

JUDGMENT OF THE GENERAL COURT (First Chamber)

15 December 2010*

In Case T-331/09,

Novartis AG, established in Basle (Switzerland), represented by N. Hebeis, lawyer,

applicant,

v

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

defendant,

* Language of the case: German.

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

Sanochemia Pharmazeutika AG, established in Vienna (Austria),

ACTION brought against the decision of the First Board of Appeal of OHIM of 18 June 2009 (Case R 1601/2007-1), relating to opposition proceedings between Novartis AG and Sanochemia Pharmazeutika AG,

THE GENERAL COURT (First Chamber),

composed of I. Wiszniewska-Białecka (Rapporteur), President, F. Dehousse and H. Kanninen, Judges,

Registrar: C. Heeren, Administrator,

having regard to the application lodged at the Court Registry on 25 August 2009,

having regard to the response lodged at the Court Registry on 11 December 2009,

further to the hearing on 15 June 2010,

gives the following

Judgment

Background to the dispute

- 1 On 22 November 2004, Sanochemia Pharmazeutika AG 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 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 TOLPOSAN.
- 3 The goods in respect of which registration was sought come within 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: 'Medicines containing tolperison; veterinary preparations containing tolperison.'

- 4 The application for the Community trade mark was published in *Community Trade Marks Bulletin* No 26/2005 of 27 June 2005.

- 5 On 6 July 2005, the applicant, Novartis AG, filed a notice of opposition, pursuant to Article 42 of Regulation No 40/94 (now Article 41 of Regulation No 207/2009), to registration of the trademark TOLPOSAN in respect of the goods referred to in paragraph 3 above.

- 6 The opposition was based on international trade mark No 227508 of 13 January 1960 for the word mark TONOPAN, with effect inter alia in Austria and Spain, for goods in Class 5 corresponding to the following description: 'Pharmaceutical products'.

- 7 The ground relied on in support of the opposition was that referred to in Article 8(1)(b) of Regulation No 40/94 (now Article 8(1)(b) of Regulation No 207/2009).

- 8 Following a request of 20 March 2006 by the applicant for the Community trade mark, on 12 April 2006 OHIM requested the applicant to furnish proof, in accordance with Article 43(2) and (3) of Regulation No 40/94 (now Article 42(2) and (3) of Regulation No 207/2009), that the earlier mark had, during the five years preceding the date of publication of the Community trade mark application, been put to genuine use in the Member States in which it is protected.

- 9 On 5 July 2006, within the allotted time-limit, the applicant submitted various documents to show that the mark on which the opposition was based had been put to genuine use in Austria and in Spain.
- 10 On 27 September 2006, the applicant for the Community trade mark, taking into account the fact that proof of genuine use of the earlier trade mark had been furnished for an analgesic used to treat headaches, limited the goods covered by the application for registration to those in Class 5 corresponding to the following description: ‘Muscle relaxant medicines containing tolperison; muscle relaxant veterinary preparations containing tolperison.’
- 11 By letter dated 28 October 2006, the applicant stated to OHIM that the medicine covered by the earlier trade mark had to be regarded as a general analgesic.
- 12 By decision of 14 August 2007, the Opposition Division rejected the opposition. It held that the marks at issue were not similar and that there therefore was no need to examine the existence of a likelihood of confusion within the meaning of Article 8(1)(b) of Regulation No 40/94. The Opposition Division also considered that it was not necessary to take into consideration the documents submitted by the applicant to show that the earlier mark had been put to genuine use, since this would not have changed its decision.
- 13 On 9 October 2007, the applicant filed a notice of appeal with OHIM under Articles 57 to 62 of Regulation No 40/94 (now Articles 58 to 64 of Regulation No 207/2009) against the Opposition Division’s decision.

- 14 By decision of 18 June 2009 ('the contested decision'), the First Board of Appeal of OHIM dismissed the appeal. The Board of Appeal considered that, since the goods at issue were in Class 5, the relevant public was composed of professionals (physicians, chemists and pharmacists) and the general public with a higher degree of attentiveness, and that the relevant territory was Austria and Spain. The Board of Appeal noted that it was not contested that proof of genuine use of the earlier mark had been furnished only for part of the goods for which the mark had been registered, and that therefore, pursuant to Article 42(3) of Regulation No 207/2009, for the purposes of the examination of the opposition, the earlier mark would be deemed to have been registered only in respect of a specific pharmaceutical product, namely an analgesic suitable for treating headaches and migraines. As regards the comparison of the goods, the Board of Appeal took the view that there was a slight degree of similarity between the goods concerned. As regards the comparison of the signs at issue, the Board of Appeal took the view that a global assessment of the signs on the visual and phonetic level led to the conclusion that, given that the initial and final parts are identical and that the middle parts are different, the signs have an average degree of similarity. On a conceptual level, the Board of Appeal stated that the signs at issue had no meaning for the average Spanish or Austrian consumer. Therefore, taking account of the slight similarity between the goods at issue and the average degree of similarity between the signs at issue, as well as the higher degree of attentiveness of the relevant public, the Board of Appeal concluded that there was no likelihood of confusion within the meaning of Article 8(1)(b) of Regulation No 207/2009.

Forms of order sought by the parties

- 15 The applicant claims that the Court should:

— annul the contested decision;

— order OHIM to pay the costs.

16 OHIM contends that the Court should:

— dismiss the action;

— order the applicant to pay the costs.

In law

17 The applicant raises a single plea alleging infringement of Article 8(1)(b) of Regulation No 207/2009.

18 Under Article 8(1)(b) of Regulation No 207/2009, upon opposition by the proprietor of an earlier trade mark, the trade mark applied for must 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. Furthermore, under Article 8(2)(a)(iii) of Regulation No 207/2009, 'earlier trade marks' means trade marks registered under international arrangements which have effect in a Member State.

- 19 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 from economically-linked undertakings, constitutes a likelihood of confusion. According to that same case-law, the likelihood of confusion must be assessed globally, according to the relevant public's perception of the signs and the goods or services concerned and taking into account all factors relevant to the case, in particular the interdependence between the similarity of the signs and that of the goods or services designated (see Case T-162/01 *Laboratorios RTB v OHIM — Giorgio Beverly Hills (GIORGIO BEVERLY HILLS)* [2003] ECR II-2821, paragraphs 30 to 33, 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, paragraphs 24 and 25).
- 20 In the present case, it is common ground that the earlier trade mark TONOPAN was the subject of an international registration having effect in Austria and Spain, which thus constitute the relevant territory for the analysis of the likelihood of confusion.
- 21 As regards the relevant public, it is established case-law that, when the goods in question are medicines, the relevant public is composed of medical professionals, on the one hand, and patients, as the end consumers, on the other (see judgment of 21 October 2008 in Case T-95/07 *Aventis Pharma v OHIM — Nycomed (PRAZOL)*, not published in the ECR, paragraph 27 and the case-law cited). In the present case, it is not disputed that the relevant public is composed of professionals, namely physicians and pharmacists, and end consumers, namely patients.
- 22 However, the applicant disputes the Board of Appeal's findings in relation to the degree of attentiveness of the relevant public, the comparison of the goods, the comparison of the signs and the existence of a likelihood of confusion in this case.

The degree of attentiveness of the relevant public

- 23 According to the case-law, so far as concerns the degree of attentiveness of the relevant public for the purposes of the global assessment of the likelihood of confusion, the average consumer of the relevant goods is deemed to be reasonably well informed and reasonably observant and circumspect. It should also be borne in mind that the average consumer's degree of attentiveness 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).
- 24 In the present case, the Board of Appeal considered that the end customer displayed a higher degree of attentiveness as the goods at issue were not general consumer goods, but consumer health goods.
- 25 The applicant claims that the goods covered by the earlier mark are cheap painkillers sold without prescription which consumers regard as general consumer goods and to which they pay no more attention than to the purchase of any other consumer goods. The applicant also contests the Board of Appeal's finding that the general public normally asks pharmacists and physicians for advice when choosing medicines. In the assessment of the likelihood of confusion, it is necessary to take into account end consumers who conduct their purchases without the assistance of professionals. Medicines covered by the earlier trade mark are sold without prescription and on the Internet, which removes the professional's supervision.
- 26 According to the case-law, medical professionals have a high degree of attentiveness when prescribing medicines. Moreover, with regard to end consumers, it is apparent

from the case-law that, in cases where pharmaceutical products are sold without prescription, it must be assumed that those goods will be of concern to consumers, who are deemed to be reasonably well informed and reasonably observant and circumspect where those goods affect their state of health, and that these consumers are less likely to confuse different versions of such goods. Furthermore, even assuming that a medical prescription is mandatory, consumers are likely to have a high degree of attentiveness upon prescription of the goods at issue, in the light of the fact that those goods are pharmaceutical products (*PRAZOL*, at paragraph 21 above, paragraph 29 and judgment of 8 July 2009 in Case T-240/08 *Procter & Gamble v OHIM — Laboratorios Alcala Farma (oli)*, not published in the ECR, paragraph 50). Thus medicines, whether or not issued on prescription, can be regarded as receiving a heightened degree of attentiveness by consumers who are reasonably well informed and reasonably observant and circumspect (judgment of 15 December 2009 in Case T-412/08 *Trubion Pharmaceuticals v OHIM — Merck (TRUBION)*, not published in the ECR, paragraph 28).

27 Therefore, in the present case the relevant public should be regarded as likely to display a higher than average degree of attentiveness.

28 Contrary to the applicant's submissions, the fact that an end consumer could possibly obtain on the Internet a medicinal product sold without prescription, without the advice of a pharmacist or physician, is not such as to lower that consumer's degree of attentiveness when purchasing such goods.

29 Consequently, the Board of Appeal rightly considered that the relevant public consisted of professionals in the medical sector and Austrian and Spanish end consumers displaying a higher degree of attentiveness.

Comparison of the goods

- 30 According to settled case-law, in order to assess the similarity of the goods or services, all the relevant factors relating to those goods or services should be taken into account. Those factors include, in particular, their nature, their intended purpose, their method of use and whether they are in competition with each other or are complementary. Other factors may also be taken into account, such as the distribution channels of the goods concerned (see Case T-443/05 *El Corte Inglés v OHIM — Bolaños Sabri (PiraÑAM diseño original Juan Bolaños)* [2007] ECR II-2579, paragraph 37 and the case-law cited).
- 31 In the present case it must be noted first that the earlier trade mark was registered for ‘pharmaceutical products’ within Class 5. The parties do not dispute that evidence of genuine use of the earlier trade mark was furnished by the applicant only for a sub-category of these goods corresponding to an ‘analgesic which is suitable in particular for treating headaches and migraines’ and that, in accordance with Article 42(2) of Regulation No 207/2009, for the purpose of considering the opposition, the earlier trade mark is treated as registered only for these goods.
- 32 Accordingly, for the purpose of assessing the similarity of the goods, the Board of Appeal rightly took into account, on the one hand, ‘analgesics which soothe pain, in particular in treating headaches and migraines’ within Class 5 and covered by the earlier trade mark, and, on the other hand, ‘muscle relaxant medicines containing tolperison; muscle relaxant veterinary preparations containing tolperison’ within Class 5 and for which registration is sought.
- 33 The Board of Appeal considered that, although the goods at issue were similar in so far as they fell within Class 5, they were at most slightly similar, as the goods covered by the earlier trade mark were part of the sub-category of analgesics, whereas the

goods for which registration was applied for belonged to the sub-category of muscle relaxants.

³⁴ The applicant submits that the degree of similarity between the goods in question is very high. The applicant criticises the Board of Appeal for failing to have taken account of the fact that the goods for which registration was applied for are muscle relaxants which also have the effect of alleviating pain and which therefore have a high degree of similarity with the analgesics covered by the earlier trade mark. The applicant submits that they are medicines whose intended use overlaps, given that muscle relaxants, like analgesics, have the effect of alleviating pain caused by muscular contractions. Furthermore, they are used as mutually complementary medicines, they are manufactured by pharmaceutical companies and marketed through the same distribution channels, and they are aimed at the same end consumers. Consequently, all the relevant factors coincide, with the exception of the intended purpose of the goods, namely their therapeutic indication. The applicant considers that the fact that the goods at issue are mutually complementary – analgesics being capable of being prescribed for painful muscular contractions – is one of the factors leading to the conclusion that the goods at issue are extremely similar.

³⁵ It should be noted that goods such as medicines have the same nature (pharmaceutical products), purpose (treatment of human health problems), consumers (medical professionals and patients) and distribution channels (typically pharmacies). This is apparent from the goods at issue belonging to the same general category of goods: medicines. However, this is a very wide category and includes goods which may be different. Thus it must be concluded that medicines belonging to the same general category of goods only allow the finding of a low degree of similarity between all the medicines.

- 36 As the factors taken into account at paragraph 35 above cannot be used to distinguish different sub-categories of medicines, it is necessary to have regard to other factors, in order to properly assess the similarity between the medicines. These factors are, in particular, whether these medicines are in competition with each other or complementary, as well as their purpose and their specific intended use (treatment of specific health problems). In taking these factors into account, a medicine's therapeutic indication is of decisive importance.
- 37 The specific nature of medicines has already been taken into account in the case-law which states that, since consumers are searching primarily for goods or services which can meet their specific needs, the purpose of the relevant goods or services is vital in directing their choices. Consequently, since consumers do employ the criterion of the purpose or intended use before making any purchase, it is of fundamental importance in the definition of a sub-category of goods or services. The purpose and intended use of a therapeutic product are expressed in its therapeutic indication (*RESPICUR*, paragraph 23 above, paragraphs 29 and 30).
- 38 In the present case, it is common ground that the goods at issue can be distinguished according to their primary therapeutic indication. The goods covered by the earlier trade mark are analgesics for soothing pain, in particular headaches, whereas the purpose of the goods in respect of which registration was applied for is to treat muscle aches by relaxing muscles. The Board of Appeal therefore correctly took the view that the goods at issue came within different sub-categories of medicines. Accordingly, it must be concluded that the goods at issue are not in competition with each other (interchangeable).
- 39 It is true, as the applicant points out, that muscle relaxants covered by the trade mark applied for may also have the effect of alleviating pain. However, this does not alter the finding that the purpose of these medicines, according to their therapeutic

indication, is to relax muscles and that this is therefore distinct from that of analgesics covered by the earlier trade mark.

- 40 Likewise, for the assessment of the similarity between the medicines, it is of less importance that the same patient may suffer from several complaints and may take several medicines simultaneously. This finding is especially true in the present case, as analgesics can be taken with other medicines.
- 41 Therefore, the fact that the goods at issue may be used simultaneously by the same consumer does not suffice for a finding that they are complementary within the meaning of the case-law. Goods or services are complementary where there is a close connection between them, in the sense that one is indispensable or important for the use of the other in such a way that consumers may think that the responsibility for the production of those goods or provision of those services lies with the same undertaking (Case T-316/07 *Commercy v OHIM — easyGroup IP Licensing (easyHotel)* [2009] ECR II-43, paragraph 57 and the cited case-law).
- 42 It is clear from the above that, in view of the similarity between the goods at issue established at paragraph 35 above and the difference linked to their therapeutic indications, the Board of Appeal did not err in holding that the goods at issue are at most slightly similar.

Comparison of the signs

- 43 It is established case-law that 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, namely the visual, phonetic and conceptual aspects (Case T-6/01

Matratzen Concord v OHIM — Hukla Germany (MATRATZEN) [2002] ECR II-4335, paragraph 30, and judgment of 10 December 2008 in Case T-290/07 *MIP Metro v OHIM — Metronia (METRONIA)*, not published in the ECR, paragraph 41).

44 Furthermore, the global assessment of the likelihood of confusion, as far as concerns the visual, phonetic or conceptual similarity of the marks in question, must be based on the overall impression of the marks, bearing in mind, inter alia, their distinctive and dominant components. The perception of the marks by the average consumer of the goods or services in question plays a decisive role in the global assessment of that likelihood of confusion. 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 judgment of 4 March 2009 in Case T-168/07 *Professional Tennis Registry v OHIM — Registro Profesional de Tenis (PTR PROFESSIONAL TENNIS REGISTRY)*, not published in the ECR, paragraph 28).

45 In the present case, the Board of Appeal considered that the two word marks at issue, TOLPOSAN and TONOPAN, had average visual and phonetic similarity, given that their initial and end parts are identical and that their middle parts are different, and that on a conceptual level the signs at issue are not comparable.

46 It must first be stated that on a conceptual level the applicant does not dispute the Board of Appeal's assessment that the trade marks at issue have no meaning for the average Austrian and Spanish consumer.

- 47 The applicant concentrates its argument on the comparison of the signs at issue carried out by the Board of Appeal on the visual and phonetic levels.
- 48 The applicant claims that the trade marks at issue have a high degree of similarity on the visual and phonetic levels, the common elements between those trade marks being clearly greater than their differences. On the visual level, the applicant submits that the trade marks at issue contain six identical letters, five of which are presented in the same order ('t', 'o', 'o', 'a' and 'n'), and that the letter 'p' comes after the vowel 'o' in the earlier trade mark and before the vowel 'o' in the trade mark for which registration is applied for. On the phonetic level, the applicant claims that the Board of Appeal failed to take account of the similarities present in the middle parts of those marks, namely the sounds 'op' and 'po', the identical chain of vowels, ('o', 'o' and 'a') and the identical letters 'p' and 'o'. According to the applicant, the Board of Appeal broke down the trade marks at issue into identical and different elements and did not take into account the overall impression produced by these elements.
- 49 First, in relation to the visual similarity, it should be noted that the trade marks TOL-POSAN and TONOPAN consist of a single word of three syllables, comprising almost the same number of letters, eight and seven respectively, the vowels of which are placed in the same order ('o', 'o' and 'a'). The trade marks at issue start with the same two letters 't' and 'o' and end with the same two letters 'a' and 'n'. However, it should also be pointed out that these trade marks display differences on the visual level, arising, on the one hand, from the presence of the letters 'l' and 's' in the middle part of the trade mark for which registration is sought, and, on the other hand, the fact that the order of the letters 'p' and 'o' is reversed in the middle parts of the marks at issue.
- 50 Therefore, the Board of Appeal did not err in considering that the initial parts 'to' and the end parts 'an' of the signs at issue were identical and that their middle parts 'lpos' and 'nop' were different.

- 51 Next, in relation to their phonetic similarity, it should be noted that the trade marks at issue start with the same sound 'to' and end with the same sound 'an'. Their middle parts 'lpos' and 'nop' contain the vowel 'o' but are pronounced differently. In this respect, as a result of the inversion of the letters 'o' and 'p' in their middle part, the trade marks at issue are pronounced differently. Moreover, the presence of the letter 'l', preceding the letter 'p', and the presence of the letter 's' in the trade mark for which registration is sought, reinforce that difference in pronunciation.
- 52 Therefore, the Board of Appeal did not err in considering that, on the phonetic level, the signs at issue are pronounced differently due to a non-identical chain of letters and the presence of different letters in their middle parts.
- 53 It follows that the Board of Appeal rightly considered that, on the visual and phonetic levels, the signs at issue have an average degree of similarity.
- 54 Finally, in relation to the applicant's claim that the Board of Appeal failed to take into account the overall impression of the trade marks at issue, it is sufficient to note that in the contested decision the Board of Appeal found that it was a global assessment of the signs at issue on the visual and phonetic levels that led it to the conclusion that the signs have an average degree of similarity. Furthermore, it indicated that the consideration that the relevant public's attention will be captured more by the trade marks' initial parts, namely 'to', cannot call in question that conclusion. It added that such an approach, consisting of paying attention only to the initial part of the sign, would amount to ignoring the assessment of the overall impression of the trade marks at issue.

- 55 The fact that the Board of Appeal found that an average degree of similarity exists between the trade marks at issue shows that, contrary to the applicant's submissions, the Board of Appeal did conduct an overall assessment of those trade marks, taking into account both their identical and their different elements. As OHIM states, the assessment of the overall impression of the trade marks at issue does not prevent a comparison of their different elements and syllables as presented to the consumer.
- 56 It follows from the foregoing that, given the average degree of similarity between the signs at issue on the visual and phonetic levels and the lack of meaning on the conceptual level, the Board of Appeal was right to consider that globally the signs at issue have an average degree of similarity.

The likelihood of confusion

- 57 The Board of Appeal found that, given the slight similarity between the goods and the average similarity between the signs, a global assessment enabled any likelihood of confusion to be ruled out in the German- and Spanish-speaking areas. The Board of Appeal stated that that conclusion was based on the consideration that the relevant public paid more attention to the goods at issue, which concern their own health, and were more vigilant when they had to choose them.
- 58 As regards the global assessment of the likelihood of confusion, it follows from the foregoing that, taking into account the fact that (i) the goods at issue are only slightly similar and the trade marks at issue have an average degree of similarity and that (ii) the relevant public has a higher degree of attentiveness than average, the Board of

Appeal did not err in concluding that there was no likelihood of confusion within the meaning of Article 8(1)(b) of Regulation No 207/2009.

59 That conclusion cannot be called into question, even if, as the applicant points out, according to the case-law the final consumer only rarely has the chance to make a direct comparison between the different marks but must rely on his imperfect recollection of them (Case C-342/97 *Lloyd Schuhfabrik Meyer* [1999] ECR I-3819, paragraph 26, and Case T-104/01 *Oberhauser v OHIM — Petit Liberto (Fifties)* [2002] ECR II-4359, paragraph 28). As has been stated above, in the present case, the relevant public has a higher degree of attentiveness when purchasing the goods at issue.

60 Likewise, this finding is not called into question by the applicant's argument that, since the end consumer's wish to purchase is expressed verbally to the pharmacist and pharmacists order the medicines by telephone from wholesalers, the similarity of the signs at issue on the phonetic level has a heightened importance.

61 Admittedly, as the Court has held, in the context of the global assessment of the likelihood of confusion, the visual, phonetic or conceptual aspects of the signs at issue do not always have the same weight and it is appropriate then to examine the objective conditions under which the marks may be present on the market (see Case T-129/01 *Alejandro v OHIM — Anheuser-Busch (BUDMEN)* [2003] ECR II-2251, paragraph 57, and Joined Cases T-117/03 to T-119/03 and T-171/03 *New Look v OHIM — Naulover (NLSPORT, NLJEANS, NLACTIVE and NLCollection)* [2004] ECR II-3471, paragraph 49). The extent of the similarity or difference between the signs at issue may depend, in particular, on the inherent qualities of the signs or the conditions under which the goods or services are marketed. If the goods covered by the mark in question are usually sold in self-service stores where consumers choose the goods

themselves and must therefore rely primarily on the image of the trade mark applied to the goods, the visual similarity between the signs will as a general rule be more important. If, on the other hand, the goods covered are primarily sold orally, greater weight will usually be attributed to any phonetic similarity between the signs (*NLSPORT, NLJEANS, NLACTIVE and NLCollection*, paragraph 49, cited above).

⁶² However, in the present case, the degree of similarity on the phonetic level between the marks at issue is not very high and is the same level as the degree of similarity on the visual level. Consequently, the fact that the similarity on the phonetic level were to have more weight than the similarity on the visual level, inasmuch as the goods at issue are traditionally sold orally, cannot lead to the conclusion of the existence of a likelihood of confusion within the meaning of Article 8(1)(b) of Regulation No 207/2009.

⁶³ It follows from all the foregoing that the single plea of infringement of Article 8(1)(b) of Regulation No 207/2009 must be rejected.

Costs

⁶⁴ Under Article 87(2) of the Rules of Procedure of the General Court, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. As the applicant has been unsuccessful, it will be ordered to pay the costs, as applied for by OHIM.

On those grounds,

THE GENERAL COURT (First Chamber)

hereby:

- 1. Dismisses the action;**
- 2. Orders Novartis AG to pay the costs.**

Wiszniewska-Białecka

Dehousse

Kanninen

Delivered in open court in Luxembourg on 15 December 2010.

[Signatures]