Reports of Cases

JUDGMENT OF THE GENERAL COURT (Fourth Chamber)

28 May 2020*

(EU trade mark — Opposition proceedings — Application for EU figurative mark AUREA BIOLABS — Earlier EU word mark AUREA — Relative ground for refusal — Likelihood of confusion — Similarity of goods — Article 8(1)(b) of Regulation (EU) 2017/1001 — Correction of the Board of Appeal's decision — Article 102 of Regulation 2017/1001)

In Cases T-724/18 and T-184/19,

Aurea Biolabs Pte Ltd, established in Cochin (India) represented by: B. Brandreth QC and L. Oommen, Solicitor,

applicant,

v

European Union Intellectual Property Office (EUIPO), represented by K. Kompari, H. O'Neill and V. Ruzek, acting as Agents,

defendant,

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

Avizel SA, established in Luxembourg (Luxembourg), represented by C. De Keersmaeker and W.-J. Cosemans, lawyers,

ACTION brought, in Case T-724/18, against the decision of the Second Board of Appeal of EUIPO of 11 September 2018 (Case R 814/2018-2), relating to opposition proceedings between Avizel and Aurea Biolabs, and, in Case T-184/19, action brought against the decision of the Second Board of Appeal of EUIPO of 29 January 2019 (Case R 814/2018-2 (CORR)), correcting the decision of 11 September 2018,

THE GENERAL COURT (Fourth Chamber),

composed of S. Gervasoni (Rapporteur), President, R. Frendo and J. Martín y Pérez de Nanclares, Judges,

Registrar: A. Juhász-Tóth, Administrator,

having regard to the applications lodged at the Court Registry on 7 December 2018 (Case T-724/18) and on 27 March 2019 (Case T-184/19),

* Language of the case: English.

having regard to the plea of inadmissibility raised by EUIPO by a document lodged at the Court Registry on 28 May 2019 in Case T-184/19,

having regard to the observations on the plea of inadmissibility lodged at the Court Registry on 28 June 2019,

having regard to the order of 11 July 2019 reserving the decision on the plea of inadmissibility for the final judgment in Case T-184/19,

having regard to the responses of EUIPO lodged at the Court Registry on 18 March 2019 (Case T-724/18) and 24 September 2019 (Case T-184/19),

having regard to the responses of the intervener lodged at the Court Registry on 14 March 2019 (Case T-724/18) and 3 June 2019 (Case T-184/19),

having regard to the change in the composition of the Chambers of the General Court,

having regard to the decision of 12 November 2019 joining Cases T-724/18 and T-184/19 for the purposes of the oral part of the procedure,

following the oral hearing of 22 January 2020, during which observations were submitted by the parties on the possible joinder of Cases T-724/18 and T-184/19 for the purposes of the judgment,

gives the following

Judgment

Background to the dispute

1 On 19 September 2016, the applicant, Aurea Biolabs Pte Ltd, filed an application for registration of an EU trade mark with the European Union Intellectual Property Office (EUIPO), pursuant to Council Regulation (EC) No 207/2009 of 26 February 2009 on the European Union trade mark (OJ 2009 L 78, p. 1), as amended (replaced by Regulation (EU) 2017/1001 of the European Parliament and of the Council of 14 June 2017 on the European Union trade mark (OJ 2017 L 154, p. 1)).

2 Registration as a mark was sought for the following figurative sign:



3 The goods for which registration was sought fall 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: ‘Food

supplements; dietary and nutritional supplements; dietary supplemental drinks; nutritionally fortified drinks for dietetic purposes; nutritional and dietary supplements, namely, functional foods for use as nutritional and dietary supplements; vitamin and mineral supplements'.

4 On 30 January 2017, the intervener, Avizel SA, filed a notice of opposition, pursuant to Article 41 of Regulation No 207/2009 (now Article 46 of Regulation 2017/1001), to registration of the trade mark applied for in respect of the goods referred to in paragraph 3 above.

5 The opposition was based on the earlier EU word mark AUREA, registered on 12 March 2015 under number 13493432.

6 The earlier mark was registered for goods in Classes 3 and 5 corresponding, for each of those classes, to the following description:

– Class 3: 'Soaps; Essential oils; Cosmetics, other than perfumes and eaux de toilette; Hair lotions';

– Class 5: 'Cold cream for medical use; Babies' creams [medicated]; Body creams [medicated]; Hand creams for medical use; Face cream (Medicated -); Creams (Medicated -) for the lips; Creams (Medicated -) for the feet; Medicated skin creams; Medicinal creams for the protection of the skin; Skin care creams for medical use'.

7 The ground relied on in support of the opposition was that set out in Article 8(1)(b) of Regulation No 207/2009 (now Article 8(1)(b) of Regulation 2017/1001).

8 On 6 March 2018, the Opposition Division upheld the opposition on the ground that there was a likelihood of confusion and refused the application for registration.

9 On 3 May 2018, the applicant filed a notice of appeal with EUIPO, pursuant to Articles 66 to 71 of Regulation 2017/1001, against the decision of the Opposition Division.

10 By decision of 11 September 2018 ('the contested decision'), the Second Board of Appeal of EUIPO dismissed the appeal. In particular, it found that the relevant territory for assessing the likelihood of confusion was that of the European Union and the relevant public was composed partly of medical professionals and partly of the general public as end consumers, whose level of attention is high (paragraphs 17 to 24 of the contested decision). Next, the Board of Appeal found that the goods in Class 5 covered by the marks at issue were similar, to at least a low degree, and thus concluded that there was no need to assess the existence of a possible similarity between the goods designated in the application for registration and the goods in Class 3 covered by the earlier mark (paragraphs 25 to 38 of the contested decision). As for the comparison of the signs, the Board of Appeal found that visual similarity was at least average, phonetic similarity was at least average, if not high, and, for part of the relevant public, conceptual similarity was at least low (paragraphs 39 to 78 of the contested decision). In its global assessment of the likelihood of confusion, it inter alia, first, noted that, according to the case-law on the interdependence of the factors relevant to that assessment, where the goods covered were identical, the degree of difference between the signs had to be high in order to exclude a likelihood of confusion and, second, stated that the goods at issue in the present case were found to be identical (paragraph 80 of the contested decision). The Board of Appeal concluded its global assessment by agreeing with the Opposition Division's position that there was a likelihood of confusion in the present case (paragraph 92 of the contested decision).

11 By decision of 29 January 2019 (hereinafter 'the correcting decision'), the Second Board of Appeal, on the basis of 'Rule 53 EUTMIR', corrected the contested decision, by deleting paragraph 80 thereof.

Forms of order sought

12 The applicant claims that the Court should:

– in Case T-724/18, annul the contested decision and, in Case T-184/19, annul the correcting decision;

– order EUIPO to pay the costs in Cases T-724/18 and T-184/19 and, in Case T-724/18, also order the intervener to pay the costs.

13 EUIPO contends that the Court should:

– dismiss the action in Case T-724/18 as unfounded;

– dismiss the action in Case T-184/19 as inadmissible and, in the alternative, as unfounded;

– order the applicant to pay the costs in Cases T-724/18 and T-184/19.

14 The intervener contends that the Court should:

– dismiss the actions in Cases T-724/18 and T-184/19;

– order the applicant to pay the costs of those cases.

Law

15 Since the correcting decision deleted a paragraph of the contested decision, the findings of which are challenged by the action in Case T-724/18, it is appropriate to first consider the lawfulness of the correcting decision challenged by the action in Case T-184/19.

The action in Case T-184/19

16 In the action in Case T-184/19, the applicant relies on three pleas in law in support of its application for annulment of the correcting decision. First, it claims that the correcting decision is based on an erroneous legal basis, 'Rule 53 EUTMIR'. Second, having regard to the conditions laid down by the applicable legal provision, namely Article 102 of Regulation 2017/1001, the error at issue could not have been corrected. Third, the Board of Appeal disregarded the applicant's right to be heard by not giving it the opportunity to take a position on the applicable provision and on the proposed correction.

17 It can indeed be noted that the correcting decision is formally based on 'Rule 53 EUTMIR' (paragraph 5 of the correcting decision). Since only Commission Regulation (EC) No 2868/95 of 13 December 1995 implementing Council Regulation (EC) No 40/94 on the Community trade mark (OJ 1995 L 303, p. 1) contains a Rule 53, it must be held, as accepted by EUIPO in its response, that the correcting decision is based on Rule 53 of Regulation No 2868/95, even if the acronym 'EUTMIR' does not correspond to that regulation.

18 As the applicant rightly claims, Rule 53 of Regulation No 2868/95 has not been in force since 1 October 2017. As from that date, the correction of EUIPO decisions has been governed by Article 102 of Regulation 2017/1001.

19 The provision applicable to the correction of a decision is the provision in force on the date on which the correcting decision is adopted (see, to that effect, as regards a revocation decision, judgment of 21 February 2018, *Repower* v *EUIPO — repowermap.org (REPOWER)*, T-727/16, EU:T:2018:88, paragraphs 19 to 29; see also, by analogy, as regards the rectification provided for in the Rules of Procedure of the Court, order of 21 July 2015, *Tomana and Others* v *Council and Commission*, T-190/12 ECR, not published, EU:T:2015:572, paragraphs 3 and 4), namely in the present case Article 102 of Regulation 2017/1001 in force on 29 January 2019, the date of adoption of the correcting decision. It follows from settled case-law that the provision which forms the legal basis of an act and empowers a Union institution to adopt the act in question must be in force at the time when the act is adopted and that procedural rules are generally held to apply from the time of their entry into force (see judgment of 29 Mark 2011, *ThyssenKrupp Nirosta* v *Commission*, C-352/09 P, EU:C:2011:191, paragraph 88 and the case-law cited).

20 That error, legitimately invoked in the context of the applicant's first plea in law and, moreover, acknowledged by EUIPO in its response, cannot, however, lead to the annulment of the correcting decision if the conditions laid down in Article 102 of Regulation 2017/1001 for correcting the decisions of the Boards of Appeal have been complied with in the present case. An error in choosing the legal basis will lead to the annulment of the act concerned only when that error may affect the content of that act (see judgment of 18 October 2011, *Reisenthel* v *OHIM — Dynamic Promotion (Hampers, crates and baskets)*, T-53/10, EU:T:2011:601, paragraph 41 and the case-law cited).

21 By its second plea in law, the applicant specifically challenges compliance in this instance with the conditions for the correction of EUIPO's decisions laid down in Article 102 of Regulation 2017/1001. In particular, it claims that that provision does not apply to 'obvious errors', which in the present case warranted the correcting decision (points 5 and 6 of that decision), although such errors are referred to only in Article 103 of Regulation 2017/1001, which governs the revocation of EUIPO decisions.

22 It is indeed clear from the wording of Articles 102 and 103 of Regulation 2017/1001 that only Article 103 refers to 'obvious error[s]', while Article 102 now refers only to 'manifest oversights'.

23 Article 102(1) of Regulation 2017/1001, entitled 'Correction of errors and manifest oversights', reads as follows:

'1. [EUIPO] shall correct any linguistic errors or errors of transcription and manifest oversights in its decisions, or technical errors attributable to it in registering an EU trade mark or in publishing the registration of its own motion or at the request of a party.'

24 As for Article 103(1) of Regulation 2017/1001, entitled 'Revocation of decisions', it provides as follows:

'1. Where [EUIPO] has made an entry in the Register or taken a decision which contains an obvious error attributable to the Office, it shall ensure that the entry is cancelled or the decision is revoked …'

25 It should be noted that, in the versions applicable previously, the provisions governing the correction and revocation of EUIPO decisions referred to 'obvious mistake' (Rule 53 of Regulation No 2868/95) and 'obvious procedural error' (Article 80 of Regulation No 207/2009).

26 It is apparent from the case-law on the interpretation of those provisions that, in view of the importance of the binding nature of the operative part of a final decision made by a competent authority and following the principle of legal certainty, the rule enabling in exceptional circumstances subsequent corrections to be made to that decision, by means of correction or revocation, is to be interpreted strictly and is therefore limited to obvious mistakes (see, to that effect, judgments of 9 September 2011, *dm-drogerie markt* v *OHIM — Distribuciones Mylar (dm)*, T-36/09, EU:T:2011:449,

paragraphs 73, 76 and 78 and, as regards corrections only, of 14 December 2006, *Gagliardi* v *OHIM — Norma Lebensmittelfilialbetrieb (MANŪ MANU MANU)*, T-392/04, not published, EU:T:2006:400, paragraph 55).

27 However, as a result of the case-law cited in paragraph 26 above, there is a difference in the type of error that may give rise to a correction or a revocation because of the distinction between the correction procedure and the revocation procedure.

28 The correction procedure does not involve the annulment of the corrected decision, but merely results in the correction of the errors contained therein by means of a correcting decision. By contrast, the revocation procedure results in the annulment of the erroneous decision and involves a return to the stage of the procedure at which the case before EUIPO was before the adoption of that decision, without there being a correction of the error identified in the revocation decision itself.

29 Thus, corrections are limited to obvious formal mistakes which affect the form of the decision taken only but not its scope and substance (judgment of 14 December 2006, *MANŪ MANU MANU*, T-392/04, not published, EU:T:2006:400, paragraph 55). This is true of errors which are so obvious that no wording other than the corrected wording could be intended (see, to that effect, judgment of 9 September 2011, *dm*, T-36/09, EU:T:2011:449, paragraphs 73 and 75) and errors which do not justify invalidating or revoking the decision marred by them (see, to that effect, judgment of 15 March 2011, *Ifemy's* v *OHIM — Dada & Co Kids (Dada & Co. kids)*, T-50/09, EU:T:2011:90, paragraph 32) and hearing the parties.

30 By contrast, the adoption of a revocation decision is justified by errors which do not allow the operative part of the decision at issue to be maintained without a new analysis which will be carried out subsequently by the body which took that decision. This is true of errors affecting the award of costs (see, to that effect, judgment of 1 July 2009, *Okalux* v *OHIM — Messe Düsseldorf (OKATECH)*, T-419/07, EU:T:2009:238, paragraphs 33 and 40), those relating to the right to be heard (see, to that effect and by analogy, judgment of 18 October 2011, *Hampers, crates and baskets*, T-53/10, EU:T:2011:601, paragraphs 37 to 39) or those concerning the obligation to state reasons (see, to that effect, judgment of 31 October 2019, *Repower* v *EUIPO*, C-281/18 P, EU:C:2019:916, paragraph 34).

31 The difference between correction cases and revocation cases, explained in the case-law handed down under the provisions which applied previously, set out in points 29 and 30 above, has not been called into question by the change in the terms used in the relevant provisions in the present case.

32 As confirmed by EUIPO at the hearing, the distinction between errors justifying correction and errors justifying revocation was maintained and the substitution of the expression 'obvious mistake' with 'manifest oversights' in Article 102 of Regulation 2017/1001 is precisely explained by the need to maintain the distinction with the errors referred to in Article 103 of Regulation 2017/1001, now called 'obvious error' and no longer 'obvious procedural error'. However, since the terms used in several language versions of Article 102 of Regulation 2017/1001 (inter alia 'Versehen' in German, 'sviste' in Italian or 'equivocaciones' in Spanish) refer to 'omissions' more broadly as meaning 'errors', EUIPO must be regarded as being able to continue to correct certain errors on the basis of Article 102 of Regulation 2017/1001, without relying on the revocation procedure governed by Article 103 of Regulation 2017/1001. As regards errors that can be corrected under Article 102 of Regulation 2017/1001, it is apparent from the case-law on the interpretation of that new provision (see, to that effect, judgments of 24 October 2019, *ZPC Flis* v *EUIPO — Aldi Einkauf (FLIS Happy Moreno choco)*, T-708/18, not published, EU:T:2019:762, paragraphs 38 to 41, and of 24 October 2019, *Flis* v *EUIPO — Aldi Einkauf (Happy Moreno choco)*, T-498/18, EU:T:2019:763, paragraphs 37 to 40) that it is still not possible to correct errors affecting the substance of the decision taken, such as those relating to the list of goods covered by the earlier mark, which entails a new assessment of the existence of a likelihood of confusion.

33 It follows that an error identified in a decision may be corrected, pursuant to Article 102 of Regulation 2017/1001, where it constitutes an incongruous element in a decision which is otherwise consistent and unambiguous, that is to say where it is clear that the error is the result of an oversight or a slip of the pen which must be manifestly corrected in the proposed manner because no wording other than that resulting from the correction could have been envisaged.

34 In the present case, the correction consisted in the deletion of a paragraph of the contested decision, namely paragraph 80, on the ground, invoked by EUIPO, that it was marred by an obvious error. That paragraph amounts to an erroneous restatement of what the Board of Appeal allegedly noted in an earlier passage of the contested decision. It is clear that the Board of Appeal considered, as is apparent from paragraphs 31 to 36 of the contested decision, that the goods at issue were merely similar, to at least a low degree, so that the finding of identity of the goods in paragraph 80 of the contested decision was the result of an obvious oversight.

35 In that regard, in the light of the foregoing (see paragraphs 32 and 33 above), it must be found that the fact that the correction did not, in the present case, consist in the inclusion of a paragraph which had been omitted but in the deletion of a paragraph of the contested decision does not allow in itself to infer that that correction was made in disregard of Article 102 of Regulation 2017/1001.

36 Furthermore, the contradiction between the analysis of the similarity of the goods at issue, the outcome of which is a finding of similarity to at least a low degree (paragraphs 6, 31, 36 and 38 of the contested decision), and the restatement, in the global analysis of the likelihood of confusion, of the result of the comparison of those goods as being based on a finding of identity (paragraph 80 of the contested decision), could only be resolved by the deletion of that restatement.

37 It is clear from the last sentence of the deleted paragraph of the contested decision, in particular from the words 'the contested goods were found to be', that that paragraph was intended to recall the comparative analysis carried out previously. It follows that, as regards the restatement of the result of a previous analysis for the purposes of carrying out the global assessment of the likelihood of confusion which involves taking into account various factors, including the similarity of the products (judgment of 14 December 2006, *Mast-Jägermeister* v *OHIM — Licorera Zacapaneca (VENADO with frame and others)*, T-81/03, T-82/03 and T-103/03, EU:T:2006:397, paragraph 74; see also, by analogy, judgment of 29 September 1998, *Canon*, C-39/97, EU:C:1998:442, paragraph 17), that restatement necessarily had to comply with the analysis relied on and thus establish a similarity to at least a low degree rather than the identity of the goods at issue. The error thus made could therefore evidently be corrected only in accordance with the analysis actually carried out by the Board of Appeal, which concluded that the goods were similar, and could not be corrected either in that way or by a finding of identity of those goods (see, to that effect, judgment of 9 September 2011, *dm*, T-36/09, EU:T:2011:449, paragraph 75).

38 The obvious character of that error is further substantiated by the fact that the Board of Appeal failed to apply the case-law relating to the assessment of the likelihood of confusion where the goods are identical, also referred to in paragraph 80 of the contested decision, in the subsequent paragraphs on the global analysis of the likelihood of confusion. That is evidenced by the Board of Appeal's reference in paragraph 91 of the contested decision to the complementarity of the goods at issue, in accordance with its assessment of the similarity of those goods in paragraphs 31 to 38 of the contested decision and, in particular, in paragraphs 32 and 33 thereof.

39 The deletion of paragraph 80 of the contested decision was thus clearly necessary; accordingly it can be classified as a legitimate correction of an error pursuant to Article 102 of Regulation 2017/1001.

40 It follows, moreover, that the Board of Appeal cannot be criticised for not having heard the applicant prior to the adoption of the correcting decision, as submitted by the applicant in its third plea in law. Unlike Article 103 of Regulation 2017/1001 on the revocation procedure, which provides that the

parties must be heard before a revocation decision is adopted, Article 102 of that regulation does not require the parties to the proceedings before the Board of Appeal to be heard before rectification. Furthermore, in the light of those specific provisions of Regulation 2017/1001 setting out the situations in which the parties must be heard, the second sentence of Article 94(1) of that regulation, which lays down, in EU trade mark law, the general principle of protection of the rights of the defence, does not apply in the present case. This is all the more so since the correction legitimately made in the present case did not modify the substance of the contested decision (see paragraphs 29 and 32 above) and did not, therefore, justify a prior hearing of the applicant.

41 For that same reason, namely lack of effect on the substance of the contested decision, the claim of prejudice to fairness as a result of the modification of the substantive content of the contested decision, although an action had been brought against it, must also be dismissed.

42 It follows from the foregoing that there is no reason to consider that the content of the correcting decision may have been affected by the erroneous reference to 'Rule 53 EUTMIR' rather than to Article 102 of Regulation 2017/1001. In those circumstances, the annulment of that decision due to that error would not have any useful effect, since the decision adopted by the Board of Appeal following that annulment would be adopted in the same conditions and based on the same factors as the annulled decision.

43 Therefore, it must be held that the Board of Appeal's error as regards the legal basis referred to does not justify the annulment of the correcting decision. The action brought in Case T-184/19 must therefore be dismissed as unfounded, without it being necessary to rule on the plea of inadmissibility of that action raised by EUIPO.

The action in Case T-724/18

44 In the action in Case T-724/18, the applicant raises a single plea in law, alleging infringement of Article 8(1)(b) of Regulation 2017/1001, in support of its application for annulment of the contested decision.

45 Since the claim for annulment of the correcting decision has been rejected (see paragraph 43 above), the lawfulness of the contested decision, as corrected, must be examined. Consequently, the complaint put forward in support of that single plea and directed against paragraph 80 of the contested decision, deleted by the correcting decision, must, in any event, be rejected, without it being necessary to examine its merits.

46 Article 8(1)(b) of Regulation 2017/1001 provides that, 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. Furthermore, under Article 8(2)(a)(i) of Regulation 2017/1001, 'earlier trade marks' means EU trade marks with a date of application for registration which is earlier than the date of application for registration of the EU trade mark in question.

47 According to settled case-law, the risk that the public may 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 the same case-law, the likelihood of confusion must be assessed globally, according to the relevant public's perception of the signs and goods or services in question and taking into account all factors relevant to the circumstances of the case, in particular the interdependence between the similarity of the signs and that of the goods or services covered (see judgment of 9 July 2003, *Laboratorios RTB* v *OHIM — Giorgio Beverly Hills (GIORGIO BEVERLY HILLS)*, T-162/01, EU:T:2003:199, paragraphs 30 to 33 and the case-law cited).

48 For the purposes of applying Article 8(1)(b) of Regulation 2017/1001, a likelihood of confusion presupposes that the marks at issue are identical or similar and that the goods or services which they cover are identical or similar. Those conditions are cumulative (see judgment of 22 January 2009, *Commercy* v *OHIM — easyGroup IP Licensing (easyHotel)*, T-316/07, EU:T:2009:14, paragraph 42 and the case-law cited).

49 The perception of marks in the mind of the average consumer of the category of goods or services in question plays a decisive role in the global assessment of the likelihood of confusion (see judgment of 12 June 2007, *OHIM* v *Shaker*, C-334/05 P, EU:C:2007:333, paragraph 35 and the case-law cited).

50 In the present case, the applicant does not contest the Board of Appeal's finding that the relevant public is composed of medical professionals and of patients as end consumers and demonstrates a high level of attention (paragraphs 19 to 21 of the contested decision). That finding must be endorsed, having regard in particular to the nature of the goods at issue (see, to that effect, judgment of 15 December 2009, *Trubion Pharmaceuticals* v *OHIM — Merck (TRUBION)*, T-412/08, not published, EU:T:2009:507, paragraph 28 and the case-law cited).

51 The applicant also does not contest the Board of Appeal's definition of the territory relevant for the assessment of the likelihood of confusion in the present case (paragraphs 20 to 24 of the contested decision), namely the territory of the European Union, since it must be borne in mind that it is sufficient for a relative ground for refusal to exist in part of the European Union (see, to that effect, judgment of 14 December 2006, *VENADO with frame and others*, T-81/03, T-82/03 and T-103/03, EU:T:2006:397, paragraph 76 and the case-law cited).

52 By contrast, the applicant contests the Board of Appeal's assessment of the similarity of the goods covered by the marks at issue.

53 It should be recalled, in that regard, that the Board of Appeal held, in the part of the contested decision dealing with the comparison of the goods (paragraphs 25 to 38 of that decision), that the goods in Class 5 covered by the marks at issue were similar, to at least a low degree (paragraphs 31, 36 and 38 of the contested decision). In doing so, it relied on the fact that the intended purposes of the goods at issue overlapped and those goods were often purchased in pharmacies and on their possible complementarity. In particular, the goods concerned pursue a comparable objective, that of improving the shape or appearance of the body or otherwise maintaining a healthy body (paragraphs 32 to 34 of the contested decision). Further, the Board of Appeal pointed out that the differences in the methods of administering the goods or in their therapeutic indications were not sufficient to rule out any similarity between those goods (paragraph 35 of the contested decision).

54 It must also be borne in mind that, according to settled case-law, in assessing the similarity of the goods or services at issue, all the relevant factors relating to those goods or services should be taken into account. Those factors include, inter alia, their nature, their intended purpose and 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 judgment of 11 July 2007, *El Corte Inglés* v *OHIM — Bolaños Sabri (PiraÑAM diseño original Juan Bolaños)*, T-443/05, EU:T:2007:219, paragraph 37 and the case-law cited).

55 In the present case, the Board of Appeal essentially found three factors of similarity between the goods covered by the marks at issue, namely, first, their common intended purpose, that is to improve the shape or appearance of the body or otherwise maintain a healthy body, second, their complementarity and, third, their frequent purchase in pharmacies.

56 The applicant does not dispute that latter factor of similarity, relating to distribution channels. By contrast, it criticises the other two accepted factors of similarity, both as far as concerns their intrinsic assessment and as regards their overall ability, taken together with the distribution channels factor, to characterise a similarity between the goods at issue, having regard in particular to the differences in nature, therapeutic indication and methods of administration between those goods.

57 Thus, the applicant criticises, first, the Board of Appeal for having attached excessive importance to the intended purpose of the goods at issue, which, moreover, was wrongly analysed at too high a level of abstraction.

58 In that regard, it should be noted, first of all, that the applicant does not dispute, as such, the fact that the food, nutritional, dietary and vitamin supplements covered by the mark applied for and the creams for medical use designated by the earlier mark pursue the same objective of improving the shape or appearance of the body or otherwise maintaining a healthy body (paragraph 32 of the contested decision).

59 It must be noted, next, that the treatment of human health problems, which is less restrictive than the intended purpose referred to in paragraph 58 above, was considered a common purpose or intended use which can validly be taken into account for the similarity of goods in Class 5 (see, to that effect, judgments of 17 October 2006, *Armour Pharmaceutical* v *OHIM — Teva Pharmaceutical Industries (GALZIN)*, T-483/04, EU:T:2006:323, paragraph 70, and of 2 December 2014, *Boehringer Ingelheim Pharma* v *OHIM — Nepentes Pharma (Momarid)*, T-75/13, not published, EU:T:2014:1017, paragraphs 58 and 59).

60 It may be added that, even supposing that the case-law relating to the specificity of medicinal products and the decisive importance of taking account of their specific purpose expressed by their therapeutic indication, which was, moreover, recalled by the Board of Appeal (paragraph 28 of the contested decision), is applicable in the present case, even though the applicant maintains that the goods covered by the mark applied for are not pharmaceutical goods, the finding that the goods at issue are similar to at least a low degree, provided that the other factors of similarity are present, cannot be called into question by that case-law.

61 Admittedly, it is clear from that case-law that, in order to assess correctly the similarity between medicines, which form a very broad category comprising products which may be different, it is necessary to take into consideration the specific purpose and intended use of a therapeutic product, which is expressed by its therapeutic indication (see, to that effect, judgment of 15 December 2010, *Novartis* v *OHIM — Sanochemia Pharmazeutika (TOLPOSAN)*, T-331/09, EU:T:2010:520, paragraphs 35 to 37 and the case-law cited).

62 However, the difference relating to the therapeutic indications or the specific intended purpose of those goods is not sufficient to prevent a finding of similarity and allows a legitimate basis for the conclusion that there is a degree of similarity which is at least low, provided that the other factors of similarity are present (see, to that effect, judgments of 17 October 2006, *GALZIN*, T-483/04, EU:T:2006:323, paragraphs 70 and 71; of 11 November 2009, *Bayer Healthcare* v *OHIM — Uriach-Aquilea OTC (CITRACAL)*, T-277/08, not published, EU:T:2009:433, paragraphs 44 and 45; and of 2 December 2014, *Momarid*, T-75/13, not published, EU:T:2014:1017, paragraph 66).

63 This is all the more so in the present case since the Board of Appeal considered, without making any error, that the goods covered by the marks at issue shared a number of specific intended purposes.

64 First of all, the Board of Appeal correctly noted, without challenge by the applicant, that it is common to take supplements containing beta-carotene prior to sun exposure in order to prepare the skin, protect it from ageing caused by ultraviolet rays and promote a healthy tan, in the same way as sun

creams are applied for that purpose (paragraph 32 of the contested decision). Thus, it found, in essence, the existence of a specific intended purpose common to the goods covered by the marks at issue, that of protecting and embellishing the skin when exposed to the sun.

65 Next, the Board of Appeal found, without any proper challenge by the applicant, that consumers bought certain creams designated by the earlier mark and certain vitamin supplements covered by the mark applied for to eliminate or reduce cellulite (paragraph 32 of the contested decision) and that, in so doing, those goods shared that specific purpose.

66 In particular, the applicant merely claims that it is incorrect and not proven that the vitamins supplements covered by the mark applied for may help reduce or eliminate water retention and that water retention is one of the major causes of cellulite. As is apparent from the wording itself of the contested decision, that objective pursued by the purchase of vitamin supplements was considered to be a matter of common knowledge by the Board of Appeal, which it is not necessary to prove (see, to that effect, judgment of 16 February 2017, *Antrax It* v *EUIPO — Vasco Group (Thermosiphons for radiators)*, T-828/14 and T-829/14, EU:T:2017:87, paragraph 90 and the case-law cited) and which it is for the applicant to call into question by showing that the Board of Appeal erroneously qualified that matter as being of common knowledge (see, to that effect, judgments of 7 December 2012, *A. Loacker v OHIM — Editrice Quadratum (QUADRATUM)*, T-42/09, not published, EU:T:2012:658, paragraph 73, and of 23 January 2014, *Sunrider* v *OHIM — Nannerl (SUN FRESH)*, T-221/12, not published, EU:T:2014:25, paragraph 77).

67 However, in the present case, the applicant merely contests, not the objective of the fight against cellulite pursued by certain vitamin supplements as such, but the scientific accuracy of the effects of those supplements on water retention and cellulite, without, moreover, substantiating that challenge. Furthermore, it may also be noted that the articles from specialist health and wellbeing websites, produced by the intervener in the annex to the response, advise that certain vitamins be consumed to reduce cellulite and accordingly show that vitamin supplements may have that objective. Contrary to the applicant's claim during the hearing, those articles cannot be declared inadmissible since they were submitted in the present proceedings in order to substantiate the accuracy of a matter of common knowledge taken into consideration by EUIPO (see, to that effect, judgment of 10 November 2011, *LG Electronics* v *OHIM*, C-88/11 P, not published, EU:C:2011:727, paragraph 29).

68 Finally, the Board of Appeal rightly noted that the goods covered by the mark applied for, in particular vitamin supplements, were intended to restore or maintain a healthy appearance and make the complexion radiant (paragraph 32 of the contested decision) and that the creams covered by the earlier mark were intended to reduce or prevent skin irritation as well as rashes and pimples which are harmful to the appearance of the user (paragraph 34 of the contested decision), so that the goods at issue pursued that common objective of skin care and beauty. Accordingly, contrary to what the applicant suggests, the conclusion relating to that objective was not inferred from the mere finding relating to the creams covered by the earlier mark, but was based on findings relating to the two types of products covered by the marks at issue. Furthermore, contrary to what the applicant also submits, in so far as the Board of Appeal has, in the present case, noted the existence of several specific intended purposes in addition to the general intended purpose referred to in paragraph 58 above, each of the specific intended purposes at issue need not characterise all the goods covered by the mark applied for in order to establish a similarity of at least a low degree between those goods and those covered by the earlier mark. It is thus irrelevant that the 'nutritionally fortified drinks for dietetic purposes' designated by the trade mark application are not intended to reduce skin irritation.

69 Second, the applicant complains that the Board of Appeal found that the goods concerned were complementary, although those goods, taken individually, are neither indispensable nor important for the use of the others, and placed excessive reliance on the assessment of that complementarity in the global assessment of the likelihood of confusion (paragraphs 33 and 91 of the contested decision).

70 It is apparent from the case-law that the goods are complementary if 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 those goods lies with the same undertaking (judgments of 1 March 2005, *Sergio Rossi* v *OHIM — Sissi Rossi (SISSI ROSSI)*, T-169/03, EU:T:2005:72, paragraph 60, and of 22 January 2009, *easyHotel*, T-316/07, EU:T:2009:14, paragraph 57).

71 Pursuant to the case-law definition of the complementarity factor referred to in paragraph 70 above, it must admittedly be considered that the food, nutritional and vitamin supplements covered by the mark applied for and the creams covered by the earlier mark are not complementary, in the sense that some of them are indispensable or important for the use of the others.

72 However, it is also apparent from the case-law that, even without achieving such a degree of complementarity, the fact that the goods may be used together may be taken into account for the assessment of the similarity of those goods, it being made clear that that possibility of joint use is not accepted as proof of the complementarity of the goods at issue, but is, in general, considered to be an indication of the similarity factor relating to the relevant public concerned or confirmation of that relating to the intended purpose of the goods (see, to that effect, judgments of 10 September 2008, *Boston Scientific* v *OHIM — Terumo (CAPIO)*, T-325/06, not published, EU:T:2008:338, paragraphs 83 to 85, and of 15 December 2009, *TRUBION*, T-412/08, not published, EU:T:2009:507, paragraph 32).

73 It is moreover in the context of its considerations on the intended purpose of the goods at issue that the Board of Appeal referred to the complementarity between certain vitamin supplements of the mark applied for and the sun lotions of the earlier mark (paragraph 32 of the contested decision) and, in connection with its finding relating to the sale of the goods in question in pharmacies, that it referred to, in general terms, the possible complementarity between the goods covered by the marks at issue (paragraph 33 of the contested decision).

74 It follows that the reference to ‘complementary character of the goods’ in paragraph 91 of the contested decision is also to be understood in that general sense, that is to say as being linked to, or even as referring to, the other accepted similarity factors, and not in the strict sense referred to in paragraph 70 above. That reference is merely a restatement, in the concluding part of the analysis of the likelihood of confusion, of the prior assessments relating to the similarity of the goods. Therefore, although it is regrettable that the Board of Appeal did not use more precise terminology in relation to that issue, it cannot be criticised for having given too much importance to the criterion of complementarity in the strict sense and for having, by reason of an erroneous assessment of that criterion, erred in its global assessment of the likelihood of confusion.

75 It follows from the above that the Board of Appeal rightly found that the factors of similarity between the goods at issue were their general intended purpose and several specific intended purposes, their possible joint use and the identity of their distribution channels, that latter factor being consistent with the case-law (see, to that effect, judgment of 26 November 2015, *Bionecs* v *OHIM — Fidia farmaceutici (BIONECS)*, T-262/14, not published, EU:T:2015:888, paragraph 31) and, moreover, undisputed by the applicant (see paragraph 56 above).

76 Third, the applicant claims that the Board of Appeal inferred from those factors the existence of a similarity between the goods covered by the marks at issue, by giving excessive weight to the objective pursued by the goods at issue and by taking insufficient account of the difference in the nature and method of administration of those goods (paragraphs 32 and 35 of the contested decision).

77 It should be pointed out, in this respect, first of all, that the Board of Appeal inferred from all those similarity factors a degree of similarity of the goods at issue which is not high or medium but at least low.

78 Next, it must be noted that it is apparent from the case-law delivered in circumstances similar to those in the present case — characterised by a common intended purpose of the goods, the possible joint use and identical distribution channels — that such similarity factors are sufficient to prove the similarity of the goods concerned (see, to that effect, judgment of 10 September 2008, *CAPIO*, T-325/06, not published, EU:T:2008:338, paragraph 87; of 15 December 2009, *TRUBION*, T-412/08, not published, EU:T:2009:507, paragraph 32; and of 28 September 2016, *LLR-G 5* v *EUIPO(SILICIUM ORGANIQUE G5 LLR-G5)*, T-539/15, not published, EU:T:2016:571, paragraph 32). Further, the fact that the goods at issue are administered differently does not call into question such a similarity (see, to that effect, judgment of 17 November 2005, *Biofarma* v *OHIM — Bausch & Lomb Pharmaceuticals (ALREX)*, T-154/03, EU:T:2005:401, paragraph 50). In particular, in the case of goods similar to the goods covered by the marks at issue, where 'dietary supplements' and 'healing salves' which can be assimilated to creams for medical use are concerned, the General Court held that those goods were similar despite the different ways in which they are administered, salves being applied to wounds and sores whereas dietary supplements were intended to be ingested (see, to that effect, judgment of 11 November 2009, *CITRACAL*, T-277/08, not published, EU:T:2009:433, paragraphs 43 to 45). Contrary to what the appellant claimed at the hearing, the fact that that judgment was delivered before the judgment of 19 June 2012, *Chartered Institute of Patent Attorneys* (C-307/10, EU:C:2012:361) and the subsequent case-law does not call into question the relevance of that judgment for the assessment of the present case. In that judgment, the Court laid down the requirement that the goods or services for which protection is sought be identified with sufficient clarity and precision, but did not rule on the criteria for assessing the similarity of those goods or services.

79 Finally, it should be added that the alleged difference in the nature of the goods covered by the marks at issue — those covered by the earlier mark being presented as pharmaceutical in nature, given the words 'for medical use', whereas those covered by the mark applied for are claimed not to be pharmaceutical products — is not such as to call into question the abovementioned considerations relating to the similarity of those goods. It follows from the judgments of 10 September 2008, *CAPIO* (T-325/06, not published, EU:T:2008:338); of 15 December 2009, *TRUBION* (T-412/08, not published, EU:T:2009:507); and of 28 September 2016, *ORGANIC SILIUM G5 LLR-G5* (T-539/15, not published, EU:T:2016:571), referred to in paragraph 78 above, that the goods concerned were considered to be similar despite their different nature. Moreover, although it is true that the finding of similarity in the judgment of 11 November 2009, *CITRACAL* (T-277/08, not published, EU:T:2009:433) concerned goods of the same nature, namely pharmaceutical products, it was not classified as similarity to 'at least to a low degree' since such a classification may precisely, in the present dispute, be justified by the difference in the nature, whether pharmaceutical or not, of the goods at issue.

80 It follows that, even if the Board of Appeal erroneously classified the goods covered by the mark applied for as pharmaceutical goods and irrelevantly emphasised the 'increasingly pharmaceutical' nature of the goods covered by the earlier mark, such errors cannot call into question the Board of Appeal's finding that those goods are similar to at least a low degree. That is all the more so because, as the intervener pointed out, it is common for certain components, which are part of the nature of the goods, and in particular certain active ingredients contained in food, nutritional and vitamin supplements and creams, to be identical.

81 It follows from the above that the Board of Appeal was entitled to consider that the goods covered by the marks at issue were similar, to at least a low degree.

82 Consequently, the Board of Appeal was also correct in finding that there was a likelihood of confusion.

83 According to settled case-law, 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 the similarity of the goods or services concerned. 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 (judgments of 29 September 1998, *Canon*, C-39/97, EU:C:1998:442, paragraph 17, and of 14 December 2006, *VENADO with frame and others*, T-81/03, T-82/03 and T-103/03, EU:T:2006:397, paragraph 74).

84 However, in the present case, the Board of Appeal correctly stated that even a public with a high level of attention was only rarely able to make a direct comparison of the different marks, but had to rely on the imperfect image it has retained of them (paragraph 82 of the contested decision). It also noted, without being contradicted by the applicant, that the knowledge of patients, who are part of the relevant public in the present case, was not that of professionals in the sector (paragraph 83 of the contested decision). The Board of Appeal also legitimately found that, in view of the coincidence between the distinctive word element of the mark applied for and the only word element constituting the earlier mark 'aurea', there was at least average visual similarity (paragraph 63 of the contested decision), at least average, if not high, phonetic similarity (paragraph 68 of the contested decision) and at least low conceptual similarity for consumers speaking a Latin language, who will understand that 'aurea' refers to 'gold' or 'golden' (paragraph 73 of the contested decision), assessments which are moreover not contested by the applicant. Further, the Board of Appeal correctly pointed out that the relevant public was faced with the marks at issue 'both visually and phonetically' and therefore found that a greater weight was to be given to the visual and phonetic similarities in the global analysis of likelihood of confusion (paragraphs 87 to 89 of the contested decision). Finally, it noted, still without being challenged, that the earlier mark had normal inherent distinctiveness (paragraph 78 of the contested decision).

85 The Board of Appeal, therefore, was able to find, correctly, in paragraphs 91 and 92 of the contested decision, in accordance with the case-law referred to in paragraph 83 above, that the degree of similarity between the goods covered by the marks at issue, which was at least low, was offset by a degree of visual similarity which was at least average, and of phonetic similarity, which was at least average, if not high, to deduce that it was perfectly conceivable that consumers might associate those signs by believing that they are sub-brands of the same undertaking and, therefore, that there was a likelihood of confusion (see, to that effect, judgment of 28 September 2010, *Market Watch* v *OHIM — Ares Trading (Seroslim)*, T-201/08, not published, EU:T:2010:408, paragraph 49).

86 For the sake of completeness, it follows that, even if the Board of Appeal had not legitimately corrected the contested decision, the complaint criticising paragraph 80 of the contested decision, deleted by the correcting decision, could have been rejected.

87 It should be borne in mind that, by that complaint, the applicant complains that the Board of Appeal erroneously stated, in paragraph 80 of the contested decision, that the goods in question were identical, whereas it had indicated, in several previous paragraphs (paragraphs 6, 31, 36 and 38 of the contested decision), that those goods were merely found to be similar, to at least a low degree. Such a fundamental error vitiates the entire analysis of the likelihood of confusion since a finding that the goods are identical implies that the signs must be found to be highly different to exclude the likelihood of confusion.

88 Even if the Board of Appeal had erroneously found that the goods at issue were identical even though its comparison of those goods only showed a low degree of similarity of those goods, such an erroneous finding does not vitiate the analysis of the likelihood of confusion. It follows from the above that not only did the Board of Appeal correctly consider that the goods concerned were similar, to at least a low degree (see paragraph 81 above), but also that such a finding of similarity between the goods had enabled it to legitimately find that there was a likelihood of confusion in the present case (see paragraph 85 above).

89 That complaint raised in support of the plea alleging infringement of Article 8(1)(b) of Regulation 2017/1001 must, therefore, in any event, be rejected, as must, consequently, that single plea relied on by the applicant.

90 The action in Case T-724/18 should therefore also be dismissed.

Costs

91 Under Article 134 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. According to Article 135(1) of the Rules of Procedure, if equity so requires, the Court may decide that an unsuccessful party is to pay only a proportion of the costs of the other party in addition to bearing his own costs, or even that he is not to be ordered to pay any costs.

92 In this case, admittedly, the applicant has been unsuccessful in its submissions and both EUIPO and the intervener have applied for costs.

93 However, the applicant would not have had to raise the complaint against paragraph 80 of the contested decision and certain arguments put forward in support of the other complaints, nor bring the action against the correcting decision had the Board of Appeal stated the reasons for the contested decision more clearly and rigorously. In those circumstances, the applicant and EUIPO should each be ordered to bear their own costs.

94 In addition, pursuant to Article 138(3) of the Rules of Procedure, the intervener should be ordered to bear its own costs.

On those grounds,

THE GENERAL COURT (Fourth Chamber)

hereby:

1. **Joins Cases T-724/18 and T-184/19 for the purposes of the judgment;**

2. **Dismisses the actions;**

3. **Orders Aurea Biolabs Pte Ltd, the European Union Intellectual Property Office (EUIPO) and Avizel SA to bear their own costs.**

Gervasoni Frendo Martín y Pérez de Nanclares

Delivered in open court in Luxembourg on 28 May 2020.

E. Coulon
Registrar

M. van der Woude
President