JUDGMENT OF THE COURT OF FIRST INSTANCE (Fifth Chamber)

17 October 2006 *

In Case T-483/04,

Armour Pharmaceutical Co., established in Bridgewater, New Jersey (United States), represented by R. Gilbey, lawyer,

applicant,

v

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

defendant,

the other party to the proceedings before the Board of Appeal of OHIM being

Teva Pharmaceutical Industries Ltd, established in Jerusalem (Israel),

* Language of the case: French.

APPLICATION brought against the decision of the Fourth Board of Appeal of OHIM of 7 September 2004 (Case R 295/2003-4) relating to opposition proceedings between Armour Pharmaceutical Co. and Teva Pharmaceutical Industries Ltd,

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

composed of M. Vilaras, President, M.E. Martins Ribeiro and K. Jürimäe, Judges,

Registrar: K. Pocheć, Administrator,

having regard to the application lodged at the Registry of the Court of First Instance on 8 December 2004,

having regard to the response lodged at the Court Registry on 2 May 2005,

further to the hearing on 31 January 2006,

gives the following

Judgment

Background to the dispute

1 On 12 April 2000 Teva Pharmaceutical Industries Ltd filed an application under Council Regulation (EC) No 40/94 of 20 December 1993 on the Community trade

mark (OJ 1994 L 11, p. 1), as amended, for registration of a Community trade mark with the Office for Harmonization in the Internal Market (Trade Marks and Designs) (OHIM).

2 The mark sought to be registered is the word sign GALZIN.

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: 'pharmaceutical preparations for the treatment of Wilson's disease'.

4 On 2 January 2001 the trade mark application was published in *Community Trade Marks Bulletin* No 2/2001.

5 On 28 March 2001, Armour Pharmaceutical Co. filed, pursuant to Article 42 of Regulation No 40/94, a notice of opposition to registration of the mark applied for in respect of all of the goods covered by the application, citing its earlier word mark CALSYN, registered in France on 3 February 1983 under number 1 226 303 for goods in Class 5 of the Nice Agreement and corresponding to the following description: 'pharmaceutical and medical preparations, more specifically calcium-based preparations'.

6 The ground relied on in support of the opposition was the likelihood of confusion referred to in Article 8(1)(b) of Regulation No 40/94.

7 By decision of 28 February 2003 the Opposition Division of OHIM upheld the opposition and rejected the trade mark application in its entirety.

8 On 17 April 2003 the other party to the proceedings before the Board of Appeal filed an appeal at OHIM under Articles 57 to 62 of Regulation No 40/94 against the Opposition Division's decision.

9 By decision of 7 September 2004 ('the contested decision'), the Fourth Board of Appeal of OHIM upheld the appeal and annulled the decision of the Opposition Division, ordering the applicant to pay the costs. The Board of Appeal considered, essentially, that, under Article 43(2) *in fine* of Regulation No 40/94, the earlier mark was deemed to be registered in respect of 'calcium-based pharmaceutical preparations', that that finding in the decision of the Opposition Division had not been challenged by the parties and that it shared that view. Moreover, although according to the contested decision there was a certain degree of similarity between the goods and the marks, it was not sufficient to lead to a likelihood of confusion on the part of the French public between the goods placed on the market under each of those marks, given the differences between the conflicting signs, particularly from a phonetic standpoint, and also the fact that the goods in question are not intended to treat the same disorders. Lastly, the Board of Appeal found that, given the nature of the goods, the public comprising both consumers of medicinal products and medical professionals would pay particular attention to the signs identifying the goods.

Forms of order sought by the parties

10 The applicant claims that the Court should:

— annul the contested decision;

— uphold the decision of the Opposition Division;

— order OHIM to pay the costs.

11 OHIM defers to the assessment of the Court as to whether or not there is a likelihood of confusion between the marks at issue. If the Court finds that there is no likelihood of confusion amongst French consumers, OHIM contends that the Court should dismiss the action and order the applicant to pay the costs. If the Court finds that there is a likelihood of confusion amongst French consumers, OHIM contends that the Court should annul the contested decision and order the other party to the proceedings before the Board of Appeal to pay the costs, if it appears, or order that each party is to bear its own costs.

Admissibility of the form of order sought by OHIM

12 Under Article 113 of the Rules of Procedure of the Court of First Instance, the Court may at any time, of its own motion, consider whether there exists any absolute bar to proceeding with a case.

13 It is appropriate to bear in mind the case-law to the effect that nothing prevents OHIM from endorsing a head of claim of the applicant's or from simply leaving the decision to the discretion of the Court, while putting forward all the arguments that it considers appropriate for giving guidance to the Court (Case T-107/02 *GE Betz* v *OHIM — Atofina Chemicals (BIOMATE)* [2004] ECR II-1845, paragraph 36, and Case T-379/03 *Peek & Cloppenburg* v *OHIM (Cloppenburg)* [2005] ECR II-4633, paragraph 22). On the other hand, it may not seek an order annulling or altering the decision of the Board of Appeal on a point not raised in the application or put

forward pleas in law not raised in the application (see, to that effect, Case C-106/03 P *Vedial* v *OHIM* [2004] ECR I-9573, paragraph 34, and *Cloppenburg*, paragraph 22).

14 It follows from that case-law that it is necessary, in the present case, to consider the lawfulness of the contested decision in the light of the pleas in law put forward in the application, taking into account also the arguments put forward by OHIM.

Substance

15 The applicant puts forward two pleas in support of its action, alleging infringement of Article 43(2) and (3) and of Article 8(1)(b) of Regulation No 40/94.

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

Arguments of the parties

16 The applicant claims that it adduced evidence, in the opposition proceedings, that its earlier mark CALSYN was being used for calcium-based pharmaceutical preparations, although it covers the pharmaceutical and medical preparations in general listed in Class 5 of the Nice Agreement. In taking into account for the

purposes of the opposition only calcium-based pharmaceutical preparations, the Board of Appeal infringed Article 43(2) and (3) of Regulation No 40/94.

17 The applicant contends, essentially, that it is conceivable that, where the earlier mark designates a set of goods and services of different kinds, fairness requires that, for the purposes of the opposition, only the field in which the mark over five years old is used be taken into account, in order to avoid abusive reliance on marks designating the whole of one or more classes. However, once the specific product use of which has been proven comes within a specific category for which registration is sought, limiting the goods taken into account to the specific product would have a disproportionate restrictive effect. This is so in the present case, since calcium-based pharmaceutical preparations are a form of pharmaceutical preparations.

18 The applicant submits that such a restrictive interpretation of Article 43(2) and (3) of Regulation No 40/94 as that adopted by the Board of Appeal is not consistent with the definition of property rights laid down in the harmonised laws on marks and is discriminatory in relation to the scope granted in opposition proceedings to unused registrations under five years old.

19 OHIM begins by setting out the principles governing the question of proof of use of a mark. It states that, where a mark has been registered in respect of all of the general indications of the headings of a given class and has been used for specific goods or services included in the same class, the finding should, in principle, be that the mark has been used for those specific goods or services. It is also possible to consider that the mark has been used for a distinct sub-category, if it is possible to establish one, where the specific goods or services have sufficient common

properties. OHIM adds, however, that this type of generalisation must be made very carefully, without losing sight of the fact that the protection of the earlier mark is justified only if it has actually been used.

20 In the present case, OHIM observes that the earlier mark is registered in respect of 'pharmaceutical and medical preparations, more specifically calcium-based preparations', and that use thereof has been established in respect of calcium-based pharmaceutical preparations only, the applicant having itself identified separately in the description of the goods under its mark the calcium-based preparations.

21 Accordingly, the applicant cannot criticise the Opposition Division and the Board of Appeal for having found that its mark was registered only in respect of calcium-based pharmaceutical preparations for the purposes of considering the opposition. In OHIM's view, finding that the earlier mark is used for the entire category of pharmaceutical preparations when it is in reality being used only for one very specific product would grant undue protection to the earlier mark and would be contrary to the principles laid down in Article 43(2) of Regulation No 40/94.

22 OHIM contends in any event that the contested decision does not contain any lacunae, since the applicant did not bring any appeal on this point against the Opposition Division's decision and did not raise this argument before the Board of Appeal.

Findings of the Court

23 As evidenced by the ninth recital in the preamble to Regulation No 40/94, the legislature considered that protection of an earlier mark is justified only if it has

actually been put to use. Consistent with that recital, Article 43(2) and (3) of Regulation No 40/94 provides that an applicant for a Community trade mark may request proof that the earlier mark has been put to genuine use in the territory where it is protected during the period of five years preceding the date of publication of the trade mark application against which opposition has been filed (Case T-39/01 *Kabushiki Kaisha Fernandes* v *OHIM — Harrison (HIWATT)* [2002] ECR II-5233, paragraph 34, and Case T-356/02 *Vitakraft-Werke Wührmann* v *OHIM — Krafft (VITAKRAFT)* [2004] ECR II-3445, paragraph 25).

24 According to Rule 22(2) of Commission Regulation (EC) No 2868/95 of 13 December 1995 implementing Regulation No 40/94 (OJ 1995 L 303, p. 1), proof of use is to consist of indications concerning the place, time, extent and nature of use of the earlier trade mark (*VITAKRAFT*, paragraph 27).

25 In the present case, it is common ground that the earlier mark was registered for 'pharmaceutical and medical preparations, more specifically calcium-based preparations' in Class 5 of the Nice Agreement. It is also undisputed that, at the request of the other party to the proceedings before the Board of Appeal, the applicant provided proof of genuine use of the earlier mark through documents showing its actual use for the marketing of pharmaceutical preparations, more specifically calcium-based preparations.

26 It is necessary to interpret the last sentence of Article 43(2) of Regulation No 40/94 and Article 43(3), which applies Article 43(2) to earlier national marks, as seeking to prevent a trade mark which has been used in relation to part of the goods or services for which it is registered being afforded extensive protection merely because it has been registered for a wide range of goods or services. Thus, when those provisions are applied, it is necessary to take account of the breadth of the categories of goods or services for which the earlier mark was registered, in particular the extent to which the categories concerned are described in general terms for registration

purposes, and to do this in the light of the goods or services in respect of which genuine use has, of necessity, actually been established (Case T-126/03 *Reckitt Benckiser (España)* v *OHIM — Aladin (ALADIN)* [2005] ECR II-2861, paragraph 44).

27 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).

28 It must be borne in mind that the earlier mark was registered for 'pharmaceutical and medical preparations, more specifically calcium-based preparations'. That description obviously covers a category of goods, namely pharmaceutical preparations in general, which is sufficiently broad for it to be possible to identify within it various sub-categories capable of being viewed independently. The concept of pharmaceutical preparation covers goods which are sufficiently different in their intended purpose and end consumers, according to their specific therapeutic indications, and in their channels of distribution, depending on whether they are available on medical prescription or over the counter, for it to be possible to identify within it various sub-categories. Moreover, the applicant has itself identified separately in the description of the goods under its mark the sub-category corresponding to 'calcium-based preparations'.

29 In those circumstances, the Court finds that proof of genuine use of the earlier mark has been made out only in respect of part of the goods or services coming within a broad category of goods capable of including various independent sub-categories.

30 It follows that by taking into account, for the purposes of considering the opposition, only 'calcium-based pharmaceutical preparations', the Board of Appeal applied correctly Article 43(2) and (3) of Regulation No 40/94.

31 This finding is not affected by the arguments put forward by the applicant.

32 First, the applicant observes essentially that, although it is fair, where the earlier mark designates a set of goods and services of different kinds, to take into consideration for the purposes of the opposition the field in which the mark over five years old is used, in order to avoid abusive reliance on marks designating the whole of one or more classes, it is nevertheless disproportionate to restrict that consideration solely to the specific product within one category.

33 The Court finds, first, that Article 43(2) of Regulation No 40/94 refers to goods and services, and not to categories or classes of goods for which the mark is registered. Second, the expression 'calcium-based pharmaceutical preparations', which were taken into account for the purposes of the opposition, does not refer only to a specific product but to a sufficiently broad, independent sub-category, and this cannot be termed a disproportionate restriction in the circumstances of this case. As evidenced by paragraphs 29 and 30 above, that position is in accordance with the Court's case-law.

34 Next, regarding the applicant's argument that such a restrictive interpretation of Article 43(2) of Regulation No 40/94 is discriminatory in relation to the scope granted in opposition proceedings to unused registrations under five years old, the Court finds that no discrimination is to be found because the two situations are not comparable. Proof of genuine use of a mark which has been registered for less than five years is not required, precisely because the five-year period is intended to allow commercial exploitation of the mark. Under Article 50 of Regulation No 40/94, it is only upon expiry of a continuous period of five years during which the trade mark has not been put to genuine use in the Community in connection with the goods or services in respect of which it is registered that it may be declared to be revoked on grounds of lack of genuine use.

35 In the light of the foregoing, the first plea must be rejected as unfounded.

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

Arguments of the parties

36 First, the applicant challenges the Board of Appeal's finding that there is not a sufficient degree of similarity between the goods in question.

37 According to the applicant, the two types of goods at issue are similar pharmaceutical preparations, originating from the same types of manufacturers and produced and distributed through the same channels. One is described by

reference to the active ingredient and the other by reference to the therapeutic indication. It was for the other party to the proceedings before the Board of Appeal to demonstrate that, notwithstanding this apparent similarity, the actual conditions in which the two products are prescribed and used eliminate any likelihood that a consumer might be faced with both of them simultaneously. No evidence to that effect has been adduced. Likewise, it has not been proven that the dosage form and mode of administration of the products eliminate any likelihood of confusion.

38 The applicant adds that it was not sufficient, in order to eliminate the likelihood of confusion, to find that two pharmaceutical preparations are intended to treat different ailments. It was for the other party to the proceedings before the Board of Appeal to demonstrate, and for it to ensure, that one and the same ill person would not be able to have prescribed, or use, both treatments at the same time, and that was not done.

39 Second, the applicant claims that the Board of Appeal failed to define the public to be taken into account and to assess the likelihood of confusion in relation thereto. It observes that, in the field of medicinal products, the public to be taken into account is the population as a whole, including, on the one hand, health-care professionals such as physicians, pharmacists and nurses and, on the other, all persons likely to use pharmaceutical preparations, including those who already have reduced visual, cognitive or intellectual abilities and who may still be weakened by illness.

40 The applicant further maintains that the likelihood of confusion on the part of the public does not exist only at the time of purchase; post-sale confusion has long been taken into account in the United States. Medicinal products are generally taken for a certain period of time and, when selecting their treatment from their medicine cabinets, ill people are no longer guided by health-care professionals.

41 Third, the applicant draws a comparison between the conflicting signs.

42 It begins by stating that, as the Board of Appeal recognised, the signs CALSYN and GALZIN have no conceptual meaning for the average consumer, so that the two conflicting marks are highly distinctive. The applicant relies on the case-law of the Court of Justice and the Court of First Instance where it has been held that the more distinctive the earlier mark, the greater will be the likelihood of confusion. In recognising that the mark CALSYN is arbitrary and distinctive, the Board of Appeal should have accorded more importance to the overall similarities than to differences in detail. However, it did exactly the opposite.

43 The applicant criticises the Board of Appeal for having incorrectly focused its analysis on the differences in the visual and phonetic details between the two marks, when it should have compared the visual, phonetic and conceptual impact of the two marks as a whole.

44 As regards the visual comparison, the applicant observes that the two signs share the same number of letters and show a striking similarity, as the common letters 'a', 'l' and 'n' are in the same order. It complains that the Board of Appeal failed to take account of the visual similarities between the upper-case 'C' and 'G', which are differentiated only by a small line which may be easily overlooked when the letter 'G' is handwritten. Likewise, the letters 's' and 'z' are very similar visually; only their geometric form is reversed.

45 As regards the phonetic comparison, the applicant complains that the Board of Appeal conducted a subtle analysis of the differences in detail between the two signs,

which cannot be discerned by the reference public. The applicant takes the view that the sounds of the letters 'c' and 'g' are very similar and would not necessarily be perceptible, particularly by members of the public who do not have normal hearing, or elderly or foreign persons. The same is true for the letters 's' and 'z'.

46 The applicant further criticises the Board of Appeal for having found arbitrarily that the phonemes 'yn' and 'in' are pronounced differently. It observes that the combination 'yn' is not very well known in the French language, where the letter 'y' is treated phonetically like the letter 'i', so that the public, apart from the minority familiar with the English language or the phonetic rules relied upon by OHIM, instinctively pronounces 'yn' as 'in'. Thus, the mere differences in 'air pressure' between the letters 'c' and 'g', and 'z' and 's', and, possibly, in pronunciation between 'yn' and 'in' do not in any way reduce the overall phonetic similarities between the two marks.

47 Lastly, the applicant states that the overall comparison must take account of the fact that visual and phonetic perceptions cannot be considered in isolation from each other because the human mind, in order to pronounce a word, especially an arbitrary word, will make an effort to visualise it mentally; the reverse is also true. Thus, their strong phonetic similarity leads to visual memorisation, and hence to very similar written reproduction of the two marks, by consumers who do not have both marks in front of them at the same time. Likewise, strong visual similarity leads to similar pronunciation when consumers turn to their visual memory.

48 In conclusion, the applicant contends that the Board of Appeal should have held that the similarities between the two signs outweighed the differences and that,

notwithstanding the different therapeutic indications, the goods should have been found to be similar.

49 OHIM contends, first, that it shares the view of the applicant and the Board of Appeal as to the determination of the target public, namely health-care professionals and the public in general in France.

50 Second, OHIM analyses the similarity of the goods. It observes that, in accordance with the Guidelines concerning opposition proceedings, pharmaceutical preparations are generally regarded as very similar to other pharmaceutical preparations, although the degree of similarity may be lesser if the pharmaceutical particulars are clearly different.

51 In the present case, the goods covered by the earlier mark CALSYN for which use has been demonstrated are calcium-based pharmaceutical preparations. The evidence of use shows that CALSYN is an injectable, calcitonin-based solution, sold only on prescription ('List II') and administered to patients, in particular in the event of hypercalcemy (calcium deficiency and progressive decalcification of the bones) and to treat diseases which attack the bones (in particular Paget's disease, a disease of the human skeleton leading to deformation of the bones).

52 The pharmaceutical preparations for the treatment of Wilson's disease designated in the disputed application are intended for the treatment of a rare hereditary genetic disease which causes an accumulation of copper in the body. Such preparations are prescribed by physicians and provided on prescription, given their very specific therapeutic indications.

53 In conclusion, OHIM states that the goods in question are similar because they are pharmaceutical preparations, but to a limited extent because of their different therapeutic indications. The Board of Appeal's assessment on this point is therefore correct.

54 Third, OHIM makes a visual, phonetic and conceptual comparison of the signs.

55 As regards the visual comparison, it observes that there are visual similarities between the conflicting signs, because they share the same number of letters (six), including three identical letters placed in the same order and in the same position in the word ('a', 'l' and 'n'), and that the upper-case letters 'G' and 'C' and the letters 'z' and 's' are similar. The letter 'y' in the earlier mark nevertheless differentiates the signs, as noted by the Board of Appeal.

56 On the phonetic level, OHIM contends that the two signs are bisyllabic and that the syllables 'cal' and 'gal' and also 'zin' and 'syn' are very similar. The endings 'in' and 'yn' can be pronounced the same in French [in] (as in *sinistre*, *sinusite*, or *synonyme*, *synergie*) or [ë] (as in *sincère*, *singe*, *lapin* or *synthèse*, *syndicat*), with the vowel 'y' following the same rules as the vowel 'i'. OHIM defers to the assessment of the Court on the Board of Appeal's phonetic analysis.

57 With respect to the conceptual comparison of the signs, OHIM concurs with the Board of Appeal's view that the marks do not have any meaning for the relevant public, so that no conclusion may be drawn on this point.

58 Given the visual and phonetic similarities noted, OHIM concludes that the signs are, overall, similar.

59 Fourth, OHIM makes an overall assessment of the likelihood of confusion. It refers, first, to the case-law, according to which a limited degree of similarity between the goods or services designated may be offset by a high degree of similarity between the marks, and vice versa. According to OHIM, for the purposes of assessment of the likelihood of confusion, the average consumer to be taken into account is deemed to be reasonably well informed and reasonably observant and circumspect. However, it should also be remembered that the average consumer's level of attention is likely to vary according to the category of goods or services in question.

60 Next, OHIM contends that, in general, the average consumer is more attentive towards pharmaceutical preparations subject to prescription than those sold over the counter, and that the level of attention also depends on the product's therapeutic indication. In the present case, OHIM contends that the pharmaceutical preparations at issue are subject to prescription, so that it may be considered, as did the Board of Appeal, that the consumers' level of attention is rather high.

61 In conclusion, OHIM defers to the assessment of the Court as to whether the similarity of the signs and the goods is likely to give rise to a likelihood of confusion on the part of consumers in France.

Findings of the Court

62 Under Article 8(1)(b) of Regulation No 40/94, upon opposition by the proprietor of an earlier trade mark, the trade mark applied for is not to be registered 'if because of its identity with or similarity to the earlier trade mark and the identity or similarity of the goods or services covered by the 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 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.

63 The likelihood of confusion on the part of the public, which is defined as the likelihood 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, must be assessed globally, taking into account all factors relevant to the circumstances of the case (Case C-39/97 *Canon* [1998] ECR I-5507, paragraphs 16 and 29; Case C-342/97 *Lloyd Schuhfabrik Meyer* [1999] ECR I-3819, paragraphs 17 and 18; and Case T-104/01 *Oberhauser* v *OHIM — Petit Liberto (Fifties)* [2002] ECR II-4359, paragraphs 25 and 26).

64 That global assessment implies some interdependence between the factors taken into account, and in particular similarity between the trade marks and between the goods or services covered. Accordingly, a lesser degree of similarity between the goods or services may be offset by a greater degree of similarity between the marks, and vice versa (*Canon*, paragraph 17; *Lloyd Schuhfabrik Meyer*, paragraph 19; and *Fifties*, paragraph 27).

65 In the present case, the earlier mark is registered in France. Accordingly, reference must be made to the perception by the French public for the purposes of the application of Article 8(1)(b) of Regulation No 40/94.

66 Moreover, since the goods in question are pharmaceutical preparations, the relevant public is composed of medical professionals, on the one hand, and patients, as the end consumers, on the other (Case T-130/03 *Alcon* v *OHIM — Biofarma (TRAVATAN)* [2005] ECR II-3859, paragraph 49, and Case T-154/03 *Biofarma* v *OHIM — Bauch & Lomb Pharmaceuticals (ALREX)* [2005] ECR II-4743, paragraph 46).

67 The Court does not accept the applicant's assertion that the Board of Appeal failed to define the target public. It is clear from paragraph 10 of the contested decision that the Board of Appeal, after referring to French consumers, stated that the public included 'both the consumers of medicinal products and medical professionals'. Accordingly, the Court finds that the Board of Appeal defined the relevant public correctly.

68 In respect of the similarity of the goods concerned, all the relevant factors relating to those goods should be taken into account, including, inter alia, their nature, their intended purpose and their method of use and whether they are in competition with each other or are complementary (*Canon*, paragraph 23).

69 In the present case, the Court notes that the Board of Appeal found, essentially, that the conflicting goods were both pharmaceutical preparations, and therefore similar, the difference between them being their different therapeutic indications. This point is also acknowledged by the applicant when it maintains that pharmaceutical preparations should generally be regarded as similar but that the goods in question

are designed for different ailments. The applicant's written pleadings indicate that it disagrees with the Board of Appeal's assessment only as to the degree of similarity present.

70 Suffice it to note that the goods in question are of the same nature (pharmaceutical preparations), have the same function or intended purpose (treatment of human health problems), are directed at the same consumers (professionals in the health sector and patients), use the same distribution channels (typically pharmacies) and can be complementary. Their difference, however, lies in their different therapeutic indications.

71 Accordingly, the Court finds that the similarities between the goods outweigh the differences and concludes that there exists, as correctly found by the Board of Appeal in the contested decision, some degree of similarity between the goods in question.

72 As to the visual, phonetic or conceptual similarity of the conflicting signs, the global assessment of the likelihood of confusion must be based on the overall impression given by them, bearing in mind, inter alia, their distinctive and dominant components (see Case T-292/01 *Phillips-Van Heusen* v *OHIM — Pash Textilvertrieb und Einzelhandel (BASS)* [2003] ECR II-4335, paragraph 47, and case-law cited).

73 First, regarding the conceptual comparison, the Court notes that the Board of Appeal found that the conflicting marks had no meaning for the average consumer and that that finding was not challenged by the applicant. The Court finds that the

Board of Appeal's analysis is correct, as the conflicting signs do not have any meaning.

74 Next, regarding the visual aspect, the Court notes that the two signs are purely verbal and share the same number of letters (six), including three identical letters placed in the same order and in the same position in the word ('a', 'l' and 'n'). The Court also finds that the upper-case letters 'G' and 'C' are similar, so that the fact that the first letter of each of the signs may catch the consumer's eye is not established. Moreover, and contrary to the Board of Appeal's finding, the Court finds that the letters 'z' and 's' are also similar. It is true, as indicated by the Board of Appeal, that the letter 'y' in the earlier mark attracts attention because it is a letter seldom used in the French language. However, that characteristic by itself does not make the two signs significantly different. The Court concludes that the two signs are, overall, visually similar.

75 Lastly, regarding the phonetic comparison, the Court notes that the two signs are bisyllabic and that the first syllables 'cal' and 'gal' in each of the signs will be pronounced in a similar manner, as the sounds of the consonants 'c' and 'g' are very similar. Moreover, and contrary to the Board of Appeal's findings, the Court finds that, in French, the phonemes 'yn' and 'in' will very often be pronounced in the same way. Accordingly, the Court finds that the Board of Appeal made an error of assessment in finding that the conflicting signs were phonetically different.

76 In the light of the foregoing, the Court finds that the two signs are, overall, similar and, consequently, that the Board of Appeal made an error of assessment in accepting that the conflicting signs were different, particularly from a phonetic standpoint.

77 As regards the overall assessment of the likelihood of confusion, the Court observes that the Board of Appeal found that, although there is a certain degree of similarity between the goods and between the marks, it was not sufficient to give rise to a likelihood of confusion between the goods sold under each of those marks. To reach that conclusion, the Board of Appeal found, inter alia, that, given the nature of the goods, the public including both consumers of medicinal products and medical professionals would pay particular attention to the signs identifying the goods.

78 It must be borne in mind that it is settled case-law that, for the purposes of that overall assessment, the average consumer of the category of goods concerned is deemed to be reasonably well informed and reasonably observant and circumspect. According to that same case-law, 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 (*Lloyd Schuhfabrik Meyer*, paragraph 26).

79 The Court finds that the level of attention of the average consumer of pharmaceutical preparations must be determined on a case-by-case basis, according to the facts in the case-file, especially the therapeutic indications of the goods in question. Likewise, the Court finds that, in the case of medicinal products subject to medical prescription such as those being considered in the present case, that level of attention will generally be higher, given that they are prescribed by a physician and subsequently checked by a pharmacist who delivers them to the consumers.

80 However, the fact that the relevant public is composed of persons whose level of attention may be considered high is not sufficient, given the similarity between the

goods and the conflicting signs, to exclude the possibility that the public might believe that those goods come from the same undertaking or, as the case may be, from economically-linked undertakings. The Court notes that the Board of Appeal's conclusion that there is no likelihood of confusion was founded on an incorrect assumption, namely that there were significant differences between the signs, especially from a phonetic standpoint, and that those differences were likely to offset the degree of similarity existing between the goods. That assessment cannot be accepted since, as stated in paragraphs 74 and 75 above, the conflicting signs have strong visual and phonetic similarities.

81 In those circumstances, the Court finds, contrary to the conclusion in the contested decision, that, in terms of the overall impression, given the similarity of the goods concerned and the visual and phonetic similarities of the two marks, the apparent differences between the marks are not sufficient to eliminate the existence of a likelihood of confusion on the part of the relevant public.

82 It follows from all of the foregoing that the second plea in law put forward by the applicant, seeking a declaration that the Board of Appeal infringed Article 8(1)(b) of Regulation No 40/94, must be upheld. Consequently, the contested decision must be annulled.

Costs

83 Under Article 87(2) of the Rules of Procedure of the Court of First Instance, 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, in that the contested decision is annulled, it must be ordered to pay the costs incurred by the applicant, in accordance with the form of order sought by the applicant.

On those grounds,

THE COURT OF FIRST INSTANCE (Fifth Chamber)

hereby:

1. **Annuls the decision of the Fourth Board of Appeal of the Office for Harmonization in the Internal Market (Trade Marks and Designs) (OHIM) of 7 September 2004 (Case R 295/2003-4);**

2. **Orders OHIM to bear its own costs and to pay those incurred by the applicant.**

Vilaras Martins Ribeiro Jürimäe

Delivered in open court in Luxembourg on 17 October 2006.

E. Coulon M. Vilaras

Registrar President