

JUDGMENT OF THE COURT OF FIRST INSTANCE (Third Chamber)

15 March 2006 *

In Case T-35/04,

Athinaiki Oikogeniaki Artopoiia AVEE, established in Pikermi (Greece),
represented by C. Chrissanthis, lawyer,

applicant,

v

Office for Harmonization in the Internal Market (Trade Marks and Designs)
(OHIM), represented by J. Novais Gonçalves, acting as Agent,

defendant,

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

* Language of the case: English.

Ferrero OHG mbH, established in Stadtallendorf (Germany), represented by M. Schaeffer, lawyer,

ACTION brought against the decision of the First Board of Appeal of OHIM of 1 December 2003 (Case R 460/2002-1), relating to opposition proceedings between Athinaiki Oikogeniaki Artopoiia AVEE and Ferrero OHG mbH,

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

composed of M. Jaeger, President, J. Azizi and E. Cremona, Judges,
Registrar: I. Natsinas, Administrator,

having regard to the application lodged at the Registry of the Court of First Instance on 30 January 2004,

having regard to the response lodged at the Court Registry on 12 May 2004,

having regard to the intervener's response lodged at the Court Registry on 4 May 2004,

further to the hearing on 2 June 2005,

gives the following

Judgment

Background to the dispute

- 1 On 26 February 1999, the applicant filed at the Office for Harmonization in the Internal Market (Trade Marks and Designs) (OHIM), under Council Regulation (EC) No 40/94 of 20 December 1993 on the Community trade mark (OJ 1994 L 11, p. 1), as amended, an application for registration as a Community trade mark of a figurative and word sign composed of a banner of indeterminate colour with a white border, on which the word 'ferró' is written in capital letters, of which the first and final letters (the latter with an accent) are larger in size. The sign appears as follows:



- 2 Registration of the trade mark was sought for goods and services in Classes 29, 30 and 42 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 which correspond, for each of those classes, to the following description:

- Class 29: ‘Meat, fish, poultry and game, meat extracts, preserved, dried and cooked fruits and vegetables, jellies, jams, eggs, milk and milk products, edible oils and fats, tinned foods, pickles’;

- Class 30: ‘Coffee, tea, cocoa, sugar, rice, tapioca, sago, artificial coffee, flour and preparations made from cereals, bread, biscuits, pastry and confectionery, ices, honey, syrup, yeast, baking powder, salt, mustard, all kinds of bread preparations, pepper, vinegar, sauces (condiments), ice, treacle’;

- Class 42: ‘Providing of food and drink, temporary accommodation, medical, hygienic and beauty care, institutes of hygiene, weight loss, nutrition and health, veterinary and agricultural services, scientific and industrial research, legal services, computer programming’.

³ The trade mark application was published in the *Community Trade Marks Bulletin* on 27 March 2000.

⁴ On 26 June 2000, the intervener filed an opposition, pursuant to Article 42(1) of Regulation No 40/94, against registration of the mark applied for. The opposition was based on the word mark FERRERO (‘the earlier mark’), which is the subject of German registration No 956 671 for certain goods in Classes 5, 29, 30, 32 and 33, in particular, ‘chocolate, including filled chocolate products; chocolates, including those with filling made out of fruit, coffee, non-alcoholic beverages, wine and/or alcoholic

beverages or with filling made out of milk and dairy products, in particular yoghurt; pastries of long durability and fine pastry, in particular ready-made cakes and wafers, sugar confectionery, spreads containing sugar, cocoa, praline, milk and/or fats; coffee and tea drinks, also with addition of alcoholic beverages; non-alcoholic beverages; all products also as dietetic food for children and/or the sick, or for medical purposes’.

- 5 The opposition was based on all the goods referred to above and directed against some of the goods and services specified in the contested Community trade mark application, namely those in Classes 29 and 30, as set out above, and, in respect of Class 42, the ‘providing of food and drink’. The ground relied on in support of the opposition was that under Article 8(1)(b) of Regulation No 40/94.

- 6 By decision of 25 March 2002, the Opposition Division of OHIM partly upheld the opposition for certain goods in Class 30, because of the phonetic and visual similarity between the trade mark applied for and the earlier mark, and the fact that they cover similar or identical goods. The opposition was upheld for the following goods: ‘Coffee, tea, cocoa, sugar, artificial coffee, flour and preparations made from cereals, bread, biscuits, pastry and confectionery, ices, syrup, yeast, baking powder, all kinds of bread preparations, honey and treacle’.

- 7 On 24 May 2002, the applicant filed a notice of appeal against the decision of the Opposition Division.

- 8 By decision of 1 December 2003 ('the contested decision'), the First Board of Appeal dismissed the appeal and confirmed the Opposition Division's decision, holding that there was a likelihood of confusion, including the likelihood of association, between the marks in question. In essence, the Board of Appeal observed that it was common ground that the goods covered by the marks in question were partly identical and partly similar. In addition, it considered that the signs in question were phonetically and visually similar.

Forms of order sought by the parties

- 9 The applicant claims that the Court should:
- annul the contested decision and/or alter it accordingly so that the intervener's opposition be dismissed and the relevant Community trade mark application for registration be accepted;
 - reject in its entirety the opposition to registration of the Community trade mark applied for in respect of all the classes where the opposition was successful;
 - take any other measure required that would effectively result in acceptance of the Community trade mark application;
 - order OHIM to grant registration of the Community trade mark applied for;

- order OHIM and the intervener to pay the costs, including those incurred in the opposition proceedings and before the Board of Appeal.

10 OHIM contends that the Court should:

- dismiss the application;
- order the applicant to pay the costs.

11 The intervener contends that the Court should dismiss the application.

12 On 19 April 2005, the applicant stated, in reply to the written question addressed to it by the Court on 14 April 2005, that it was seeking, first, annulment of the contested decision and, second, an order that OHIM register the trade mark applied for.

Law

The admissibility of certain of the applicant's claims

13 By its first and fourth heads of claim, the applicant is seeking, in essence, that OHIM be ordered to register the trade mark applied for for the goods in question. In addition, by its third head of claim, the applicant is asking the Court to adopt all the measures necessary to obtain registration of the mark applied for.

- 14 OHIM submits that those claims are inadmissible.
- 15 In that regard, it should be recalled that where an action is brought before the Court against a decision of a Board of Appeal, OHIM is required by Article 63(6) of Regulation No 40/94 to take the measures necessary to comply with the judgment. Accordingly, the Court of First Instance is not entitled to issue directions to OHIM. It is for OHIM to draw the appropriate inferences from the operative part and grounds of the Court's judgment (Case T-331/99 *Mitsubishi HiTec Paper Bielefeld v OHIM (Giroform)* [2001] ECR II-433, paragraph 33; Case T-34/00 *Eurocool Logistik v OHIM (EUROCOOL)* [2002] ECR II-683, paragraph 12; and Case T-388/00 *Institut für Lernsysteme v OHIM — Educational Services (ELS)* [2002] ECR II-4301, paragraph 19).
- 16 It follows that the applicant's first and fourth heads of claim, in that they ask the Court to give directions to OHIM to register the Community trade mark applied for, must be rejected as inadmissible.
- 17 The applicant's third head of claim asking the Court to take all the measures necessary to ensure acceptance of the application for the Community trade mark in question is also inadmissible.
- 18 In that regard, it should be recalled that, under Article 21 of the Statute of the Court of Justice and Article 44(1)(c) of the Rules of Procedure of the Court of First Instance, every application must contain a summary of the pleas in law relied upon and that that statement must be sufficiently clear and precise to enable the defendant to prepare the defence and the Court to give a ruling. The same goes for each head of claim, which must be accompanied by pleas in law and arguments enabling both the defendant and the Court to assess its validity.

- 19 In order to ensure legal certainty and the sound administration of justice, if an action is to be admissible, the essential facts and law on which it is based must be apparent from the text of the application itself, at the very least summarily, provided that the statement is coherent and comprehensible (see Case T-56/92 *Koelman v Commission* [1993] ECR II-1267, paragraph 21, and Case T-387/94 *Asia Motor France and Others v Commission* [1996] ECR II-961, paragraph 106).
- 20 In that connection, the application must particularise the plea in law on which the action is based. Therefore, a mere abstract statement of that plea does not satisfy the requirements of the Rules of Procedure (see Case T-251/97 *T. Port v Commission* [2000] ECR II-1775, paragraph 90; Case T-111/99 *Samper v Parliament* [2000] ECR-SC I-A-135 and II-611, paragraph 27; and Case T-247/01 *eCopy v OHIM (ECOPY)* [2002] ECR II-5301, paragraph 15).
- 21 In this case, the applicant pleads no material in support of its third head of claim. It follows from the case-law cited in paragraph 20 above that a claim asking the Court to grant whatever relief is necessary for the acceptance of the application for a Community trade mark lacks the necessary precision and must, consequently, be regarded as inadmissible.
- 22 In any event, it must be observed that it is for OHIM to investigate the application for registration of a Community trade mark and to decide upon it. It is then for the Court of First Instance, if appropriate, to review the evaluation made by the Board of Appeal in the decision adopted by OHIM. It is not, by contrast, for the Court of First Instance to put itself in OHIM's place in exercising the powers vested in OHIM by Regulation No 40/94.

Substance

- 23 The applicant relies on a single plea in law, alleging breach of Article 8(1)(b) of Regulation No 40/94.

Arguments of the parties

- 24 The applicant challenges the Board of Appeal's determination that there is a likelihood of confusion between the marks in question, that is, the figurative mark applied for containing the verbal element 'FERRÓ' and the earlier mark.
- 25 As regards the visual similarity between the marks in question, the applicant claims that, contrary to the Board of Appeal's finding in the contested decision, several factors can neutralise the existence of a certain degree of similarity capable of creating a likelihood of confusion.
- 26 In that respect, first, the applicant points out the highly distinctive character of the figurative element of the trade mark applied for, that is, the banner of indeterminate colour with a white border. It is an original and imaginative logo which, even without the verbal element 'FERRÓ', could be remembered by the consumer as designating the goods covered by the mark applied for because of its simplicity and symmetrical configuration.

- 27 Secondly, as regards the configuration of the verbal element of the mark sought, the applicant maintains that the curved typography of the word ‘ferró’ has, also, a highly distinctive character (see, by analogy, and as regards italic typography Case T-311/01 *Éditions Albert René v OHIM — Trucco (Starix)* [2003] ECR II-4625, paragraph 54).
- 28 Thirdly, while the first three letters — ‘f’, ‘e’ and ‘r’ — of the two marks in question are certainly identical, that identity is counteracted both by the larger size of the letters ‘f’ and ‘o’ of the verbal element of the mark sought and by the different length, because of the different number of letters and syllables, of the marks in question. The applicant points out that the verbal element, ‘ferró’, of the mark sought is, actually, shorter than the verbal element, ‘ferrero’, which makes up the earlier mark.
- 29 As regards the phonetic comparison of the marks in question, the applicant does not share the analysis made by the Board of Appeal in the contested decision.
- 30 In that regard, first, the applicant points out that the acoustic duration of the marks in question is dissimilar because of the different number of syllables of which they are composed, namely three syllables for the verbal element of the earlier mark ‘ferrero’, and two syllables for that of the mark applied for ‘ferró’.
- 31 Secondly, the effect of the repetition of the phoneme ‘er’ in the verbal element ‘ferrero’ making up the earlier mark is absent from the verbal element of the mark sought, ‘ferró’, which enables, the applicant submits, the aural perception made by the two marks to be differentiated. That phenomenon of repetition is, according to the applicant, the essential characteristic of the earlier mark.

32 Thirdly, while it is the second syllable of the verbal element of the earlier mark 'ferrero' which is accented, in the average German consumer's pronunciation of the word 'ferro' the accent would fall on the last syllable.

33 In addition, as regards the overall assessment of the likelihood of confusion, the applicant points out that the consumer is, in this case, able to make a direct visual comparison between the different marks covering the goods at issue, since they are goods for everyday use placed on the same shelves in supermarkets.

34 Furthermore, the applicant maintains that, where there is a low degree of similarity between the marks, as in this case, only the highly distinctive character of the earlier mark could justify it being accorded a high degree of protection. That could not be the case here.

35 Finally, the applicant points out that the Greek courts have concluded that there is no likelihood of confusion between the marks at issue in this case on the Greek market. In addition, OHIM decided in a similar case to this one that there was no likelihood of confusion between the word marks FERRERO and FERRO, despite a close link between the goods concerned, namely, first, salty biscuits and, second, sweet biscuits, in view of the visual and phonetic differences between the marks in dispute.

36 OHIM and the intervener contend that the Board of Appeal did not infringe Article 8(1)(b) of Regulation No 40/94 by deciding that the signs in question were similar from both the phonetic and the visual point of view, and that for that reason and

because of the similarity between or identity of the goods covered by the marks in question there was a likelihood of confusion between them.

Findings of the Court

- ³⁷ 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 shall not 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'.
- ³⁸ In addition, under Article 8(2)(a)(i) and (ii) of Regulation No 40/94, 'earlier trade marks' means Community trade marks and trade marks registered in a Member State with a date of application for registration which is earlier than the date of application for the Community trade mark.
- ³⁹ 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.
- ⁴⁰ According to the same case-law, the likelihood of confusion must be assessed globally, according to the perception which the relevant public has of the signs and

goods or services in question and taking into account all factors relevant to the circumstances of the case, particularly the interdependence between the similarity of the signs and that of the goods and services covered (see Case T-162/01 *Laboratorios RTB v OHIM — Giorgio Beverly Hills (GIORGIO BEVERLY HILLS)* [2003] ECR II-2821, paragraphs 30 to 33, and the case-law there cited).

41 In this case, the earlier word mark FERRERO, on which the opposition was based, is registered and protected in Germany. Therefore, in order to establish whether there is a likelihood of confusion between the marks in dispute, account must be taken of the point of view of the relevant public in that State.

42 Since the goods covered by the marks in question are goods used for everyday consumption, the target public is the average consumer, who is deemed to be reasonably well informed and reasonably observant and circumspect.

43 Therefore, it must be held that the Board of Appeal correctly held that the likelihood of confusion was to be assessed in relation to the average German consumer, which the parties, moreover, do not dispute.

44 Nor do the parties dispute that the goods covered by the trade mark applied for and the goods for which the earlier trade mark is protected are partly identical and partly similar. In those circumstances, the outcome of the action depends on the degree of similarity of the signs in question. The examination of the similarity of the signs must thus include all the goods listed in the application for a Community trade mark

within Class 30 of the Nice Agreement, as reproduced above (see paragraph 6), since they are the goods for which the Board of Appeal decided that the opposition must be upheld.

⁴⁵ As is clear from settled case-law, the global assessment of the likelihood of confusion must, as far as concerns the visual, aural or conceptual similarity of the marks in question, be based on the overall impression given by the marks, 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 there cited).

⁴⁶ Therefore, the analysis by the Board of Appeal in the contested decision where it made a visual, aural and conceptual comparison of the signs in question in this case must be scrutinised in order to determine whether the degree of similarity between those signs was sufficiently high to permit the conclusion, in the light of the high degree of similarity between the goods, that there was a likelihood of confusion in the mind of the average German consumer.

⁴⁷ In the first place, as regards the visual comparison of the marks, it must be observed, at the outset, that the Court has already made clear that there is no reason why it should not be determined whether there is any visual similarity between a word mark and a figurative mark, since the two types of mark have graphic form capable of creating a visual impression (Case T-110/01 *Vedial v OHIM — France Distribution (HUBERT)* [2002] ECR II-5275, paragraph 51).

48 In that regard, it must be held that a compound trade mark, word and figurative, cannot be regarded as having a similarity with another mark which is identical or which has a similarity with one of the components of the compound mark unless that component forms the dominant element within the overall impression created by the compound mark. That is the case where that component is likely to dominate, by itself, the image of that mark which the relevant public keeps in mind, with the result that the other components of that mark are negligible within the overall impression created by it (Case T-6/01 *Matratzen Concord v OHIM — Hukla Germany (MATRATZEN)* [2002] ECR II-4335, paragraph 33, and Case T-390/03 *CM Capital Markets Holding v OHIM — Caja de Ahorros de Murcia (CM)* [2005] ECR II-1699, paragraph 46).

49 According to the settled case-law, that approach does not amount to taking into consideration only one component of a complex trade mark and comparing it with another mark. On the contrary, such a comparison must be made by examining the marks in question, each considered as a whole. However, that does not mean that the overall impression created in the mind of the relevant public by a complex trade mark may not, in certain circumstances, be dominated by one or more of its components (Case T-31/03 *Grupo Sada v OHIM — Sadia (GRUPO SADA)* [2005] ECR II-1167, paragraph 49).

50 Here, the Board of Appeal confirmed the Opposition Division's assessment that the verbal element 'ferró' was its dominant element. The Board of Appeal held, in fact, that the figurative element of the trade mark applied for, that is, the banner on which the word 'ferró' is written, was a secondary element (paragraph 24 of the contested decision).

- 51 That assessment can only be upheld. Contrary to the applicant's claim, having regard to the overall visual impression produced by the mark applied for, the banner is not a sufficiently important figurative element to make a greater impression on the consumer than its verbal element. On the contrary, as OHIM points out, the figurative element here, namely the banner, does not constitute a particularly original or imaginative representation capable of attracting the consumer's attention. In any event, neither the undulating shape of the banner, nor its size, nor its colours are so characteristic as to enable it to dominate the verbal element of the mark applied for.
- 52 The Court takes the view that the word 'ferró' prevails over the figurative element of the mark applied for and predominates, effectively, at the time of its perception because of its large size and superimposition on the banner which, having only a purely background decorative function, cannot be regarded as the dominant element of the mark applied for. It follows that the Board of Appeal made no error of assessment in holding that 'ferró' was the dominant element of the mark applied for and that the banner was of secondary importance. In those circumstances, the signs can be compared using the verbal elements alone, without infringing the principle that the assessment of the likelihood of confusion, as regards the similarity of the signs, must be based on the overall impression they produce (see, to that effect, order of 10 December 2004 in Case T-261/03 *Euro Style v OHIM — RCN-Companhia de Importação e Exportação de Texteis (GLOVE)*, not published in the ECR, paragraph 38).
- 53 The comparison between the dominant verbal element of the mark applied for, 'ferró', and that forming the earlier word mark, 'ferrero', reveals a certain degree of visual similarity between them.

54 As OHIM contends, it must be held that the different number of syllables — a fortiori, of letters — in the two signs in question is not such as to put seriously in question the visual similarity between those two trade marks. Thus, even if the earlier word mark is made up of seven letters and three syllables, whereas the verbal element of the mark applied for contains only five letters and two syllables, it is none the less true that the two signs share the same letters, namely ‘f’, ‘e’, ‘r’ and ‘o’. Furthermore, those letters are placed in the same order. Thus, both the verbal element of the mark applied for, ‘ferró’, and the verbal element forming the earlier mark, ‘ferrero’, start and finish with the same letters, namely the ‘f’ and the ‘o’. In addition, the two signs have in common their first three letters, namely ‘fer’. In that regard, it must be recalled that, generally, the consumer’s attention is directed above all to the start of the word (Joined Cases T-183/02 and T-184/02 *El Corte Inglés v OHIM — González Cabello and Iberia Líneas Aéreas de España (MUNDICOR)* [2004] ECR II-965, paragraph 83). Those elements of visual resemblance prevail over the different length of the signs in question, which cannot, therefore, create a marked visual difference between them.

55 Furthermore, the only difference in the syllabic structure of the two signs in question is due to the repetition in the sign forming the earlier mark, ‘ferrero’, of the phoneme ‘er’, repetition which is absent from the verbal element of the mark applied for, ‘ferró’. That difference in the syllabic structure of the signs in question cannot prevail over the similarities between them, since the letters which form the additional syllable of the verbal element forming the earlier mark, namely ‘e’ and ‘r’, are all present in the dominant verbal element of the mark applied for, and more precisely in its first syllable. Therefore, the additional syllable of the earlier mark cannot alter the overall visual perception of the marks in question by the average consumer.

56 In addition, as regards the figurative elements of the dominant verbal element of the mark applied for, such as the slightly curved graphic of the word ‘ferró’, the Court

considers that such graphic is hardly noticeable, and therefore in this case has no distinctive character. The same goes for the use of larger characters for the first and last letters of that word. The use of larger letters is not sufficient to create a marked difference compared to the other letters in the centre of that word, contrary to what the applicant claims. Finally, the accent over the final letter 'ó' of the word 'ferró' is hardly visible and is not, anyway, a visual sign known to the average German consumer. In that regard, it must be recalled that the average consumer normally perceives a mark as a whole and does not proceed to analyse its various details (see, by analogy, Case C-342/97 *Lloyd Schuhfabrik Meyer* [1999] ECR I-3819, paragraph 25).

57 The figurative elements which fall to be examined are minor and could not be memorised by the average consumer as effective differences. It follows that those figurative elements of the dominant verbal element of the mark applied for, 'ferró', are not sufficiently important to overcome, in this case, the visual similarity between it and the earlier trade mark FERRERO, in view of the high degree of similarity between the goods covered by those two marks.

58 In the light of those circumstances, it must be held that the Board of Appeal did not err in finding that the signs in question are visually similar.

59 Secondly, as regards the phonetic comparison, it must be observed, as the Board of Appeal did (see paragraph 28 of the contested decision), that the signs in question are similar from the phonetic point of view. Indeed, it must be pointed out, first, that all the letters in the verbal element forming the earlier trade mark, 'ferrero', are contained in the dominant element of the mark applied for, namely the verbal

element 'ferró', and, second, that the latter contains no letters other than those occurring in the earlier mark, namely 'f', 'e', 'r' and 'o'. It is to be noted, also, that the letters are placed in the same order in the two signs in question, which, furthermore, have the same first three letters, namely 'f', 'e' and 'r', and terminate with the same letter 'o'. It follows that, from a phonetic point of view, the two signs in question have a certain degree of similarity.

60 Admittedly, the syllabic structure of the signs in question is different, the earlier trade mark having three syllables ('fer', 're' and 'ró'), the mark applied for only two ('fer' and 'ró'). However, the repetition of the phoneme 'er' in the middle of the earlier trade mark, since it is a sound already present in the pronunciation of the dominant verbal element of the mark applied for, cannot bring to the earlier mark a sufficiently distinct character from the phonetic point of view, contrary to what the applicant claims. Therefore, the interposition of the phoneme 'er' between the first and third syllable of the earlier mark is insufficient to override the similarity between the verbal element forming the dominant element of the mark applied for and the earlier mark.

61 In addition, as to the impact of the written accent over the last letter of the verbal element of the mark applied for, 'ferró', it must be observed, first, that it is not certain that it could alter the average German consumer's aural impression of the mark applied for. That finding is supported by the fact that German orthography does not recognise the accent as a typographic element. Therefore, the Court considers it likely, rather, that the average German consumer, in pronouncing the word 'ferró', would put the accent on the first syllable and not on the last. Consequently, phonetic similarity with the earlier trade mark, the accent on which could fall either on the second syllable or on the first, cannot be excluded.

62 It follows that, as part of a global assessment, the signs in question present a certain degree of phonetic similarity for the relevant public.

63 Thirdly, as regards the conceptual comparison, it is common ground that such a comparison is irrelevant, since neither the dominant element of the mark applied for nor the earlier mark has any meaning in German.

64 Consequently, considered globally, the degree of similarity between the goods covered by the marks in question and the degree of visual and aural similarity between them are sufficiently high to conclude that there is a likelihood of confusion for the average German consumer.

65 Accordingly, the Board of Appeal correctly upheld the intervener's opposition and rejected, in part, the application for registration of the mark applied for, because of the likelihood of confusion between it and the earlier trade mark.

66 That conclusion cannot be undermined by the arguments advanced by the applicant and referring, on the one hand, to a decision of the Greek courts and, on the other hand, to a decision of OHIM in a case similar to this one.

67 In the first place, as regards the Greek courts' decision, in which no likelihood of confusion on the Greek market was found between the two marks in question in this action, the Court notes that the Community trade mark regime is an autonomous system which applies independently of any national system (Case T-32/00 *Messe München v OHIM (electronica)* [2000] ECR II-3829, paragraph 47). Accordingly, whether or not a sign is registrable as a Community trade mark must be assessed by

reference to the relevant Community legislation only, with the result that neither OHIM nor, as the case may be, the Community Court is bound by decisions in other Member States finding the same sign to be registrable as a trade mark (Case T-36/01 *Glaverbel v OHIM (Glass-sheet surface)* [2002] ECR II-3887, paragraph 34). The legality of decisions of the Boards of Appeal is to be assessed purely by reference to Regulation No 40/94, as interpreted by the Community judicature, and not to a Member State's national court's practice in its earlier decisions (see Case T-117/02 *Grupo El Prado Cervera v OHIM — Debuschewitz's heirs (CHUFACIT)* [2004] ECR II-2073, paragraph 57, and the case-law there cited).

68 In the second place, as regards the Opposition Division's decision cited by the applicant, the legality of the decisions of the Boards of Appeal is to be assessed solely on the basis of Regulation No 40/94, as interpreted by the Community judicature, and not on the basis of OHIM's practice in its earlier decisions (see Case T-33/03 *Osotspa v OHIM — Distribution & Marketing (Hai)* [2005] ECR II-763, paragraph 69, and the case-law there cited). In any event, it is appropriate to question the relevance of that argument in this case, since neither the marks in question nor the goods covered were the same as those at issue in these proceedings. Furthermore, as the intervener pointed out, that decision was upheld by the Fourth Board of Appeal of OHIM (Case R 540/2002-4). However, the Fourth Board of Appeal's decision is the subject of an action pending before the Court.

69 Finally, the applicant's assertion that where there is a low degree of similarity between the marks only the highly distinctive character of the earlier trade mark could justify it being accorded a high degree of protection cannot be accepted. In the first place, even in the case of a trade mark of little distinctive character, there can be a likelihood of confusion, particularly because of the similarity of the signs and of the goods or services covered. In the second place, furthermore, the degree of similarity

between the goods covered by the marks in question in this case and the degree of similarity between the marks themselves, considered cumulatively, are sufficiently high to justify the conclusion that there is a likelihood of confusion, whatever the degree of distinctiveness of the earlier mark.

- 70 In addition, although the earlier trade mark's high distinctiveness could be taken into account to assess whether, in the first place, the similarity between the goods or services in question and, in the second place, the similarity between the signs are sufficient to give rise to a likelihood of confusion, its existence is not a prerequisite for protection of the earlier right (see, to that effect, Case T-185/03 *Fusco v OHIM — Fusco International (ENZO FUSCO)* [2005] ECR II-715, paragraph 60).
- 71 In view of the foregoing, the applicant's sole plea in law and the entire action must be dismissed.

Costs

- 72 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, in accordance with the form of order sought by OHIM, be ordered to pay the costs. Since the intervener did not apply for costs, it must bear its own costs.

On those grounds,

THE COURT OF FIRST INSTANCE (Third Chamber)

hereby:

- 1. Dismisses the action;**

- 2. Orders the applicant to pay the costs incurred by the Office for Harmonisation in the Internal Market (Trade Marks and Designs);**

- 3. Orders the intervener to bear its own costs.**

Jaeger

Azizi

Cremona

Delivered in open court in Luxembourg on 15 March 2006.

E. Coulon

M. Jaeger

Registrar

President