end consumers, for whom the opposing marks are highly similar.

74 Accordingly, the Court finds that there is a likelihood of confusion between the mark applied for and the earlier mark in the minds of German end consumers. The single plea must therefore be upheld and the contested decision consequently annulled, without its being necessary to consider the relevance for purposes of the present case of the decision of the Deutsches Patent- und Markenamt relied on by the applicant.

Costs

75 Under Article 87(2) 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. Since OHIM has been unsuccessful, it must be ordered to pay, in addition to its own costs, the applicant's costs in accordance with the form of order sought by the applicant. Since the applicant has not applied for the intervener to be ordered to pay the costs, the applicant must be ordered to bear its costs relating to the intervention. Lastly, the intervener must bear its own costs.

On those grounds,

THE COURT OF FIRST INSTANCE (Second Chamber)

hereby:

- 1. Annuls the decision of the Second Board of Appeal of the Office for Harmonization in the Internal Market (Trade Marks and Designs) (OHIM) of 19 April 2004 (Case R 1004/2002-2);**
- 2. Orders OHIM to bear its own costs and to pay those incurred by the applicant, except for those relating to the intervention;**
- 3. Orders the applicant to bear its costs relating to the intervention;**

4. Orders the intervener to bear its own costs.

Pirrung

Meij

Pelikánová

Delivered in open court in Luxembourg on 13 February 2007.

E. Coulon

Registrar

J. Pirrung

President

