JUDGMENT OF THE COURT OF FIRST INSTANCE (Third Chamber)

22 September 2005 *

In Case T-130/03,

Alcon Inc., established in Hünenberg (Switzerland), represented by G. Breen, Solicitor, and J. Gleeson, Barrister,

applicant,

v

Office for Harmonisation in the Internal Market (Trade Marks and Designs) (OHIM), represented by S. Palmero Cabezas and S. Laitinen, 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: English.

Biofarma SA, established in Neuilly-sur-Seine (France), represented by V. Gil Vega, A. Ruiz Lopez, and D. González Maroto, lawyers,

ACTION brought against the decision of the Third Board of Appeal of OHIM of 30 January 2003 (Case R 968/2001-3) concerning opposition proceedings between Alcon Inc. and Biofarma SA,

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

composed of M. Jaeger, President, V. Tiili and O. Czúcz, Judges,

Registrar: C. Kristensen, Administrator,

having regard to the application lodged at the Registry of the Court of First Instance on 17 April 2003,

having regard to the response of OHIM lodged at the Registry of the Court of First Instance on 17 October 2003,

having regard to the response of the intervener lodged at the Registry of the Court of First Instance on 6 October 2003,

further to the hearing on 14 April 2005,

gives the following

Judgment

Background to the dispute

1 On 11 June 1998, Alcon Inc. 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 mark TRAVATAN.

3 The goods in respect of which registration of the trade mark 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: 'Ophthalmic pharmaceutical preparations'.

4 The application was published in *Community Trade Marks Bulletin* No 23/99 of 22 March 1999.

5 On 22 June 1999, Biofarma SA filed an opposition under Article 42 of Regulation No 40/94 against the registration of that Community trade mark. The ground relied on in support of the opposition was that referred to in Article 8(1)(b) of Regulation No 40/94. The opposition was based on the existence of the national word mark TRIVASTAN, registered in Italy on 27 January 1986 under No 394980.

6 The opposition was filed against all goods covered by the trade mark application. It was based on all the goods covered by the earlier mark, namely 'Pharmaceutical, veterinary and hygiene products; dietary products for infants or patients; plasters; materials for dressings; tooth fillings and dental impressions; disinfectants; herbicides and pesticides', in Class 5.

7 By letter of 5 May 2000, the applicant requested that the intervener furnish proof, in accordance with Article 43(2) and (3) of Regulation No 40/94, that the earlier mark had, during the period of five years preceding the date of publication of the Community trade mark application, been put to genuine use in the Member State in which it is protected in connection with all the goods on which the opposition is based. By letter of 29 May 2000, the Opposition Division requested the intervener to furnish such proof within two months.

8 On 28 July 2000, the intervener sent documents to OHIM intended to demonstrate genuine use of the earlier mark in Italy. In particular, among these documents were invoices, the explanatory notice relating to the intervener's medicinal product, an extract from the Italian directory *L'Informatore Farmaceutico* and an extract from the *Pharmaceutical Trade Mark Directory*.

9 By decision of 26 September 2001, the Opposition Division found that the use of the earlier mark was proven in respect of a specific pharmaceutical product, namely a 'peripheral vasodilator intended to treat peripheral and cerebral vascular disturbance and vascular disorders of the eye and ear', and it allowed the opposition for all the goods claimed. It therefore refused registration of the mark applied for on the ground that there was a risk of confusion, including the risk of association, in Italy, given the fact that the marks were similar both visually and phonetically and that there was a degree of similarity between the goods.

10 On 13 November 2001, the applicant filed an appeal with OHIM against the decision of the Opposition Division pursuant to Articles 57 to 62 of Regulation No 40/94.

11 By decision of 30 January 2003 ('the contested decision'), the Third Board of Appeal dismissed the appeal. It essentially held that, since the goods designated by the marks at issue displayed a high degree of similarity and there were considerable visual and phonetic similarities between the marks, there was a likelihood of confusion, including a likelihood of association, between the goods in question.

Forms of order sought

12 The applicant claims that the Court should:

— annul the contested decision;

— order OHIM to pay the costs.

13 OHIM contends that the Court should:

— dismiss the action;

— order the applicant to pay the costs.

14 The intervener contends that the Court should:

— dismiss the action;

— order the applicant to pay the costs.

Law

15 In support of its action, the applicant relies essentially on two pleas in law in its application. The first plea alleges infringement of Article 43(2) and (3) of Regulation No 40/94, in that the evidence of genuine use submitted by the intervener does not demonstrate that the earlier mark was actually used in respect of ophthalmic products. The second plea alleges infringement of Article 8(1)(b) of that regulation.

16 At the hearing the applicant also raised a plea alleging infringement of Article 43(2) and (3) of Regulation No 40/94, in so far as the conditions concerning genuine use of the earlier mark were not satisfied.

Admissibility of the plea in law submitted at the hearing

17 At the hearing the applicant referred to the judgment of the Court of First Instance of 8 July 2004 in Case T-334/01 *MFE Marienfelde* v *OHIM — Vétoquinol (HIPOVITON)*, not yet published in the ECR, in order to claim that the conditions concerning genuine use were not satisfied, in particular because of the low volume of sales of the earlier mark.

18 OHIM and the intervener take the view that the plea or argument submitted at the hearing is inadmissible, given that it was submitted for the first time before the Court of First Instance.

19 Under the first paragraph of Article 48(2) of the Rules of Procedure of the Court of First Instance, no new plea in law may be introduced in the course of the proceedings unless it is based on matters of law or of fact which come to light in the course of the procedure.

20 It should first be observed that, in its application, the applicant did not complain that the Board of Appeal had infringed Article 43(2) and (3) of Regulation No 40/94 in so far as the conditions concerning genuine use of the earlier mark were not satisfied, but only in so far as the evidence of genuine use submitted by the intervener did not show that the earlier mark had actually been used in respect of ophthalmic products.

21 Next, it must be noted that the applicant has entirely failed to establish the existence of new facts or law within the meaning of the first subparagraph of Article 48(2) of the Rules of Procedure.

22 Consequently, the plea in law submitted at the hearing must be rejected as inadmissible.

23 In any event, even if that plea were to be interpreted as an argument related to the first plea put forward in the application, it must be pointed out that the purpose of this action is to review the legality of the decision taken by the Board of Appeal of OHIM (Case T-128/01 *DaimlerChrysler* v *OHIM (grille)* [2003] ECR II-701, paragraph 18, and Case T-129/01 *Alejandro* v *OHIM — Anheuser-Busch (BUDMEN)* [2003] ECR II-2251, paragraph 67). Therefore the Court's review cannot go beyond the factual and legal context of the dispute as it was brought before the Board of Appeal (Case T-194/01 *Unilever* v *OHIM (ovoid tablet)* [2003] ECR II-383, paragraph 16, and the judgment of 22 June 2004 in Case T-66/03 *'Drie Mollen sinds 1818'* v *OHIM — Nabeiro Silveira (Galáxia)* [2004] ECR II-1765, paragraph 45).

24 In the present case, the Opposition Division found that the conditions concerning genuine use of the earlier mark were satisfied. It is clear from the file that, during the procedure before OHIM, the applicant did not dispute the fact, either before the Opposition Division or before the Board of Appeal, that the evidence supplied by the intervener showed genuine use of the earlier mark in respect of a particular product. Before the Opposition Division, the applicant even stated that it had 'noted the documents provided to prove use of the trade mark TRIVASTAN in Italy' and proposed 'not to dispute this issue'. On the other hand, the applicant asserted that the documents provided by the intervener did not indicate that the product in question, which was covered by the earlier mark, had been used as an ophthalmic product, but merely that it could be used for that purpose.

25 It follows from all the foregoing that the applicant's arguments can only be dismissed. Consequently, only the pleas in law raised before OHIM, as set out in paragraph 15 above, will be examined on the merits.

First plea: infringement of Article 43(2) and (3) of Regulation No 40/94

Arguments of the parties

26 According to the applicant, the Board of Appeal was wrong to hold that the evidence of the use of the earlier mark demonstrated that the latter was in genuine use in Italy in respect of ophthalmic products. The documents submitted by the intervener merely indicated that the product could be used in respect of ophthalmic treatment.

27 OHIM observes that, under Article 43(2) and (3) of Regulation No 40/94, the intervener was never under an obligation to prove specific use of its mark in respect of the goods applied for. The use of a mark as a trade mark means that the sign has been used for the purpose, inter alia, of operating as a link between the goods and services covered by the mark and the person or company responsible for their marketing, that is to say, its use as an indication of origin. The applicant does not contest that the documents submitted prove the use of the earlier mark as a trade mark in relation to a product that could be used in respect of ophthalmic treatment.

28 The intervener asserts that it has supplied evidence demonstrating that ophthalmic treatment was one of the therapeutic indications of the product covered by the

earlier mark approved by the Italian health authorities and that that medicinal product was sold for several years (namely from 1995 to 1999). Proof that the medicinal product has actually been taken by patients suffering from vascular disorders of the eyes cannot be required.

Findings of the Court

29 It is to be noted, first of all, that, even if the applicant does not explicitly rely on Article 43(2) and (3) of Regulation No 40/94, its arguments must be construed as relying on a plea alleging infringement of that provision. Since the applicant claims, in essence, that the evidence of use produced by the intervener does not demonstrate that the intervener used the mark in respect of ophthalmic products, that argument implies that the possible infringement of that provision should be examined first, and that only afterwards should the possibly erroneous comparison between the products be assessed within the context of Article 8(1)(b) of that regulation.

30 It was not disputed before OHIM that the earlier mark was used to designate a medicinal product. It is apparent from the file, and in particular from the explanatory notice relating to the intervener's medicinal product and from an extract from the Italian directory *L'Informatore Farmaceutico*, that the mark TRIVASTAN designates a peripheral vasodilator used in neurology, otorhinolaryngology, ophthalmology, angiology and geriatrics and, more precisely, that it is indicated for the treatment of 'peripheral and cerebral vascular disturbance and vascular disorders of the eye and ear'.

31 It should be noted that, if one of the therapeutic indications of a medicinal product is to treat vascular disorders of the eye and it has been proven that that product was sold for several years, which is not contested, it could have been used for treating such disorders. In those circumstances, it would be superfluous and even difficult to require proof that the medicinal product was actually taken by patients suffering from vascular disorders of the eyes.

32 Consequently, it must be held that the Board of Appeal did not infringe Article 43(2) and (3) of Regulation No 40/94 by concluding that the evidence provided by the intervener demonstrated genuine use of the earlier mark in respect of a 'peripheral vasodilator intended to treat peripheral and cerebral vascular disturbance and vascular disorders of the eye and ear'.

33 Consequently, the applicant's first plea in law must be dismissed.

Second plea: infringement of Article 8(1)(b) of Regulation No 40/94

Arguments of the parties

34 The applicant submits that the goods at issue are not sufficiently similar to justify the finding of OHIM and that the conflicting marks are not similar, having regard to their visual and aural differences; there is therefore no likelihood of confusion or association between the marks.

35 As regards similarity, the applicant is of the opinion that OHIM did not properly consider the form of the goods. The intervener's product is a tablet taken orally whereas the applicant's product takes the form of eye drops.

36 In addition, as these products are only available on prescription and from pharmacies, consumers purchase a product which has already been chosen and

identified for them by a physician. The applicant submits that since the trade mark TRAVATAN is used in relation to an ophthalmic product used in the treatment of glaucoma, the appropriate medication is prescribed by a medical eye specialist, whereas TRIVASTAN is prescribed by a medical specialist in the field of vascular disorders. Both products are therefore prescribed by medical specialists and the respective prescriptions are filled and dispensed by pharmacists. It is highly unlikely that a pharmacist would confuse the form of the products or their indications (that is to say, eye drops for the treatment of glaucoma as opposed to a vasodilator in pill form generally used to treat the veins of the body). The applicant states that the intervener's product appears to be a product for the general treatment of vascular problems.

37 Furthermore, the applicant has deliberately confined the specification of its product to 'ophthalmic pharmaceuticals for the treatment of glaucoma', thus diminishing further any similarity between the goods. The Board of Appeal did not properly consider that factor.

38 As regards the similarity between the signs, the applicant submits, with regard to visual similarity, that, based on an overall impression, although there are similarities, these are not sufficient to deem them visually similar. Contrary to the Board of Appeal's findings, the two first letters of each word, 't' and 'r' are not the dominant part of the prefix to each trade mark, since the prefix 'tr' is meaningless without reference to the vowel to which it is attached and it is that vowel which enables consumers to pronounce the syllable. Consequently, the proper comparison should be between each syllable as a whole, namely the prefix 'tra' and the prefix 'tri'.

39 As regards phonetic similarity, the applicant submits that the differences are sufficient to distinguish the trade marks, a fortiori where the phonetic differences are considered in combination with the visual differences. There is quite a

perceptible difference in the Italian pronunciation of 'tri' and 'tra'. Moreover, the addition of the consonant 's' gives the sound of TRIVASTAN a major phonetic difference.

40 As regards conceptual similarity, the applicant submits that the marks are different. The prefix 'tri' in the earlier mark means 'triple' or 'three times' and the syllable 'vas' is indicative of 'vascular'. Consequently, the meaning of the earlier mark TRIVASTAN is easily discernible by professionals such as doctors and pharmacists since it means that the product is one having triple strength and used for vascular disorders. The suffix 'tan' is meaningless and non-distinctive and, although common to both marks, it is also common to many marks for goods in Class 5. The TRAVATAN mark applied for has no meaning as it is an invented word, although the first four letters are derived from 'Travoprost' which is the international nonproprietary name of the applicant's product.

41 Therefore, even if it were to be considered that there was a certain visual or phonetic similarity between the signs, the effect of that similarity should not be overstated, having regard in particular to the difference between the form that the two products take, and the healthcare context in which their sale arises.

42 In addition, the applicant states that the earlier mark is not intrinsically distinctive and that no proof of its reputation has been put forward. When an earlier mark is not especially well known to the public and consists of an image with little imaginative content, the mere fact that the two marks may be similar is not sufficient to give rise to a likelihood of confusion (Case C-251/95 *SABEL* [1997] ECR I-6191, paragraph 25).

43 Furthermore, the European Agency for the Evaluation of Medicines has granted authorisation for the marketing throughout the European Union of the applicant's product bearing the trade mark TRAVATAN.

44 OHIM and the intervener support the findings of the Board of Appeal.

Findings of the Court

45 As set out in 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 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. Moreover, under Article 8(2)(a)(ii) of Regulation No 40/94, 'earlier trade marks' means, inter alia, trade marks registered in a Member State with a date of application for registration which is earlier than the date of application for registration of the Community trade mark.

46 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.

47 According to the same line of case-law, the likelihood of confusion must be assessed globally, according to the perception that the relevant public has 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 interdependent similarity between the signs and between the goods or services covered (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).

48 In the present case, the earlier mark TRIVASTAN is registered in Italy, which therefore constitutes the relevant territory for the purposes of applying Article 8(1)(b) of Regulation No 40/94.

49 It is common ground that the products in question are medicinal products requiring a doctor's prescription prior to their sale to end users in pharmacies. Consequently, the relevant public is composed not only of end users, but also of professionals, that is doctors who prescribe the medicinal product and pharmacists who sell that prescribed product.

50 In the light of the aforementioned considerations, it is necessary to compare, first, the goods concerned and, second, the conflicting signs.

— Comparison of the goods

51 As a preliminary point, it is necessary to rule on the possible restriction of the list of goods claimed to 'ophthalmic pharmaceuticals for the treatment of glaucoma' which

the applicant claims to have made. In that respect, it should be borne in mind that, for the purposes of applying Article 8(1)(b) of Regulation No 40/94, the likelihood of confusion must be assessed in relation to all the goods specified in the trade mark application. In order to be taken into consideration, a restriction of the list of goods or services specified in a Community trade mark application must be made in accordance with certain detailed rules, on application for amendment of the application filed, in accordance with Article 44 of Regulation No 40/94 and Rule 13 of Commission Regulation (EC) No 2868/95 of 13 December 1995 implementing Regulation No 40/94 (OJ 1995 L 303, p. 1) (*ovoid tablet,* paragraph 13, and Case T-286/02 *Oriental Kitchen* v *OHIM — Mou Dybfrost (KIAP MOU)* [2003] ECR II-4953, paragraph 30). Furthermore, the restriction of goods contained in an application for a Community trade mark must be made expressly and unconditionally (see, to that effect, Case T-219/00 *Ellos* v *OHIM (ELLOS)* [2002] ECR II-753, paragraphs 61 and 62, and the judgment of 10 November 2004 in Case T-396/02 *Storck* v *OHIM (shape of a sweet)* [2004] ECR II-3821, paragraph 20).

52 In the present case, the applicant stated, in the statement of grounds for the action of 28 January 2002, as follows:

'In order to assist the Board of Appeal, the applicants confirm that they are willing to limit the specification of goods of application No. 847590 to "ophthalmic pharmaceuticals for the treatment of glaucoma".'

53 It must be observed that that wording 'confirm that they are willing to' did not comply with the detailed rules for restricting the specification of goods, since the applicant did not submit a request to amend the application to that effect pursuant to the abovementioned provisions.

54 In those circumstances, the Board of Appeal cannot be criticised for failing to take account of the restriction claimed to have been made of the goods contained in the application for the Community trade mark.

55 The goods to be compared are therefore 'ophthalmic pharmaceutical products' and a 'peripheral vasodilator intended for the treatment of peripheral and cerebral vascular disturbance and vascular disorders of the eye and ear'.

56 In assessing the similarity of the goods or services concerned, all the relevant factors relating to those goods or services themselves should be taken into account. Those factors include, inter alia, their nature, their intended purpose and their method of use and whether they are in competition with each other or are complementary (see, by analogy, Case C-39/97 *Canon* [1998] ECR I-5507, paragraph 23).

57 In the present case, as OHIM correctly points out, the products have the same nature (pharmaceutical products), purpose (treatment of eye disorders whether or not provoked by vascular causes), consumers (professionals including physicians and pharmacists and real end-user, that is patients who suffer from eye disorders) and distribution channels (typically pharmacies) and can be complementary. They could thus undoubtedly be produced or sold by the same economic operators.

58 The applicant's argument that the products are not similar because the intervener's product is a tablet taken orally, whereas the applicant's product takes the form of eye

drops, must be rejected. That difference in the way in which the medicinal product is administered is of less significance, in the present case, than the fact that the two products have a common nature and purpose.

59 Furthermore, the applicant's argument that its medicinal product is prescribed by a medical eye specialist, whereas the intervener's medicinal product is prescribed by a medical specialist in the field of vascular disorders, is not relevant. Since the intervener's medicinal product may be used for the treatment of vascular disorders of the eye, it cannot be ruled out that a medical eye specialist, rather than a medical specialist in the field of vascular disorders, would treat a patient suffering from that type of disorder.

60 Consequently, since the product covered by the earlier mark may be used for the treatment of vascular disorders of the eye, even if that product is intended for the general treatment of vascular problems, as the applicant claims, it must be regarded as analogous to an ophthalmic pharmaceutical product, since in both instances, the treatment of eye disorders is involved.

61 Consequently, the Board of Appeal did not err in finding that there was a high degree of similarity between the products in question.

— Comparison of the signs at issue

62 As is clear from settled case-law, 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 the signs, bearing in mind, inter alia, their distinctive and dominant components (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).

63 The word signs to be compared are the following:

— TRAVATAN: trade mark applied for;

— TRIVASTAN: earlier mark.

64 The applicant asserts that the similarities between the signs are insufficient to establish their visual identity and that the Board of Appeal wrongly isolated the first two letters of the signs at issue as the dominant component of each trade mark instead of examining the first syllable as a whole.

65 The applicant's argument cannot be accepted. The Board of Appeal rightly found that, visually, the two signs were nearly the same length and shared seven letters, 't', 'r', 'v', 'a', 't', 'a' and 'n', in the same order. It also stated pertinently that the signs began with the same letters 't' and 'r' and had the same ending in 'tan'. It must be observed that the fact that the first two letters do not entirely form the first syllable is not relevant, in the present case, when the signs are compared visually. It must therefore be concluded that the overall impression created by those visual resemblances is that

the signs are similar. The Board of Appeal was right to find that the differences between the signs in question, caused by the fact that the third letter of each sign is different (the vowels 'i' and 'a') and the presence of an additional letter in the earlier mark (the consonant 's'), were not capable of overriding that impression, since those elements were not very perceptible visually.

66 Consequently, it must be found that the Board of Appeal did not err in finding that the signs were similar visually.

67 As regards phonetic similarity, the applicant claims that the Board of Appeal failed to take sufficient account of the phonetic impact of the distinct characteristics of the marks, which it deemed insignificant. The differences between the signs are however sufficient to distinguish them phonetically, since they give rise to clearly distinct pronunciation by Italian speakers.

68 In that respect, the Board of Appeal found that, since the average consumer only rarely has the chance to make a direct comparison between the different marks but must rely on the imperfect phonetic impression of them retained in his/her memory, taking into account the highly similar sound of the first two syllables of the conflicting signs and the identical sound of the last syllable of the signs, that creates, in the mind of the average consumer, the impression of a similar phonetic entity.

69 It must be pointed out that, as the intervener claims, both signs consist of words having the same phonetic length, the same initial sound ('tr'), the same final sound (the syllable 'tan'), fairly similar middle sounds ('va'/'vas') and the same cadence, as the majority of the phonemes are identical and appear in the same order. It should be noted that the existence of such a large number of common elements prevents Italian consumers from clearly perceiving the small differences between those signs, which is liable to give rise to some confusion on their part.

70 Consequently, the Board of Appeal did not err in finding that there was phonetic similarity between the conflicting signs.

71 As regards the comparison of the signs from a conceptual point of view, the applicant asserts that the signs are distinguishable in that respect, since TRAVATAN is devoid of meaning, while the first syllable of the earlier mark TRIVASTAN means 'triple' and its second syllable 'vas' is an allusion to the adjective 'vascular'. The only syllable common to both signs has no particular meaning or distinctive character in respect of goods in Class 5.

72 The Board of Appeal found that the words 'trivastan' and 'travatan' have no significance for the Italian consumer.

73 The Board of Appeal's assessment must be endorsed. It does not appear likely that the earlier mark TRIVASTAN indicates to the relevant public, even if that public also includes professionals, that the product is one having triple strength and used for vascular disorders. Even if the public could understand 'tri' as being a reference to 'triple', it is not obvious what 'triple' refers to. Moreover, as OHIM found, there

are words in Italian beginning with 'tri', but in which that 'tri' does not mean 'triple' at all (e.g. 'tributàrio' (fiscal or tributary) or 'tribolàre' (to cause suffering)).

74 The words 'travatan' and 'trivastan' must therefore be considered to have no particular meaning for the Italian consumer and, consequently, there is no conceptual similarity between the signs in question.

75 Consequently, it must be concluded that there is significant visual similarity and a phonetic similarity between the conflicting signs but no conceptual similarity between them.

76 Given the significant similarity of the goods and the visual and phonetic similarity of the signs, it must be found that there is a likelihood of confusion between the signs.

77 As regards the applicant's argument that no evidence of reputation has been adduced for the earlier mark, it should be noted that the intervener has never relied on the reputation of its mark.

78 Furthermore, as regards the applicant's argument that the earlier mark is not intrinsically distinctive, it must be held that the applicant provides no supporting

evidence at all in that connection. In addition, the Board of Appeal did not base its argument concerning the likelihood of confusion on the high level of intrinsic distinctiveness of the earlier mark. Although the distinctive character of the earlier mark must be taken into account when assessing the likelihood of confusion (see, by analogy *Canon*, paragraph 24), it is only one factor among others involved in that assessment. Thus, even in a case involving an earlier mark of weak distinctive character, there may be a likelihood of confusion on account, in particular, of a similarity between the signs and between the goods or services covered (see, to that effect, the judgment of 16 March 2005 in Case T-112/03 *L'Oréal* v *OHIM — Revlon (FLEXI AIR)*, ECR II-949, paragraph 61).

79 Moreover, as regards the reference by the applicant to the fact that the European Agency for the Evaluation of Medicinal Products has granted it authorisation to market its product using the trade mark TRAVATAN, it is sufficient to observe that, since the applicant made no mention thereof before OHIM and failed to submit to it any evidence in that regard, that argument is inadmissible. Moreover, it is irrelevant in the present case, since any such authorisation has no bearing on the assessment of likelihood of confusion in connection with the application of Regulation No 40/94.

80 In those circumstances, it must be held that the degree of similarity between the goods and the signs at issue is sufficiently high to warrant the conclusion that the public might believe that the goods or services in question originate from the same undertaking or, as the case may be, from economically-linked undertakings.

81 The applicant's second plea in law and, consequently, the application in its entirety must therefore be dismissed.

Costs

82 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 the applicant has been unsuccessful, it must be ordered to pay the costs incurred by OHIM and the intervener, in accordance with the form of order sought by those parties.

On those grounds,

THE COURT OF FIRST INSTANCE (Third Chamber)

hereby:

1. Dismisses the action;

2. Orders the applicant to pay the costs.

Jaeger Tiili Czúcz

Delivered in open court in Luxembourg on 22 September 2005.

H. Jung M. Jaeger

Registrar President