(b) the Council did not provide sufficient evidence that the conditions of Article 2(10)(i) of the basic Regulation are met. It also committed a misuse of powers and a manifest error of assessment in the application of art 2(10)(i) of the basic Regulation by relying on incorrect or misinterpreted facts in order to establish that the conditions of the application of article 2(10)(i) of the basic Regulation were met. The Council ignored the facts that the applicant provided to the Commission, which the Commission verified, and which it did not rebut during any of the stages of the investigation procedure.

3. Third plea in law, alleging

— that the Council violated first paragraph of Article 2(10) of the basic Regulation, since:

(a) it did not carry out a fair comparison between the export price and the normal value. It did not sufficiently demonstrate the differences in factors affecting prices and price comparability. By contrast with existing case law, it did not establish asymmetry between the normal value and the export price, in the absence of adjustment for commissions paid. The Council ignored the information and evidence provided in the applicant's Questionnaire Response and during its verification visits, which established that ICOF S also handles domestic sales. It failed to sufficiently indicate the reasons why it did not take that information and evidence into account. In doing so, the Council committed a manifest error in the assessment of facts and a misuse of powers. It did not sufficiently motivate the need for an adjustment and the latter is discriminatory towards the applicant,

(b) the Council did not avoid duplication in the deduction of profits from the export price. The Council deducted a first hypothetical margin of 5 % for ICOF E's profits, in application of Article 2(9) of the basic Regulation and a second hypothetical margin of 5 % for ICOF S' profits, thereby deducting an unreasonable total hypothetical margin of 10 % for an intra-group sales operation. This is obviously contrary to the facts and the practice for this type of business operations. The Commission, as investigative authority, should have known this. The Council therefore committed a manifest error in the assessment of facts regarding the intra-group profits and it made a wrong, discriminatory and unreasonable application of Article 2(10) of the basic Regulation.

4. Fourth plea in law, alleging

— that the Council in its assessment of the applicant's situation violated the principle of sound administration. It ignored information, evidence and arguments provided to the Commission during the investigation. Instead, the Council relied on formal invoices, commissions paid and contracts taken out of their context in order to artificially inflate the applicant's dumping margin. The Commission and Council should have exercised better diligence and a more rigorous analysis in reaching their conclusions.

5. Fifth plea in law, alleging

— that the contested regulation was adopted in violation of the principles of equality and non-discrimination. By applying an adjustment to the applicant's export price, the Council created an asymmetry between the export price and the normal value for the sole reason of the applicant's corporate and tax structure. Furthermore, the applicant suffered from a double deduction of a hypothetical profit margin by reason of that structure. Both situations are discriminatory against the applicant in relation to the other investigated companies, which sustain similar costs that have not been subject to adjustments.

([1]) OJ L 343, 22.12.2009, p. 51

Action brought on 17 January 2012 — Bauer v OHIM — BenQ Materials (Daxon)

(Case T-29/12)

(2012/C 80/39)

Language in which the application was lodged: German

Parties

Applicant: Erika Bauer (Schaufling, Germany) (represented by: A. Merz, lawyer)

Defendant: Office for Harmonisation in the Internal Market (Trade Marks and Designs)

Other party to the proceedings before the Board of Appeal: BenQ Materials Corp. (Gueishan Taoyuan, Taiwan)

Form of order sought

The applicant claims that the Court should:

— annul the decision of the Second Board of Appeal of the Office for Harmonisation in the Internal Market (Trade Marks and Designs) of 9 November 2011 in Case R 2191/2010-2 in its entirety;

— order OHIM to pay the costs.

Pleas in law and main arguments

Applicant for a Community trade mark: BenQ Materials Corp.

Community trade mark concerned: the word mark 'Daxon' for goods in Classes 3, 5 and 10

Proprietor of the mark or sign cited in the opposition proceedings: the applicant

Mark or sign cited in opposition: the word mark 'DALTON' for goods and services in Classes 3, 5, 18, 25, 35, 41 and 44

Decision of the Opposition Division: rejection of the opposition

Decision of the Board of Appeal: dismissal of the appeal

Pleas in law: Infringement of Article 8(1)(b) of Regulation No 207/2009 as there is a likelihood of confusion between the marks at issue.

Action brought on 23 January 2012 — Piotrowski v OHIM (MEDIGYM)

(Case T-33/12)

(2012/C 80/40)

Language of the case: German

Parties

Applicant: Elke Piotrowski (Viernheim, Germany) (represented by J. Albrecht, lawyer)

Defendant: Office for Harmonisation in the Internal Market (Trade Marks and Designs)

Form of order sought

The applicant claims that the Court should:

— annul the decision of the Fourth Board of Appeal of the Office for Harmonisation in the Internal Market (Trade Marks and Designs) of 18 November 2011 in Case R 734/2011-4;

— order the defendant to pay the costs.

Pleas in law and main arguments

Community trade mark concerned: the word mark 'MEDIGYM' for goods in Class 10

Decision of the Examiner: the application was rejected

Decision of the Board of Appeal: the appeal was dismissed

Pleas in law: Infringement of Article 75 of Regulation No 207/2009 as the Board of Appeal's decision was based on reasons on which the applicant had had no opportunity to present her comments and infringement of Article 7(1)(b) and (c) of Regulation No 207/2009 as the Community trade mark at issue was refused protection pursuant to Article 154(3) and Article 37(1) of Regulation No 207/2009 even though the mark was not ineligible for registration either under Article 7(1)(b) or Article 7(1)(c) of Regulation No 207/2009

Action brought on 25 January 2012 — Herbacin cosmetic v OHIM — Laboratoire Garnier (HERBA SHINE)

(Case T-34/12)

(2012/C 80/41)

Language in which the application was lodged: German

Parties

Applicant: Herbacin cosmetic GmbH (Wutha-Farnroda, Germany) (represented by: J. Eberhardt, lawyer)

Defendant: Office for Harmonisation in the Internal Market (Trade Marks and Designs)

Other party to the proceedings before the Board of Appeal: Laboratoire Garnier et Cie (Paris, France)

Form of order sought

The applicant claims that the Court should:

— annul the decision of the First Board of Appeal of the Office for Harmonisation in the Internal Market (Trade Marks and Designs) of 22 November 2011 in Case R 2255/2010-1;

— order the defendant to pay the costs.

Pleas in law and main arguments

Applicant for a Community trade mark: Laboratoire Garnier et Cie

Community trade mark concerned: the word mark 'HERBA SHINE' for goods in Class 3

Proprietor of the mark or sign cited in the opposition proceedings: the applicant

Mark or sign cited in opposition: the national and Community word mark and international registration 'HERBACIN' for goods in Class 3

Decision of the Opposition Division: the opposition was upheld

Decision of the Board of Appeal: the appeal was upheld

Pleas in law: Infringement of the first sentence of Article 42(2) of Regulation No 207/2009 in that, at the time of the first-instance opposition decision, an effective request for proof of use on the part of the applicant no longer existed; infringement of point (b) of the second sentence of Article 15(1) of Regulation No 207/2009 in that the Board of Appeal of OHIM erred in law in disregarding considerable export turnover under the opposing mark 'HERBACIN'; and infringement of the first sentence of Article 15(1) of Regulation No 207/2009 in that the proof of use submitted as regards customers within the Community was incorrectly assessed.