

Gerecht van Eerste Aanleg, 13 februari 2007, Curon v Euron

Curon v Euron

MERKENRECHT

Geen gevaar voor verwarring

Finally, contrary to the applicant's submissions, the earlier mark cannot be regarded as being particularly distinctive in character. It is attenuated by the sequence 'e-u-r-o', because of its frequent use in the trade mark field, and in various trade names. Furthermore, that sequence includes a strong evocative element as regards the geographic origin of the goods that it designates. In any event, since the marks at issue do not have decisive visual, phonetic or conceptual similarity, the potentially distinctive aspect of the earlier mark cannot affect the overall assessment of the likelihood of confusion

Vindplaatsen: curia.europa.eu; JGR 2007, nr. 22, p. 187, m.nt. Vollebregt

Gerecht van Eerste Aanleg, 13 februari 2007

(M. Vilaras, F. Dehousse and D. Šváby,)

(...).

JUDGMENT OF THE COURT OF FIRST INSTANCE (Fifth Chamber)

13 February 2007 (*)

(Community trade mark – Opposition proceedings – Application for Community word mark CURON – Opposition by the proprietor of the Community word mark EURON – Likelihood of confusion – Article 8(1)(b) of Regulation (EC) No 40/94)

In Case T-353/04,

Ontex NV, established in Buggenhout (Belgium), represented by M. Du Tré, lawyer, applicant,

v

Office for Harmonisation in the Internal Market (Trade Marks and Designs) (OHIM), represented by A. Follard-Monguiral, acting as Agent, defendant,

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

Curon Medical, Inc., established in Sunnyvale, California (United States), represented by C. Algar and J. Cohen, Solicitors, and T. Ludbrook, Barrister,

ACTION brought against the decision of the Second Board of Appeal of OHIM of 5 July 2004 (Case R 22/2004-2), relating to opposition proceedings between Ontex NV and Curon Medical Inc.,

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

composed of M. Vilaras, President, F. Dehousse and D. Šváby, Judges,

Registrar: B. Pastor, Deputy Registrar,

having regard to the application lodged at the Registry of the Court of First Instance on 23 August 2004,

having regard to the response of OHIM lodged at the Registry of the Court on 22 December 2004, having regard to the response of the intervener lodged at the Registry of the Court on 4 January 2005, further to the hearing on 24 January 2006, gives the following

Judgment

Background to the dispute

1 On 2 November 2000, Curon Medical Inc., established in Sunnyvale, California, United States ('the intervener'), filed an application for registration of a Community trade mark at the Office for Harmonisation in the Internal Market (Trade Marks and Designs) under Council Regulation (EC) No 40/94 of 20 December 1993 on the Community trade mark (OJ 1994 L 11, p. 1), as amended.

2 The mark in respect of which registration was sought was the word mark 'CURON' ('the mark applied for').

3 The goods and services in respect of which registration of the trade mark was initially sought are in Classes 10, 41 and 42 of the Nice Agreement of 15 June 1957 concerning the International Classification of Goods and Services for the Purposes of the Registration of Marks, as revised and amended. On 4 September 2003, the intervener restricted the list of goods and services contained in the registration application to goods in Class 10. Those Class 10 goods are described as follows:

'Surgical, medical, dental and veterinary apparatus, instruments and devices except X-ray apparatus as well as their parts for use within the medical field, in particular X-ray tubes and X-ray screens, exposed and unexposed X-ray films, cartridges and other containers for the transportation of unexposed and exposed X-ray films and apparatus and devices for developing exposed X-ray films; excluding orthopaedic appliances and instruments, prostheses, apparatus and instruments for the external fixation and stapling of prostheses, power-tool apparatus for use in surgery, parts and fittings for the excluded goods, bone cement; and not including disposable articles and products other than for use in connection with catheters, radio frequency electrosurgery, gastroesophageal reflux disease, surgical treatment of faecal incontinence and gastroenterological disorders'.

4 On 25 June 2001, the application for registration was published in the Community Trade Marks Bulletin No 56/01.

5 On 12 September 2001, Ontex NV, established in Buggenhout (Belgium), filed a notice of opposition to registration of the trade mark applied for. The applicant cited Article 8(1)(a) and (b) of Regulation No 40/94 as justification for the opposition. That opposition was based on the earlier Community word mark 'EURON' registered under No 762351 on 29 August 2000 for goods in Classes 5, 10, 16, 24 and 25 of the Nice Agreement ('the earlier mark'). The opposition was based on the fact that some of the goods in question were protected by the registration of the earlier mark, namely:

Class 10 – ‘Surgical, medical apparatus and instruments’.

6 The opposition was directed against all of the goods in Class 10 specified in the application for registration, as listed in paragraph 3 above.

7 By decision of 31 October 2003 the Opposition Division of OHIM rejected the opposition under Article 8(1)(a) of Regulation No 40/94 and upheld the opposition in its entirety under Article 8(1)(b) of that regulation (‘the Opposition Division’s decision’) on the ground that there was a likelihood of confusion, including a likelihood of association.

8 On 22 December 2003 the intervener brought an appeal against that decision before the Board of Appeal of OHIM.

9 By decision of 5 July 2004 (‘the contested decision’), the Second Board of Appeal of OHIM (‘the Board of Appeal’) upheld the appeal and annulled the Opposition Division’s decision on the ground that it had not been established that registration of the mark applied for would give rise to a likelihood of confusion or association.

Forms of order sought

10 The applicant claims that the Court should:

- annul the contested decision;
- order OHIM to pay the costs.

11 OHIM contends that the Court should:

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

12 The intervener contends that the Court should:

- uphold the contested decision;
- order the applicant to pay the costs.

Law

13 In support of its application for annulment of the contested decision, the applicant relies on a single plea in law, alleging infringement of Article 8(1)(b) of Regulation No 40/94. According to the applicant, as regards the comparison of the marks, the Board of Appeal was wrong to hold that the marks in questions were visually, phonetically and conceptually dissimilar, and that there was no likelihood of confusion between them on the part of the relevant public.

Preliminary findings

14 The applicant claims, in its originating application, that the statement of reasons on which the findings of the Board of Appeal are based is clearly lacking and inadequate.

15 It should be noted, in that regard, that the applicant stated at the hearing that it was not raising any complaint alleging that the statement of reasons was inadequate. Its assertions concern the merits of the dispute. Therefore, those assertions must be examined at the same time as the other arguments relating to the merits of the case.

Arguments of the parties

The relevant public

16 The applicant claims that the Board of Appeal failed to take account of the fact that the comparison between the marks was to be made from the point of view of an averagely attentive consumer who normally perceives trade marks one after the other, rather than

simultaneously, and tends not to subject the differences between the marks to careful consideration.

17 At the hearing, the applicant estimated that a percentage ‘up to a level of 20%’ of the relevant goods in this case can be bought by a non-specialised public.

18 OHIM takes the view that, by reason of the goods covered by the marks at issue, the targeted public is mainly composed of physicians and surgeons. This is a public which is deemed to be specialised, well informed, observant and circumspect. It will have a higher degree of attention, given the specificity and the technical nature of the goods concerned. The applicant’s assertion that the comparison of the signs should have been made by taking into consideration the viewpoint of an averagely attentive consumer is incorrect.

19 The intervener submits that the Board of Appeal took due account of the viewpoint of the average consumer of the goods covered by the marks at issue. It argues essentially that, by reason of the fact that the goods concerned are used only by a highly defined category of the public, that is to say, medical professionals and their support staff, it is that category which constitutes the average consumers for the purposes of assessing any likelihood of confusion.

Visual comparison

20 The applicant contests the Board of Appeal’s view that the overall impression made by the signs at issue is markedly different because of the first letter in each.

21 According to the applicant, the Board of Appeal failed to carry out an overall visual assessment of the two signs at issue on the basis of all the letters perceived.

22 The applicant points out that, in this case, the two marks consist of word signs containing an identical number of syllables (two) and letters (five). The fact that the last four letters of the marks at issue are identical and arranged in the same sequence and position outweighs the fact that the marks differ as to their respective first letters. Referring to a number of decisions given by OHIM and the judgment in Case T-388/00 Institut für Lernsysteme v OHIM – Educational Services (ELS) [2002] ECR II-4301, the applicant concludes that the marks at issue are visually similar.

23 The Board of Appeal, the applicant submits, committed an error of law by failing to take account, in the visual assessment of the marks at issue, of the argument that the marks are very similar when they are written by hand in small letters and/or presented in cursive script. According to the applicant, that is often the case in the medical field as well as, so far as presentation in cursive script is concerned, on packaging. Consequently, the Board of Appeal’s assessment is lacking and inadequate.

24 The applicant disputes the Board of Appeal’s view that the difference between the marks is most likely highlighted by the fact that consumers are conditioned to see the sequence of letters ‘e-u-r-o’ but not the sequence ‘c-u-r-o’. According to the applicant, even if such conditioning did exist, the Board of Appeal’s reasoning could make sense only if the sequence

'e-u-r-o' were a prefix of a trade mark which is perceived as a combination of two meaningful elements, which is not the case so far as the trade mark in question is concerned.

25 The applicant argues that the Board of Appeal engaged in speculation as to the conceptual meaning that consumers perceive in the marks at issue in order to demonstrate a visual difference. The Board of Appeal failed to take account of the fact that an averagely attentive consumer is unlikely to embark upon a conceptual analysis of the marks. In the present case, the consumer would not identify a reference to Europe in the earlier mark or a meaning which accentuates any difference between the marks at issue.

26 OHIM endorses the Board of Appeal's conclusion with respect to the visual differences between the marks at issue. As regards the argument concerning the failure to take into consideration the marks written by hand or in lower case, OHIM submits that this is irrelevant, particularly as the goods covered by the marks at issue are not sold on prescription.

27 The intervener disputes the applicant's argument that the Board of Appeal did not make an overall assessment of the visual similarity of the marks. It submits that because of that overall assessment, which is not discrete, the applicant's argument concerning the need to take account of the use of lower case to reproduce the competing marks is misconceived. The applicant's argument is not relevant since the goods in question are not among those that are habitually prescribed.

Phonetic comparison

28 The applicant disputes the Board of Appeal's argument that, because the first letters of the marks in question, namely 'c' and 'e', are pronounced quite differently, there is a discernible difference in the overall pronunciation of the marks which a reasonably perceptive consumer would have no difficulty in making out. The Board of Appeal, it claims, failed to take into account the structure of the syllables and the pronunciation of the words as a whole in different languages.

29 The applicant submits that the single letters making up the marks in question cannot be compared phonetically in order to draw conclusions in respect of the overall pronunciation of the marks. The pronunciation of the first letter of a word does not, in itself, determine the pronunciation of the word. The pronunciation of the first letter depends as much on the word as a whole as on the language in which it is expressed.

30 According to the applicant, when the pronunciation of the trade marks at issue is compared as a whole in the English language, the sound of 'eu' in 'euron' and of 'u' in 'curon' is identical. The applicant submits that, in English, it is only the presence or absence of the consonant 'c' which influences the overall aural impression of the marks, and not the first letter of each, the 'c' and the 'e' respectively. It argues that the correct comparison of the sound of the marks in English is between 'uron' and 'curon', which are phonetically very close. In English the sound of the earlier mark is

wholly contained in the sound of the trade mark applied for. The applicant observes that, when the similarity of the first syllables is combined with the identity of the second syllables 'ron', the result is an impression of phonetic similarity.

31 The applicant concludes that the Board of Appeal contended on the basis of a false premiss that relevant consumers in the European Union are able, irrespective of their language, to distinguish between the sound of the consonant 'c' and the sound of the vowel 'e', thereby implicitly concluding that, as a result, consumers are also able to distinguish between the sound of the marks as a whole.

32 The applicant claims that the grounds on which the Board of Appeal based its conclusion that the marks in question are phonetically different are lacking and inadequate.

33 OHIM underlines the fact that the targeted public is well acquainted with English vocabulary and English rules of pronunciation as it is an established fact that most scientific literature is written in English. It observes that the applicant has not produced evidence to show that a phonetic comparison in any official language of the European Union other than English would have resulted in a finding different to that reached by the Board of Appeal.

34 The intervener argues that, in the present case, the conclusion to be drawn from the correct analysis of the pronunciation of the first two letters of each mark is that there is an important distinction between them, with 'eu' being pronounced by natural speakers of a Community language as 'you', 'yur', 'yoo' or 'oo', and 'cu' being pronounced as 'coo', 'cur' or 'q'. It is not correct to claim that the relative pronunciation in English of the letter 'u' is identical in the two marks concerned and that the difference in the aural impression is due only to the presence of the letter 'c'. The letter juxtaposition 'e-u-r-o' sounds distinctly different from the letter juxtaposition 'c-u-r-e' (as syllables) suggested by the juxtaposition of the letters 'c-u-r' present in the trade mark claimed, no matter which official European Union language is concerned.

Conceptual comparison

35 According to the applicant, the Board of Appeal was wrong to maintain that there is no conceptual similarity between the marks at issue because the word 'curon', when applied to the goods in question (surgical, medical, dental and veterinary apparatus and the like), alludes to the notion of curative treatment and healing, whereas the word 'euron' makes a reference to Europe.

36 The applicant submits that 'curon' is an invented word. In its view, the observations of the Board of Appeal regarding the meaning of the mark 'CURON' may possibly be made from the perspective of certain English-speaking consumers, but do not take into account consumers as a whole or the average consumer in the Member States. According to the applicant, the mark 'CURON' has no apparent meaning for the non-English-speaking public in any of the official languages of the European Union, including the languages of the

Member States which joined the European Union on 1 May 2004. The applicant mentions, in that context, that all Community trade marks registered or applied for before the date of enlargement will automatically be extended to the territory of the new Member States. The Board of Appeal failed to take into account any language spoken in the relevant territory other than English. Its assessment of the conceptual aspects of the marks in question is clearly lacking and inadequate.

37 The applicant submits that the mark 'EURON' does not refer to Europe, but is an invented word. It cannot be perceived as a conjunction of two meaningful elements, of which 'euro' is one. Consumers do not, in its view, engage in a conceptual analysis of the marks they encounter in order to read conceptual meanings into them. Consequently no connection can be established between the goods in question and Europe.

38 OHIM cites the case-law of the Court of First Instance whereby 'conceptual similarity must be assessed on the basis of the evocative force that may be recognised in each of [the signs] taken as a whole' (Joined Cases T-183/02 and T-184/02 *El Corte Inglés v OHIM – González Cabello and Iberia Líneas Aéreas de España (MUNDICOR)* [2004] ECR II-965, paragraph 90). OHIM submits that the Board of Appeal concluded quite properly that the words in question have a different 'evocative force' even though, taken as a whole, they have no specific meaning in relation to the goods concerned.

39 The intervener endorses the Board of Appeal's finding concerning the conceptual differences between the marks in question. Those marks, it finds, are conceptually quite dissimilar.

Likelihood of confusion

40 The applicant claims that the Board of Appeal failed to apply the principle of interdependence between the factors taken into consideration and, in particular, between the similarity of the marks and that of the goods designated, according to which a lesser degree of similarity between the goods covered may be offset by a greater degree of similarity between the marks, and vice versa (Case C-39/97 *Canon* [1998] ECR I-5507, paragraph 17, and Case C-342/97 *Lloyd Schuhfabrik Meyer* [1999] ECR I-3819, paragraph 19).

41 As a consequence of the abovementioned principle of interdependence, the identity of either signs or goods will generally be indicative of a likelihood of confusion, unless there are clear differences in other respects enabling consumers to distinguish between them.

42 Being of the view that the marks in the present case are very similar, the applicant submits that, since the goods covered by those marks are identical, even a lesser degree of similarity between them is sufficient to establish a likelihood of confusion. It disputes the Board of Appeal's view that the absence of any 'substantial degree' of similarity between the marks in the present case outweighs the identity of the goods. That view suggests that the similarity between the marks has to be 'significant' in order to offset 'the identity' of the goods.

43 The applicant argues that the Board of Appeal failed to take into account the distinctiveness of the earlier mark in its assessment of the likelihood of confusion. As a result, that assessment was lacking and inadequate, as the Board of Appeal did not take all relevant factors into consideration. According to the applicant, distinctiveness must always be taken into account when such an assessment is made as an argument in favour of determining the existence of a likelihood of confusion, since the more distinctive the earlier mark, the greater will be the likelihood of confusion (Case C-251/95 *SABEL* [1997] ECR I-6191, paragraph 24).

44 The applicant maintains, on the basis of the judgment in *Lloyd Schuhfabrik Meyer*, cited in paragraph 40 above, paragraph 29, that the earlier mark would certainly be deemed highly distinctive as it does not contain any element descriptive of the goods for which it has been registered, nor does it inform consumers of, or allude to, the function which the goods are supposed to fulfil. The applicant claims that it can be concluded from the highly distinctive character of the earlier mark, combined with the identity of the goods and a strong similarity between the signs, that the likelihood of confusion with the mark applied for will certainly be great.

45 OHIM admits, with regard to the Board of Appeal's conclusion that 'the absence of any substantial degree of similarity between the marks in this case outweighs the identity of the goods', that this statement is imprecise and leads the applicant to an erroneous interpretation. According to OHIM, what the Board of Appeal obviously meant was that the differences between the signs (visual and conceptual dissimilarity, low degree of aural similarity) were substantial, thus preventing the likelihood of confusion from arising, irrespective of the identity of the goods. That interpretation is corroborated by paragraphs 20 to 22 of the contested decision. There was, therefore, no error in law in the assessment of the likelihood of confusion.

46 The intervener highlights factors which reduce the likelihood of confusion in this case. They are, in particular, the relevant public, the nature of the goods in question and the distinctive conceptual allusion made by the trade mark applied for to 'things curative'.

Findings of the Court

47 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'; it also states that 'the likelihood of confusion includes the likelihood of association with the earlier trade mark'. Furthermore, Article 8(2)(a)(i) of Regulation No 40/94 provides that the term 'earlier trade marks' covers Community trade marks with a date of application for registration which is earlier than the da-

te of application for registration of the Community trade mark.

48 It must be recalled, in that regard, that the likelihood of confusion is the risk that the public might believe that the goods or services in question come from the same undertaking or, as the case may be, from economically-linked undertakings (Canon, cited in paragraph 40 above, paragraph 29; Lloyd Schuhfabrik Meyer, cited in paragraph 40 above, paragraph 17; and Case T-104/01 Oberhauser v OHIM – Petit Liberto (Fifties) [2002] ECR II-4359, paragraph 25).

49 According to settled case-law, the likelihood of confusion as to the commercial origin of the goods or services must be assessed globally, according to the perception which the relevant public has of the signs and the products or services at issue, and taking into account all factors relevant to the circumstances of the case, in particular the interdependence of the similarity between the signs and between the goods or services (see Case T-162/01 Laboratorios RTB v OHIM – Giorgio Beverly Hills (GIORGIO BEVERLY HILLS) [2003] ECR II-2821, paragraphs 29 to 33, and the case-law cited). The likelihood of confusion presupposes, cumulatively, that the degree of similarity of the trade marks in question and that of the goods or services designated by those marks are sufficiently high (Case T-311/01 Éditions Albert René v OHIM – Trucco (Starix) [2003] ECR II-4625, paragraph 59).

50 Furthermore, it must be stated that the global appreciation of the likelihood of confusion must, as regards the visual, aural or conceptual similarity of the marks in question, be based on the overall impression created by them, bearing in mind, in particular, their distinctive and dominant components (SABEL, cited in paragraph 43 above, paragraph 23, and Lloyd Schuhfabrik Meyer, cited in paragraph 40 above, paragraph 25).

51 The more distinctive the earlier mark, the greater will be the likelihood of confusion (SABEL, cited in paragraph 43 above, paragraph 24, and Canon, cited in paragraph 40 above, paragraph 18), which must be established either in the light of the intrinsic qualities of the mark or owing to the reputation associated with it (Case T-99/01 Mystery drinks v OHIM – Karlsberg Brauerei (MYSTERY) [2003] ECR II-43, paragraph 34).

52 As the analysis of the similarity between the signs in question constitutes an essential element of the global assessment of the likelihood of confusion, it must be done in relation to the perception of the relevant public (see, to that effect Case T-185/02 Ruiz-Picasso and Others v OHIM – DaimlerChrysler (PICARO) [2004] ECR II-1739, paragraph 53).

53 It is in the light of those principles that it is appropriate to examine, regard being had to the parties' assertions, whether the degree of similarity between the marks at issue is sufficiently high to warrant the conclusion that there is a likelihood of confusion between them.

The identical nature of the goods and the relevant territory

54 It is common ground that the goods covered by the mark applied for, which are the subject of the applicant's opposition, are identical to the goods covered by the earlier mark on which the opposition was based. It is also established that the relevant territory in this case is that of the European Union. Therefore, it is appropriate to take account of those two premisses for the global assessment of the likelihood of confusion. However, it should be stated, in that connection, that registration of the trade mark applied for must also be refused even where the relative ground for refusal obtains in only part of the European Union (see, to that effect, Case T-355/02 Mühlens v OHIM – Zirh International (ZIRH) [2004] ECR II-791, paragraphs 34 to 36).

Relevant public

55 The applicant submits that the Board of Appeal failed to take account of the fact that the comparison between the marks in opposition was to be made from the point of view of an averagely attentive consumer.

56 In that connection, the Court observes, first of all, as was stated in the Opposition Division's decision, that the goods concerned may include both sophisticated apparatus and instruments used in surgical and medical practice, requiring specialist knowledge, and those for everyday use bought in bulk. It follows that the Opposition Division took the view that the relevant public in this case was composed partly of specialist consumers and partly of average consumers.

57 Second, the Court finds that, although it is true that the reference made by the Board of Appeal, in paragraph 21 of the contested decision, to a 'reasonably perceptive consumer' gives precedence to one of the characteristics attributed to the average consumer, who is 'reasonably well informed and reasonably observant and circumspect' (see, Joined Cases C-456/01 P and C-457/01 P Henkel v OHIM [2004] ECR I-5089, paragraph 35 and the case-law cited), the fact remains that that reference alone cannot be interpreted as challenging the Opposition Division's assessment as regards the mixed composition of the relevant public in this case.

58 The Court finds, in that regard, that the definition of the relevant public by the Opposition Division, implicitly adopted by the Board of Appeal, is correct. Taking account of the relatively broad description of the goods in question in this case, it is appropriate to state that the relevant public is indeed composed of both average and specialist consumers.

59 However, it must be observed that, in answer to a question from the Court during the hearing, the applicant estimated the proportion of goods in question which could be purchased by the average consumer at a percentage not exceeding 20% of all those goods. Therefore, the applicant itself acknowledges by its comments that the great majority of the relevant public is a specialist public and that only a limited part of that public consists of average consumers.

60 The Court also finds that the goods concerned are, by virtue of their nature (see paragraph 3 and 5 above), designed particularly for specialists working in the surgical and medical spheres. It follows that the main body of the relevant public consists of a specialist

public, which is likely to take greater care than the average consumer in the selection of the goods in question (see, to that effect, Case T-211/03 *Faber Chimica v OHIM – Nabersa (Faber)* [2005] ECR II-1297, paragraph 24).

61 Therefore, if the applicant's argument concerning the Board of Appeal's failure to take account of the viewpoint of the average consumer is to be taken to mean that the relevant public is composed solely of those consumers, that argument must be dismissed since it is based on an incorrect premiss.

62 If the applicant's argument must be understood as meaning that the Board of Appeal failed to give enough weight to the viewpoint of the average consumer, that argument must be dismissed as it is factually incorrect.

Visual comparison

63 As regards the visual comparison of the marks at issue, the Board of Appeal stated as follows (paragraph 20 of the contested decision):

'Notwithstanding the identity of the goods covered by the signs, the marks are clearly distinguishable from one another. The overall impression made by the signs is markedly different as a consequence of the first letter in each. The consonant C and the vowel E are some distance apart, though the contested decision seems to indicate that these letters are visually barely distinguishable. The difference between the signs is probably accentuated by the fact that consumers are conditioned to seeing the letter sequence E-U-R-O but not the sequence C-U-R-O. The Opposition Division has not, as the applicant points out, appreciated the impression made by the signs as a whole, but instead dissected them and arrived at the erroneous conclusion that the signs must be similar because four of the five letters are placed in the same order.'

64 It must be stated, as a preliminary point, that the two marks at issue are each composed of two syllables. They each contain five letters, the last four of which are identical, and are arranged in the same order and in the same position. That gives the signs at issue some degree of visual similarity.

65 Nevertheless, in order to assess the general visual impression given by the two signs, it is also appropriate to take account of the fact that the first letter of each is different.

66 The Board of Appeal did not commit a manifest error of assessment by finding, in that regard, that the vowel 'e' is, in visual terms, sufficiently different from the consonant 'c'. It must be noted, in that connection, that, unlike the consonant 'c', the vowel 'e' contains a central horizontal line which makes its written form more complex.

67 Consumers will notice the difference between the initial first letters more easily as they normally attach more importance to the first part of words (*MUNDI-COLOR*, cited in paragraph 38 above, paragraph 81). The first part of the earlier mark is also distinguished by the fact that it is constituted of the juxtaposition of the two letters 'e' and 'u', which attracts the attention

of consumers used to seeing the abbreviation 'eu', which usually refers to the European Union.

68 It must be pointed out that although, strictly speaking, the visual impression of a sign consists of the overall impression it produces, the fact that some of its constituents produce a greater or lesser visual impact cannot be ruled out. That is also true in a case such as the present, in which the sign consists of a single word. The sequence 'e-u-r-o' of the earlier mark immediately attracts the visual attention of consumers. That is due to the multiple repetition, in consumers' everyday life, of situations in which they are led to perceive various words constituted by that sequence of letters, including, in particular, the word 'euro', relating to the single currency, or even the words 'Europe' and 'European'. The visual attraction of the sequence in question is instinctive. It does not, therefore, depend on a conceptual analysis of the earlier mark by consumers or on the fact that they attribute a specific meaning to it.

69 The sequence 'e-u-r-o' is therefore visually dominant in the earlier mark, particularly because the latter is distinguished from it only by the last letter 'n'. The corollary to that is that the sequence 'u-r-o-n', common to both marks, is not the most attractive component of the earlier mark.

70 It should also be noted that the brevity of the marks at issue enables consumers to better grasp the variations in their spelling.

71 Having regard to all of the foregoing considerations, it must be held that the Board of Appeal did not commit any manifest error of assessment by concluding that, visually, the general impression given by the signs at issue differs considerably because of the first letter of each sign.

72 The differences linked to the respective first letters of the marks at issue, accentuated by the fact that consumers are conditioned to seeing the sequence 'e-u-r-o', are such that they override the similarity created by the last four letters of each of the two marks.

73 That finding is not invalidated by the applicant's other contentions.

74 First of all, as regards the applicant's claim that the Board of Appeal should have taken into consideration the fact that the marks at issue are very similar when written by hand in small letters and/or presented in cursive script, it must be noted that the two marks at issue are Community word marks. A word mark is a mark consisting entirely of letters, of words or of associations of words, written in printed characters in normal font, without any specific graphic element (*Faber*, cited in paragraph 60 above, paragraph 33). The protection which results from registration of a word mark concerns the word mentioned in the application for registration and not the specific graphic or stylistic elements accompanying that mark. The applicant's assertion is for that reason unfounded.

75 Next, it must be pointed out that the applicant has not produced any evidence, either before the Board of Appeal or during the present proceedings, that the marks at issue are often handwritten in small letters and/or presented in cursive script.

76 In any event, in this case, the consumer will have no difficulty in discerning the visual differences between the marks at issue, whether they are presented in large or small printed characters or in cursive script.

77 Second, with regard to the applicant's claims that the contested decision is not consistent with the decision-making practice of the Opposition Division and the Boards of Appeal of OHIM, it must be recalled that the legality of decisions of the Boards of Appeal is to be assessed purely by reference to Regulation No 40/94, as interpreted by the Community judicature, and not on the basis of OHIM's practice in its earlier decisions (Case T-117/02 Grupo El Prado Cervera v OHIM – Debuschewitz heirs (CHUFAFIT) [2004] ECR II-2073, paragraph 57 and the case-law cited). Accordingly, the argument alleging that the contested decision is inconsistent with the decision-making practice of OHIM cannot be accepted.

78 Third, as regards the applicant's contention that the contested decision disregards the judgment in ELS, cited in paragraph 22 above, it must be held that, in that judgment, the comparison concerned two signs, 'ils' and 'els', the only point of dissimilarity between which was their respective first letters 'i' and 'e'. Unlike the situation in the present case, neither of those signs had an element with a particular visual attraction capable of diverting consumers' attention from the part which they had in common.

79 Nor can it be overlooked that both the marks EURON and CURON have the appearance of a word and not a sign, which makes it easier to remember them and also simplifies their visual recognition. Therefore, the difference between the initial letters plays a more important role in this case than in the case which gave rise to the judgment in ELS, cited in paragraph 22 above.

80 Finally, as regards the applicant's argument that the Board of Appeal did not carry out an overall assessment of the visual similarity of the signs at issue, the Court finds that that argument fails on the facts. It is clear from the contested decision, first, that the Board of Appeal criticised the Opposition Division on the ground that it failed to 'appreciat[e] the impression made by the signs as a whole, but instead dissected them ...' (paragraph 20 of the contested decision) and, second, that it expressly referred to the general impression given by the signs at issue.

Phonetic comparison

81 So far as the phonetic comparison is concerned, the Board of Appeal stated as follows (paragraph 21 of the contested decision):

'The four letters they have in common in the same sequence naturally lend them a degree of phonetic similarity. However, the first letters, the C and the E respectively, sound distinctly different. This means that there is a discernible difference in the overall pronunciation of the marks, which a reasonably perceptive consumer will have no difficulty making out. It would be underestimating the relevant consumers involved, whichever European Union language is concerned, to conclude that they are unable to distinguish between

the sound of the consonant C and the sound of the vowel E.'

82 As a preliminary point, the applicant's claim that the Board of Appeal failed to take account of the pronunciation of the words taken as a whole must be dismissed. The phrase '[t]his means that there is a discernible difference in the overall pronunciation of the marks ...' (paragraph 21 of the contested decision) indicates that there was no omission in that regard.

83 Next, it must be observed that the applicant has failed to adduce any evidence in support of its claim that, when the marks at issue are pronounced in some European languages, they are phonetically similar, and that it has also failed to prove that assertion. In particular, it cannot be determined from that assertion which European language was specifically being referred to by the applicant.

84 The phrase '[i]t would be underestimating the relevant consumers involved, whichever European Union language is concerned, to conclude that they are unable to distinguish between the sound of the consonant C and the sound of the vowel E' (paragraph 21 of the contested decision) shows that the Board of Appeal did not fail to take into account the various European languages.

85 The Board of Appeal rightly held that, notwithstanding some phonetic similarity between the marks owing to the common sequence 'u-r-o-n', the overall pronunciation of the marks differed substantially. That is due to the fact that the respective beginnings of the words in question are pronounced in very different ways. The beginning of the mark EURON is usually pronounced, in the European languages examined, in a supple manner, which contrasts with the hard pronunciation of the beginning of the mark CURON, which is usually pronounced gutturally. This difference in pronunciation of the respective beginnings of the marks at issue is decisive as regards the overall phonetic impression for the targeted consumers.

86 Contrary to the applicant's submissions, the marks at issue cannot be regarded as being particularly close phonetically when pronounced in English. The likely pronunciation in English would be 'u-ron', 'oy-ron', or 'e-ron' for the earlier mark. In the case of the mark applied for, the pronunciation would be 'q-ron', 'coo-ron' or 'cu-ron'. Although there is indisputably some phonetic similarity between the marks at issue when pronounced in English, and even if that similarity is more marked than in some of the other languages examined, it is not sufficient to offset the phonetic distinction brought about by the respective first letters.

87 In the light of the foregoing it must be concluded that there is no evidence to invalidate the Board of Appeal's finding that, despite some phonetic similarity between the marks at issue, there is a noticeable difference in their overall pronunciation.

Conceptual comparison

88 As regards the conceptual comparison, the Board of Appeal stated the following (paragraph 22 of the contested decision):

'The phonetic and visual differences between the signs are heightened by the conceptual differences between the marks. The applicant's sign, when applied to the goods in question (surgical, medical, dental and veterinary apparatus and the like), alludes to the notion of curative treatment and healing, whereas the opponent's sign makes a reference to Europe.'

89 It should be observed, from the outset, that the meaning of the words 'euron' and 'curon' cannot be regarded as being similar. First, it has not been established that either of those words has a current meaning in one of the official languages of the European Union.

90 Second, it should be noted that the earlier mark, although it does not correspond as such to any word in the relevant European languages, has a certain 'evocative force' in that it is very close to the words 'euro' and 'Europe', words particularly well known and easily recognisable in all of the languages examined, generally used to refer to Europe or the European Union, or as regards 'euro', also to the single currency (see, as regards the evocative force, MUNDICOR, cited in paragraph 38 above, paragraphs 89 and 90, and, as regards the word 'euro', Case T-359/99 DKV v OHIM (EuroHealth) [2001] ECR II-1645, paragraph 26, and Case T-34/00 Eurocool Logistik v OHIM (EUROCOOL) [2002] ECR II-683, paragraph 48). Consumers will be aware of the evocative effect of the earlier mark without undertaking a conceptual analysis of it, but simply by focussing their attention instinctively on the recognisable element of the word mark EURON, that is to say, the term 'euro' (see, to that effect, Case T-186/02 BMI Bertollo v OHIM – Diesel (DIESELIT) [2004] ECR II-1887, paragraph 57).

91 This evocative effect is independent of whether or not the word mark EURON designates a characteristic of the goods for which registration of the earlier mark was made, since that fact does not influence the ability of the relevant public to make an association between that word mark and the words 'euro' and 'Europe' (see, by way of analogy, Case T-292/01 Philips-Van Heusen v OHIM – Pash Textilvertrieb und Einzelhandel (BASS) [2003] ECR II-4335, paragraph 54). In the same way, the evocative force of the earlier mark cannot be altered by the fact that it is supposedly 'made up'. Even a made-up word may carry conceptual weight.

92 Third, it has not been established that, in one or more of the official languages of the European Union, the mark applied for might have a conceptual meaning or an evocative force which would make it conceptually comparable to the earlier mark. The evocative force of the earlier mark alone would, in itself, be sufficient to justify the conclusion that there is a certain conceptual difference between the marks at issue (see, by way of analogy, BASS, cited in paragraph 91 above, paragraph 54).

93 Furthermore, the Court takes the view that the mark applied for has a certain evocative force which distances it conceptually from the earlier mark. That is due to the fact that the mark applied for is close to the words designating curative treatments and healing in

some of the relevant languages, such as, for example, English (the word 'cure'). The relevant consumer, whoever he is, is likely to grasp that evocative effect. Indeed, it must be held that that consumer, who is a professional, will have at least an elementary knowledge of English words in the medical and surgical fields, since English is the technical language in those fields and the average consumer here encounters a basic word in a language commonly used in commerce and also present, sometimes with slight variations and related meanings, in several other languages of the European Union, such as, in particular, Spanish, French, Italian and Portuguese. The targeted consumer will thus grasp the evocative effect at first sight of or on first hearing the mark CURON, without carrying out a detailed conceptual analysis of it. That will a fortiori be the case as the evocative effect is related to goods designated by that mark, that is to say, 'surgical, medical, dental and veterinary apparatus and the like ...'.

94 In the light of the above, it must be held that the Board of Appeal did not err in concluding that the phonetic and visual differences between the marks were heightened by their conceptual differences.

Likelihood of confusion

95 So far as the likelihood of confusion between the marks at issue is concerned, the Board of Appeal stated as follows (paragraph 23 of the contested decision):

'The absence of any substantial degree of similarity between the marks in this case outweighs the identity of the goods. The opponent has therefore not established that a likelihood of confusion or association will result as a consequence of the applicant's sign being registered.'

96 It is appropriate, in the light of the principles resulting from the case-law cited in paragraphs 49 to 51 above, to examine whether or not the Board of Appeal committed a manifest error in its assessment of the likelihood of confusion between the marks at issue.

97 As stated in paragraph 71 above, the marks are markedly different from the visual perspective because of their respective first letters. From the phonetic perspective, despite a certain undisputed similarity, a noticeable difference in their overall pronunciation results from their respective first letters (see paragraph 87 above). Conceptually the marks are different (see paragraph 94 above).

98 Although it is possible that, in general, only the auditory similarity of the marks is liable to give rise to a likelihood of confusion within the meaning of Article 8(1)(b) of Regulation No 40/94, the existence of such a likelihood must be determined in the context of an overall assessment as regards the conceptual, visual and auditory similarities of the marks at issue. In that connection, auditory similarity or dissimilarity constitutes only one of the relevant factors in the context of the overall assessment. Therefore, it cannot be held that there is necessarily a likelihood of confusion each time that the auditory similarity alone between two signs is established.

99 It must further be observed, in that connection, that the degree of phonetic similarity between two

marks is of less importance in the case of goods which are marketed in such a way that, when making a purchase, the relevant public usually perceives visually the mark designating those goods (BASS, cited in paragraph 91 above, paragraph 55). In the light of the type of goods in question, it is highly improbable that consumers will be able to distinguish them after having heard only the name of the mark which designates them, without having seen the goods themselves. Furthermore, at the hearing, the applicant did not deny the statement made by OHIM to that effect.

100 Taking account of the substantial visual and conceptual differences between the marks at issue, and of the fact that the degree of phonetic similarity between them cannot be regarded as particularly conclusive because of the phonetic differences resulting from the first letters, and in the light of the relevant public in this case, it must be held that the degree of similarity between the marks in question is not sufficiently high to conclude that there is a likelihood of confusion.

101 The Board of Appeal was for that reason correct in law to hold that it had not been established that registration of the mark applied for would lead to a likelihood of confusion or association.

102 Given the differences between the marks at issue, that finding is not invalidated by the fact that the goods covered by the mark applied for, and referred to in the applicant's opposition, are identical to the goods designated by the earlier trade mark on which the opposition was based (see, to that effect, BASS, cited in paragraph 91 above, paragraph 57, and Case T-301/03 Canali Ireland v OHIM – Canal Jean (CANAL JEAN CO. NEW YORK) [2005] ECR II-2479, paragraph 64).

103 It must be further stated, in that connection, that, contrary to the applicant's submissions, the Board of Appeal did not fail to take account of the principle of interdependence between the various factors considered and, more specifically, of the identity of the goods concerned. First, it relied on the case-law on the principle of interdependence in its findings on the likelihood of confusion (paragraph 17 of the contested decision). Second, it declared, in paragraph 20 of the contested decision, that '[n]otwithstanding the identity of the goods ... the marks are clearly distinguishable from one another', which indicates that it had in fact applied that principle in this case.

104 Finally, contrary to the applicant's submissions, the earlier mark cannot be regarded as being particularly distinctive in character. It is attenuated by the sequence 'e-u-r-o', because of its frequent use in the trade mark field, and in various trade names. Furthermore, that sequence includes a strong evocative element as regards the geographic origin of the goods that it designates. In any event, since the marks at issue do not have decisive visual, phonetic or conceptual similarity, the potentially distinctive aspect of the earlier mark cannot affect the overall assessment of the likelihood of confusion (see, to that effect, Starix, cited in paragraph 49 above, paragraph 61, and CANAL JEAN CO. NEW YORK, cited in paragraph 102 above, paragraph 62).

105 In view of all of the foregoing, the applicant's sole plea in law and the entire action must be dismissed.

Costs

106 Under Article 87(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the applicant has been unsuccessful, it must, in accordance with the forms of order sought by OHIM and the intervener, be ordered to pay the costs.

On those grounds,

THE COURT OF FIRST INSTANCE (Fifth Chamber)

hereby:

1. Dismisses the action;
 2. Orders the applicant to pay the costs.
-