

JUDGMENT OF THE GENERAL COURT (Eighth Chamber)

14 April 2011 *

In Case T-466/08,

Lancôme parfums et beauté & Cie, established in Paris (France), represented by
A. von Mühlendahl and J. Pagenberg, lawyers,

applicant,

v

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

defendant,

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

Focus Magazin Verlag GmbH, established in Munich (Germany), represented by
R. Schweizer and J. Berlinger, lawyers,

* Language of the case: English.

ACTION brought against the decision of the First Board of Appeal of OHIM of 29 July 2008 (Case R 1796/2007-1) relating to opposition proceedings between Focus Magazin Verlag GmbH and Lancôme parfums et beauté & Cie,

THE GENERAL COURT (Eighth Chamber),

composed of L. Truchot, President, M.E. Martins Ribeiro and H. Kanninen (Rapporteur), Judges,

Registrar: S. Spyropoulos, Administrator,

having regard to the application lodged at the Court Registry on 21 October 2008,

having regard to the response of OHIM lodged at the Court Registry on 13 February 2009,

having regard to the response of the intervener lodged at the Court Registry on 29 January 2009,

further to the hearing on 17 November 2010,

gives the following

Judgment

Background to the dispute

- 1 On 23 July 2003, the applicant, Lancôme parfums et beauté & Cie, filed an application for registration of 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 (replaced by Council Regulation (EC) No 207/2009 of 26 February 2009 on the Community trade mark (OJ 2009 L 78, p.1)).
- 2 The mark for which registration was sought is the word sign ACNO FOCUS.
- 3 The goods in respect of which registration was sought are in Class 3 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: 'Cosmetic and make-up preparations.'

- 4 The Community trade mark application was published in *Community Trade Marks Bulletin* No 27/2004 of 5 July 2004.

- 5 On 16 September 2004, the intervener, Focus Magazin Verlag GmbH, filed a notice of opposition to registration of the trade mark applied for, pursuant to Article 42 of Regulation No 40/94 (now Article 41 of Regulation No 207/2009).

- 6 The opposition was based on:
 - the word mark FOCUS registered in Germany on 23 May 1996 under number 39407564, in respect of goods and services in Classes 3, 5, 6, 7, 8, 9, 14 to 16, 18, 20, 21, 24 to 26, 28 to 30, 33, 34, 36, 38, 39, 41 and 42;

 - application No 453720 for registration of the Community word mark FOCUS, filed on 17 January 1997, to designate goods and services in Classes 3, 6, 7, 9, 14, 16, 21, 25, 28, 29, 32, 33, 35, 38, 39, 41 and 42.

- 7 The opposition was directed against all the goods covered by the ACNO FOCUS Community trade mark application and was based on all the goods and services covered by the earlier national mark FOCUS and the Community trade mark application FOCUS.

- 8 The grounds put forward in support of the opposition were those referred to in Article 8(1)(b) and Article 8(5) of Regulation No 40/94 (now, respectively, Article 8(1)(b) and Article 8(5) of Regulation No 207/2009).

- 9 By letter of 10 September 2005, the applicant requested, pursuant to Article 43(2) and (3) of Regulation No 40/94 (now Article 42(2) and (3) of Regulation No 207/2009), that the intervener furnish proof that the earlier national trade mark FOCUS had been put to genuine use during the period of five years preceding the date of publication of the ACNO FOCUS Community trade mark application.
- 10 By letter of 20 December 2005, the intervener claimed, in essence, that after its registration the earlier national trade mark FOCUS had been the subject of several sets of opposition proceedings in Germany all of which were concluded on 13 January 2004, so that the obligation to use the earlier trade mark took effect only on 13 January 2009.
- 11 By letter of 4 September 2006, the applicant argued, in essence, that the earlier national trade mark FOCUS had been registered in Germany on 23 May 1996, and that that was the date from which the five-year period of registration of the earlier trade mark, for the purposes of Article 43(2) of Regulation No 40/94, started to run.
- 12 By decision of 19 September 2007, the Opposition Division upheld the opposition and, therefore, refused the application for registration of the Community trade mark ACNO FOCUS. First, it found that the intervener was not required to furnish proof of use of the earlier national trade mark FOCUS, since that mark had been the subject of opposition proceedings in Germany which were concluded only on 13 January 2004. The Opposition Division then found that the goods covered by the earlier national trade mark FOCUS and the trade mark ACNO FOCUS applied for were identical, that the signs at issue were, taken as a whole, similar and that there was therefore a likelihood of confusion in Germany between the two signs at issue.

- 13 On 16 November 2007, the applicant filed a notice of appeal at OHIM against the Opposition Division's decision, pursuant to Articles 57 to 62 of Regulation No 40/94 (now Articles 58 to 64 of Regulation No 207/2009).
- 14 By decision of 29 July 2008 ('the contested decision'), the First Board of Appeal of OHIM dismissed the applicant's appeal. It found, first, that the five-year period of registration of the earlier national trade mark had only commenced on 13 January 2004. As regards, next, the similarity of the signs, the Board of Appeal noted that the element 'acno' of the trade mark applied for was descriptive of a characteristic of the goods concerned, namely the treatment of acne, and that it cannot therefore be regarded as the dominant element of the mark. Since the element 'focus', which is the dominant element of the trade mark applied for, reproduces the earlier national trade mark and the goods are identical, the Board of Appeal concluded that there was a likelihood of confusion between the signs at issue.

Procedure and forms of order sought by the parties

- 15 The applicant claims that the Court should:

— annul the contested decision;

— reject the opposition filed by the intervener against registration of the mark ACNO FOCUS;

- order OHIM and the intervener to pay the costs, including those incurred by the applicant before the Board of Appeal.

16 OHIM and the intervener contend that the Court should:

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

17 By letter of 11 October 2010, the Court asked OHIM, in accordance with Article 64 of the Court's Rules of Procedure, to produce a copy of the judgment of the Oberlandesgericht München (Higher Regional Court of Munich, Germany) of 18 April 2002 (*MICRO FOCUS*) and of the judgment of the Bundespatentgericht (Federal Patent Court) of 10 July 2003 (*AMS*), both of which are referred to in OHIM's response. OHIM complied with that request by letter of 27 October 2010.

Law

18 The applicant raises two pleas in law in support of its action, the first alleging infringement of Article 43(2) and (3) of Regulation No 40/94 and the second infringement of Article 8(1)(b) of Regulation No 40/94.

The first plea in law, alleging infringement of Article 43(2) and (3) of Regulation No 40/94

Arguments of the parties

- ¹⁹ First, the applicant submits that Article 43(2) of Regulation No 40/94 is ‘unequivocal’ in requiring, in relation to both an earlier national trade mark and an earlier Community trade mark, proof of genuine use within a period of five years from the date of registration. For the purposes of determining the point from which the five-year period of registration of the earlier national mark FOCUS started to run, it is not therefore necessary to refer to the provisions of the German legislation.
- ²⁰ Second, the applicant submits that, if the Court should decide to take the German legislation into consideration, it could be found, by reading the provisions of Article 43(2) and (3) of Regulation No 40/94 in conjunction with Paragraph 26(5) of the Gesetz über den Schutz von Marken und sonstigen Kennzeichen (‘the Markengesetz’, German Law on trade marks) of 25 October 1994 (BGBl. 1994 I, p. 3082, and BGBl. 1995 I, p. 156) and with Article 10(1) of First Council Directive 89/104/EEC of 21 December 1988 to approximate the laws of the Member States relating to trade marks (OJ 1989 L 40, p. 1), that, where the earlier trade mark on which opposition is based has itself been the subject of opposition proceedings at the national level (‘national opposition proceedings’) after it was registered, the point from which the five-year period of registration of the earlier trade mark, laid down in Article 43(2) of Regulation No 40/94 (‘the five-year period of registration’), starts to run could — in certain cases only — be the date on which the national opposition proceedings are concluded.

- 21 The applicant submits that a distinction must be drawn depending on whether the goods and services covered by the earlier trade mark are or are not the subject of national opposition proceedings. If the national opposition proceedings relate to all the goods and services covered by the earlier trade mark, the five-year period of registration should start to run only from the date on which the national opposition proceedings are concluded. By contrast, if the national opposition proceedings do not relate to all the goods and services covered by the earlier trade mark, the point from which the five-year period of registration starts to run should be the date on which the earlier trade mark was registered in relation to the goods and services that are not covered by the national opposition proceedings.
- 22 Third, the applicant claims that, even if the opposition filed in the context of the national proceedings constituted a proper reason for non-use, within the meaning of Article 43(2) of Regulation No 40/94, that reason would be valid only for the goods and services which were actually the subject of the opposition.
- 23 Consequently, none of those three interpretations would enable the intervener to rely on the goods in Class 3 in order to oppose registration of the trade mark applied for.
- 24 Lastly, the applicant submits that the approach of the Board of Appeal in the contested decision leads to the ‘absurd consequence’ that the intervener, which applied to register the earlier trade mark FOCUS in 1996 for goods and services in 25 different classes, can as a result of the opposition proceedings of which that mark had been the subject in Germany, which were concluded only in 2004, postpone the obligation to prove use of the mark for a number of years after the application to register it.

25 OHIM and the intervener contend, in essence, that, in view of the wording of Paragraph 26(5) of the Markengesetz, there cannot be two different dates from which the five-year period of registration starts to run depending on whether the goods or services covered by the earlier trade mark are or are not the subject of national opposition proceedings. The point from which the five-year period of registration starts to run is the date on which the national opposition proceedings brought against that mark are concluded, namely, in the present case, on 13 January 2004, regardless of the goods and services covered by the earlier trade mark that were the subject of the national opposition proceedings, with the result that the intervener is not required to prove that the earlier trade mark had been put to genuine use.

Findings of the Court

26 Article 43(2) of Regulation No 40/94 provides that, '[i]f the applicant so requests, the proprietor of an earlier Community trade mark who has given notice of opposition shall furnish proof that, during the period of five years preceding the date of publication of the Community trade mark application, the earlier Community trade mark has been put to genuine use in the Community in connection with the goods or services in respect of which it is registered and which he cites as justification for his opposition, or that there are proper reasons for non-use, provided the earlier Community trade mark has at that date been registered for not less than five years.'

27 It follows from that provision that the proprietor of an earlier Community trade mark who has given notice of opposition is required to prove use of that mark only in so far as, at the date of publication of the Community trade mark application, the earlier Community trade mark had been registered for not less than five years.

- 28 Article 43(3) of Regulation No 40/94 provides, '[p]aragraph 2 shall apply to earlier national trade marks referred to in Article 8(2)(a), by substituting use in the Member State in which the earlier national trade mark is protected for use in the Community'.
- 29 In order to determine whether the intervener was required to prove that the earlier national trade mark FOCUS, of which it is the proprietor, had been put to genuine use, it is therefore necessary to ascertain whether the Board of Appeal erred in finding that the five-year period of registration, on which the obligation to prove use depends, started to run on 13 January 2004.
- 30 Although it is clear from Article 43(2) of Regulation No 40/94, in conjunction with Article 43(3) thereof, that the registration of an earlier national trade mark is the point from which the five-year period of registration starts to run, it must be observed that Regulation No 40/94 does not enable the date on which the earlier national trade marks are considered to be registered in each of the Member States to be determined.
- 31 It should also be noted that, although national trade mark law was harmonised by Directive 89/104, it is none the less clear from paragraphs 26 to 31 of the judgment in Case C-246/05 *Häupl* [2007] ECR I-4673 that that directive does not harmonise the procedural aspect of trade mark registration, and it is thus for the Member State for which the registration application has been filed to determine, in accordance with its own procedural rules, the time at which the registration procedure comes to an end (see, to that effect, judgment of 26 November 2008 in Case T-100/06 *Rajani v OHIM — Artoz-Papier (ATOZ)*, not published in the ECR, paragraph 36).

- 32 It follows that, in the absence of a relevant provision in Regulation No 40/94 or Directive 89/104, reference must be made to the national law of the Member State concerned in order to determine the date on which an earlier national trade mark is registered (see, to that effect, *ATOZ*, paragraph 35).
- 33 In the present case, in order to determine the point from which the five-year period of registration of the earlier national trade mark FOCUS started to run, it was necessary, as the applicant, moreover, acknowledged at the hearing, to refer to the German legislation, since the earlier national trade mark FOCUS had been registered in Germany.
- 34 It is common ground that, in Germany, a registered trade mark may, after its registration, be the subject of opposition proceedings. In those circumstances, Paragraph 26(5) of the *Markengesetz* provides that '[w]here use of a mark is required within five years from the date of registration thereof, the date of registration shall be replaced by the date of completion of opposition proceedings in cases where notice of opposition has been given to registration.'
- 35 It follows that, in the present case, since the earlier national trade mark FOCUS had been the subject of several sets of opposition proceedings in Germany, the date on which it was registered must be replaced by the date on which the opposition proceedings were concluded, namely 13 January 2004, for the purposes of determining the point from which the five-year period of registration starts to run.
- 36 That conclusion cannot be affected by the applicant's argument that the date of 13 January 2004 should apply only to the goods and services covered by the earlier national trade mark FOCUS in respect of which opposition proceedings had been initiated in Germany.

37 It must be noted, first of all, as the Board of Appeal stated in the contested decision, that Paragraph 26(5) of the Markengesetz does not draw a distinction depending on whether the national opposition proceedings do or do not relate to certain goods or services covered by the earlier national trade mark. The applicant cannot therefore rely on the wording of that provision in order to maintain that a distinction should be drawn depending on whether the goods and services were or were not the subject of the national opposition proceedings.

38 It follows, next, from decisions of the German courts, referred to in the contested decision and relied on by OHIM in its response — and in which the provisions of Paragraph 26(5) of the Markengesetz are interpreted — that the fact that the national opposition proceedings relate to certain goods or services covered by the earlier trade mark has no bearing on determining the point from which the five-year period of registration starts to run, which, under that case-law, is in all circumstances the date on which the national opposition proceedings directed against the earlier mark are concluded (judgment of the Oberlandesgericht München of 18 April 2002 (*MICRO FOCUS*) and judgment of the Bundespatentgericht of 10 July 2003 (*AMS*)). The German courts have held that the earlier trade mark registered in Germany, together with the goods and services covered by it, constitutes a ‘single commercial concept’. Its proprietor cannot therefore be required to furnish proof that the mark had been put to genuine use solely in respect of certain goods and services covered by the earlier trade mark (see, to that effect, *MICRO FOCUS*). It should be added that, even if the applicant disputes the interpretation of German law as set out in the two decisions of the German courts referred to, it does not put forward any German judgment which supports a different interpretation.

39 It follows from the foregoing that the Board of Appeal was fully entitled to decide that the five-year period of registration of the earlier national trade mark FOCUS had started to run only on 13 January 2004, with the result that the intervener was not required to furnish proof that that mark had been put to genuine use.

- 40 In those circumstances, the applicant's argument, that, even if the opposition filed in the context of the national proceedings constituted a proper reason for non-use, that reason would be valid only for the goods and services which were actually the subject of the opposition, must be rejected as irrelevant.
- 41 As to the applicant's argument that the intervener had resorted to delaying tactics in order not to have to prove that its trade mark had been put to genuine use, it must be stated that this is based on assertions not substantiated by evidence.
- 42 It follows from all the foregoing that the plea in law alleging infringement of Article 43(2) and (3) of Regulation No 40/94 must be rejected as unfounded.

The second plea in law, alleging infringement of Article 8(1)(b) of Regulation No 40/94

- 43 Article 8(1)(b) of Regulation No 40/94 provides that, 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.

- 44 According to case-law, the risk that the public might believe that the goods or services in question come from the same undertaking or from economically-linked undertakings constitutes a likelihood of confusion. According to that same case-law, the likelihood of confusion must be assessed globally, in accordance with the perception that the relevant public has of the signs and goods or services in question, and taking account of all the factors relevant to the case, in particular the interdependence between the similarity of the signs and that of the goods or services designated (Case T-162/01 *Laboratorios RTB v OHIM - Giorgio Beverley Hills (GIORGIO BEVERLEY HILLS)* [2003] ECR II-2821, paragraphs 30 to 33, and judgment of 13 September 2010 in Case T-366/07 *Procter & Gamble v OHIM — Prestige Cosmetics (P&G PRESTIGE BEAUTE)*, not published in the ECR, paragraph 49).
- 45 In the present case, the signs to be compared are, on the one hand, the earlier national trade mark FOCUS and, on the other, the Community trade mark applied for ACNO FOCUS. Whereas the opposition was based on the earlier national trade mark FOCUS and the application for the Community trade mark FOCUS, in the contested decision the Board of Appeal based its decision solely on the earlier national trade mark FOCUS, a matter which the parties do not dispute. Therefore, in order to determine whether there is a likelihood of confusion between the signs at issue, the examination must be limited to comparing the earlier national trade mark FOCUS and the trade mark applied for ACNO FOCUS.

The relevant public

- 46 Since the earlier trade mark FOCUS is a national trade mark registered in Germany, for the purposes of analysing the likelihood of confusion the German public's point of view should be taken into consideration, as the Board of Appeal observed.

- 47 The applicant submits that the contested decision does not contain any indication as to the degree of attention of the relevant public. However, consumers of cosmetic and make-up products, who are almost exclusively women, show a high degree of attention with regard to those goods and are accustomed to noting differences between the various brands.
- 48 It is settled case-law that, in the global assessment of the likelihood of confusion, account should be taken of the average consumer of the category of products concerned, who is reasonably well informed and reasonably observant and circumspect. It should also be borne in mind that the average consumer's level of attention is likely to vary according to the category of goods or services in question (see Case T-256/04 *Mundipharma v OHIM - Altana Pharma (RESPICUR)* [2007] ECR II-449, paragraph 42 and the case-law cited).
- 49 In view of the nature of the goods concerned, namely cosmetic and make-up products, it must be found that the relevant public consists of average consumers who are reasonably well informed and reasonably observant and circumspect (see, to that effect, judgment of 8 July 2009 in Case T-240/08 *Procter & Gamble v OHIM — Laboratorios Alcala Farma (oli)*, not published in the ECR, paragraph 27, and judgment of 11 November 2009 in Case T-150/08 *REWE-Zentral v OHIM — Aldi Einkauf (Clina)*, not published in the ECR, paragraph 33), with the result that the relevant public's attention cannot be regarded as greater than it would be in relation to everyday consumer goods.
- 50 Consequently, the applicant's argument must be rejected.

The comparison of the goods and the signs at issue

- 51 The two signs at issue relate to cosmetic and make-up products. The goods at issue are therefore identical, as the Board of Appeal noted in the contested decision, and the parties do not dispute this.
- 52 As regards the comparison of the signs, it must be recalled that, in accordance with case-law, two marks are similar when, from the point of view of the relevant public, they are at least partially identical as regards one or more relevant aspects (judgment of 26 January 2006 in Case T-317/03 *Volkswagen v OHIM — Nacional Motor (Variant)*, not published in the ECR, paragraph 46, and judgment of 8 September 2010 in Case T-369/09 *Quinta do Portal v OHIM — Vallegre (PORTO ALEGRE)*, not published in the ECR, paragraph 21).
- 53 The global assessment of the likelihood of confusion must, in relation to the visual, aural or conceptual similarity of the signs in question, be based on the overall impression given by the signs, bearing in mind, in particular, their distinctive and dominant components. The perception of the marks in the mind of the average consumer of the goods or services in question plays a decisive role in the global assessment of the likelihood of confusion. In this regard, the average consumer normally perceives a mark as a whole and does not proceed to analyse its various details (see Case C-334/05 P *OHIM v Shaker* [2007] ECR I-4529, paragraph 35 and the case-law cited).
- 54 In the present case, the Board of Appeal found that the trade mark applied for displayed a medium, if not high, degree of similarity with the earlier trade mark, which it reproduces identically, adding to it the element ‘acno’. The Board of Appeal found that the element ‘acno’, very close phonetically to the German word ‘akne’, alluded to a characteristic of the goods, namely the treatment of acne problems, and that it could not therefore be distinctive. Thus, the word ‘focus’, which does not allude to any

characteristic of the cosmetic products, is the dominant element of the sign ACNO FOCUS. The Board of Appeal added that the rule according to which a consumer pays greater attention to the beginning of a sign was not to be applied mechanically, since if the initial part of a trade mark is simply descriptive of the goods concerned, a consumer would pay it only scant attention. The Board of Appeal concluded that a German purchaser of cosmetic products could readily form the view that the sign ACNO FOCUS is the name under which the opponent, proprietor of the earlier trade mark, has begun to market a new line of products for the treatment of acne.

55 The applicant submits that the trade mark applied for and the earlier trade mark are not similar and that the Board of Appeal erred in concluding that there was a likelihood of confusion between them.

56 It should be observed that the earlier trade mark is composed of the single word element 'focus', whereas the trade mark applied for comprises two word elements, 'acno' and 'focus'. The two signs at issue therefore contain a common element 'focus', and the element 'acno' is the component which distinguishes them.

57 The parties disagree as to the significance that should be attached to the elements 'acno' and 'focus' of the trade mark applied for. The applicant submits that the element 'acno', placed at the beginning, is the 'eye-catching' part. In addition, that element is not descriptive of the goods concerned, since cosmetic and make-up products do not encompass solely products for the treatment of acne. OHIM and the intervener contend that 'focus' is the dominant element of the trade mark applied for, since the element 'acno' is descriptive of one of the characteristics of the goods covered, namely the treatment of acne.

58 It should be pointed out that, for the relevant public, the element 'acno' of the trade mark applied for can refer to the German word 'akne', and can therefore be associated

with products for the treatment of acne. It must be noted in that regard that the applicant does not rule out completely a link of that kind. It simply points out that cosmetic and make-up products do not encompass solely products for the treatment of acne, with the result that the element ‘acno’ should be considered descriptive in relation to at least some of the goods covered by the trade mark application. According to case-law, the fact that a sign is descriptive in relation to only some of the goods or services within a category listed as such in the application for registration does not preclude that sign being refused registration. If, in such a case, the sign in question was registered as a Community trade mark for the category referred to, nothing would preclude its proprietor from also using it for the goods or services of that category in respect of which it is descriptive (see, to that effect, Case T-355/00 *Daimler-Chrysler v OHIM (TELE AID)* [2002] ECR II-1939, paragraph 40, and Case T-304/06 *Reber v OHIM - Chocoladefabriken Lindt & Sprüngli (Mozart)* [2008] ECR II-1927, paragraph 92).

⁵⁹ In addition, the element ‘acno’ does not allow attention to be drawn from the element ‘focus’ to the point of sufficiently amending the way in which the public will perceive that mark. Since the element ‘acno’ is descriptive of at least some of the goods covered by the trade mark application, it should be borne in mind that consumers will probably attach less significance to that element, since it is not capable of indicating the commercial origin of the goods at issue. Consequently, taken as a whole, the impression given by the trade mark applied for is dominated by the element ‘focus’ in such a manner that the element ‘acno’ features less in the picture of that mark which the relevant public keeps in its mind, in view of the goods covered by the trade mark application.

⁶⁰ It follows from the foregoing that, as regards the trade mark applied for, the element ‘acno’ is not more significant than the element ‘focus’. On the contrary, as the Board of Appeal correctly stated in the contested decision, the element ‘focus’ is the dominant element.

- 61 Furthermore, as to the applicant's argument that the beginning of a sign is significant in the overall impression given by that sign (Case T-112/03 *L'Oréal v OHIM - Revlon (FLEXI AIR)* [2005] ECR II-949, paragraphs 64 and 65, and judgment of 16 December 2008 in Case T-357/07 *Focus Magazin Verlag v OHIM — Editorial Planeta (FOCUS Radio)*, not published in the ECR, paragraph 36), it must be recalled that that argument cannot hold in all cases and does not, in any event, cast doubt on the principle that the assessment of the similarity of marks must take account of the overall impression created by those marks, since the average consumer normally perceives a trade mark as a whole and does not proceed to analyse its various details (judgment of 16 May 2007 in Case T-158/05 *Trek Bicycle v OHIM — Audi (ALLTREK)*, not published in the ECR, paragraph 70, and *PORTO ALEGRE*, paragraph 29).
- 62 It is in the light of that assessment that the degree of similarity between the two signs at issue must be examined.
- 63 Visually, the signs at issue are different in length and comprise a different number of words, so that it cannot be concluded that they are identical. It must, however, be found that there is a certain visual similarity between them, insofar as the trade mark applied for and the earlier trade mark both contain the element 'focus'.
- 64 Phonetically, it also cannot be concluded that the signs at issue are identical, since the element 'acno' of the trade mark applied for contributes to differentiating the signs at issue phonetically. It must be stated that there is a difference in pronunciation between the earlier trade mark, which is particularly short (two syllables), and the trade mark applied for (four syllables). However, because the word 'focus' is pronounced the same in both trade marks, a certain phonetic similarity can be found to exist between the two signs taken as a whole (see, to that effect, judgment of 11 December

2008 in Case T-90/06 *Tomorrow Focus v OHIM — Information Builders (Tomorrow Focus)*, not published in the ECR, paragraph 34).

⁶⁵ Conceptually, the two trade marks are fairly similar since in using the word ‘focus’ they both refer to the idea of ‘intellectual concentration’ or ‘focusing’ (see, to that effect, *Tomorrow Focus*, paragraph 35, and judgment of 16 May 2007 in Case T-491/04 *Merant v OHIM — Focus Magazin verlag (FOCUS)*, not published in the ECR, paragraph 57). It should be assumed that, because of that common element, the German public will establish a conceptual link between the two trade marks. Although the meaning of the trade mark applied for may be regarded as being more precise insofar as the element ‘acno’ may refer to ‘akne’, conceptually, that trade mark is not far from the earlier trade mark so that, for the relevant public, the trade mark applied for could be understood as being a variant of FOCUS.

⁶⁶ It should be pointed out, lastly, that Case T-34/04 *Plus v OHIM — Bälz and Hiller (Turkish Power)* [2005] ECR- II 2401, relied on by the applicant, does not provide grounds for challenging that conclusion as to the similarity of the signs at issue. In *Turkish Power*, the General Court held that, as a whole, the meaning of the sign ‘Turkish Power’ differed from that of ‘power’, the sole word element of the earlier national mark, on the ground, in particular, that the figurative element of the trade mark applied for added a distinct connotation to the single concept of strength conveyed by the word element ‘power’ of the earlier mark. The Court also noted appreciable visual and phonetic differences between the figurative mark applied for and the earlier word mark. In the present case, however, as has been observed above, not only are the trade mark applied for and the earlier trade mark purely word marks, but they also display a certain visual and phonetic similarity.

67 It follows from all the foregoing that the Board of Appeal's conclusion that the signs at issue are similar must be upheld.

The likelihood of confusion

68 A global assessment of the likelihood of confusion implies some interdependence between the factors taken into account and, in particular, between the similarity of the trade marks and that of the goods or services covered. Accordingly, a low degree of similarity between those goods or services may be offset by a high degree of similarity between the marks, and vice versa (Case C-39/97 *Canon* [1998] ECR I-5507, paragraph 17, and Joined Cases T-81/03, T-82/03 and T-103/03 *Mast-Jägermeister v OHIM - Licorera Zacapaneca (VENADO with frame and Others)* [2006] ECR II-5409, paragraph 74).

69 It has been found above that there is a certain visual, phonetic and conceptual similarity between the signs at issue. In addition, it should be recalled that the goods at issue are identical.

70 Accordingly, in particular because the relevant public retains only an imperfect picture of the marks at issue (see, to that effect, judgment of 28 October 2010 in Case T-131/09 *Farmeco v OHIM — Allergan (BOTUMAX)*, not published in the ECR, paragraph 36), with the result that their common component 'focus' creates a certain similarity between them, and because of the interdependence of the various factors to be taken into account, the Board of Appeal was fully entitled to conclude that there is a likelihood of confusion between the two signs at issue.

71 It follows that the action must be dismissed, and there is no need to adjudicate on the applicant's second head of claim which seeks to have the Court reject the intervener's opposition to registration of the trade mark applied for.

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 be ordered to pay the costs in accordance with the form of order sought by OHIM and the intervener.

On those grounds,

THE GENERAL COURT (Eighth Chamber)

hereby:

1. Dismisses the action;

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2. Orders Lancôme parfums et beauté & Cie to pay the costs.

Truchot

Martins Ribeiro

Kanninen

Delivered in open court in Luxembourg on 14 April 2011.

[Signatures]