JUDGMENT OF THE COURT OF FIRST INSTANCE (Fifth Chamber)

10 October 2006 *

In Case T-172/05,

Armacell Enterprise GmbH, established in Münster (Germany), represented by O. Spuhler, lawyer,

applicant,

v

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

defendant,

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

* Language of the case: English.

nmc SA, established in Raeren-Eynatten (Belgium), represented by P. Péters and T. de Haan, lawyers,

ACTION against the decision of the First Board of Appeal of OHIM of 23 February 2005 (Case R 552/2004-1) concerning opposition proceedings between nmc SA and Armacell Enterprise GmbH,

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

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

Registrar: K. Andová, Administrator,

having regard to the written procedure and further to the hearing on 4 May 2006,

gives the following

Judgment

The facts giving rise to the dispute

1 On 3 December 2001, Armacell Enterprise GmbH ('the applicant') filed a Community trade mark application with the Office for Harmonization in the Internal Market (Trade Marks and Designs) (OHIM) 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 Registration was sought for the word mark ARMAFOAM.

3 The goods in respect of which trade mark registration was sought are in Class 20 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: 'Foam goods made from elastomerics, thermoplastics or thermosets as system component or as end use application'.

4 On 24 June 2002, the trade mark application was published in the *Community Trade Marks Bulletin*.

5 On 9 July 2002, nmc SA ('the intervener') filed a notice of opposition under Article 42(1) of Regulation No 40/94 against registration of the trade mark.

6 The ground relied on in support of the opposition was that there was a likelihood of confusion within the meaning of Article 8(1)(b) of Regulation No 40/94 between the mark applied for and the intervener's earlier Community word mark NOMAFOAM, registered on 31 October 1997 in respect of the following goods:

— Class 17: 'products in semi-processed plastic materials, weatherstripping, packing and insulating materials; polyethylene foam (semi-processed material), materials used for thermal and acoustic insulation, padding and stuffing

materials of plastic, packing (cushioning, stuffing) materials of plastic, substances for insulating buildings against moisture and cold included in this class, soundproofing materials, flexible pipes, not of metal.'

— Class 19: 'building materials (non-metallic); non-metallic rigid pipes for building; wall linings included in this class'.

— Class 20: 'products of plastic not included in other classes, packaging containers of plastic, mattresses, cushions, pads of plastic used as supports, in particular for sitting and/or kneeling during gardening and/or do-it-yourself activities, sporting, gymnastic, recreation and leisure activities'.

— Class 27: 'mats, non-slip mats, carpets for automobiles, rugs and matting; carpets, rugs, mats and matting of plastic used as supports, in particular for sitting and/or kneeling during gardening and/or do-it-yourself activities, sporting, gymnastic, recreation and leisure activities; floor coverings, wall linings, insulating coverings not included in other classes, wall hangings, not of textile'.

— Class 28: 'gymnastic and sporting articles not included in other classes'.

7 By decision of 24 May 2004, the Opposition Division rejected the opposition on the ground that the mark applied for and the earlier mark were sufficiently dissimilar to rule out any likelihood of confusion on the part of the average Community consumer within Community territory.

8 On 5 July 2004, the intervener filed a notice of appeal with OHIM against the decision of the Opposition Division under Articles 57 to 62 of Regulation No 40/94. On 23 September 2004, it filed a statement of grounds. On 17 December 2004, the applicant filed its observations on the intervener's appeal.

9 By decision of 23 February 2005, notified to the applicant by letter of 25 February 2005 ('the contested decision'), the First Board of Appeal of OHIM granted the appeal on the ground that there was a likelihood of confusion.

Procedure and forms of order sought by the parties

10 By application lodged at the Registry of the Court of First Instance on 29 April 2005, the applicant brought the present action. It stated that it was to be represented by its Patent Attorney, C. Hano, along with its lawyer.

11 On 10 and 29 August 2005, OHIM and the intervener each lodged their responses.

12 By letter of 15 September 2005, received at the Registry of the Court of First Instance on 19 September 2005, the applicant sought leave under Article 135(2) of the Rules of Procedure of the Court of First Instance to lodge a response. The applicant also confirmed that its Patent Attorney would participate at the hearing.

13 By decision of the President of the Fifth Chamber of the Court of First Instance of 27 September 2005, the request to lodge a response was refused. By letter of the same date, the Registrar of the Court of First Instance informed the applicant of this refusal, which was on the basis that it could submit its observations at the hearing and, further, Mr Hano had the right to be heard at the hearing only in the presence and under the supervision of the applicant's lawyer.

14 The applicant claims that the Court of First Instance should:

— annul the contested decision;

— order OHIM to pay the costs.

15 OHIM claims that the Court of First Instance should:

— dismiss the action;

— order the applicant to pay the costs.

16 The intervener claims that the Court of First Instance should:

— dismiss the action;

— order the applicant to pay the costs.

Law

17 The applicant raises a single plea of annulment which, although it makes formal reference to infringement of the second sentence of Article 43(5) of Regulation No 40/94, alleges infringement only of Article 8(1)(b) of that regulation on the ground that the Board of Appeal erred in finding that there was a likelihood of confusion.

Arguments of the parties

18 The applicant submits, firstly, that the conflicting marks are not similar.

19 The first syllables of those marks, 'no' for NOMAFOAM and 'ar' for ARMAFOAM, are very different. As those syllables are at the beginning of the signs, they catch the consumer's attention more easily. The degree of aural and visual similarity is therefore very small.

20 With regard to conceptual similarity, the applicant argues that as the words 'armafoam' and 'nomafoam' do not exist as such in the languages concerned, the relevant public will tend to perceive them as invented words. However, the applicant considers that the second component of the marks, the English word 'foam', will be perceived by the relevant public as purely descriptive of the goods covered by the marks. According to the applicant, English is the decisive language from the point of view of the relevant public for assessing the conceptual similarity. The 'foam' component of the marks is therefore not very distinctive. This means that the first components of those marks, 'arma' and 'noma', which, for the relevant public, are

clearly differentiated terms, are all the more important since they do not refer to any commonly understood concepts. As they have a particular, distinctive character, those first components constitute the dominant elements of the marks in the context of the overall impression created by those marks.

21 The applicant therefore states that the relevant public will pay attention not to the endings of the marks, which are purely descriptive, but to the beginnings, which are not at all descriptive and have a clearly distinctive character. There is, therefore, no conceptual similarity between the marks. Moreover, nowhere in the contested decision did the Board of Appeal make any assertion to the effect that there was a conceptual similarity.

22 The Board of Appeal wrongfully considered that the overall impression made by the marks is characterised by their endings, 'foam', whereas, according to the principle established by the case-law, as it is normally the beginning of a word that is distinctive, it is that part that sticks in the mind. The Board of Appeal also stated that the identical component 'foam' is descriptive of the goods concerned. It is possible, however, under the case-law of the Court of Justice, for a descriptive component of a mark not to be distinctive, which is inconsistent with the findings of the Board of Appeal and must lead to the annulment of the contested decision.

23 Secondly, and in the alternative, the applicant maintains that the goods covered by the conflicting marks are not similar. The foam goods that are the subject of the trade mark application and the products made of plastic listed in Class 20 which are the subject of the earlier mark are not similar. The same applies to the other goods covered by the earlier mark.

24 The Board of Appeal did no more than state, at paragraph 21 of the contested decision, that the trade mark application covered, inter alia, foam goods made of

elastomers and thermoplastics, that the goods in Class 20 covered by the earlier mark were made of plastic and that plastic, rubber and elastic polymers were similar substances which could be used to manufacture a large range of products falling within Class 20, such as mats, mattresses and pads.

25 The fact that the goods covered by the marks can be manufactured from the same material is not enough to make those goods similar within the meaning of Article 8(1)(b) of Regulation No 40/94. The Board of Appeal therefore misinterpreted the requirement of similarity of goods.

26 OHIM and the intervener contest the applicant's arguments. The Board of Appeal rightly concluded that there was a likelihood of confusion. In any event, the intervener takes the view that the applicant's arguments relating to the comparison of the goods are inadmissible.

Findings of the Court

27 Article 8(1)(b) of Regulation No 40/94 provides that, upon opposition by the proprietor of an earlier trade mark, the trade mark applied for is not to be registered 'if because of its identity with or similarity to the earlier trade mark and the identity or similarity of the goods or services covered by the trade marks there exists a likelihood of confusion on the part of the public in the territory in which the earlier trade mark is protected; the likelihood of confusion includes the likelihood of association with the earlier trade mark'.

28 According to the case-law, 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, constitutes a likelihood of confusion (Case C-39/97 *Canon* [1998] ECR I-5507, paragraph 29; Case C-342/97 *Lloyd Schuhfabrik Meyer* [1999] ECR I-3819, paragraph 17; Case T-104/01 *Oberhauser* v *OHIM — Petit Liberto (Fifties)* [2002] ECR II-4359, paragraph 25).

29 According to the same case-law, the likelihood of confusion on the part of the public must be assessed globally, taking into account all factors relevant to the circumstances of the case (Case C-251/95 *SABEL* [1997] ECR I-6191, paragraph 22; *Canon*, paragraph 16; *Lloyd Schuhfabrik Meyer*, paragraph 18; and *Fifties*, paragraph 26).

30 As far as the visual, aural or conceptual similarity of the marks in question is concerned, that global assessment must be based on the overall impression given by the marks, bearing in mind, in particular, their distinctive and dominant components (*SABEL*, paragraph 23).

31 The 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 lesser degree of similarity between those goods or services may be offset by a greater degree of similarity between the marks, and vice versa (*Canon*, paragraph 17, *Lloyd Schuhfabrik Meyer*, paragraph 19, and *Fifties*, paragraph 27).

32 In addition, the perception of marks in the mind of the average consumer of the goods or services in question plays a decisive role in the global assessment of the likelihood of confusion. The average consumer normally perceives a mark as a whole and does not proceed to analyse its various details (*SABEL*, paragraph 23; *Lloyd*

Schuhfabrik Meyer, paragraph 25; *Fifties*, paragraph 28; and Case T-355/02 *Mühlens* v *OHIM — Zirh International (ZIRH)* [2004] ECR II-791, paragraph 41). For the purposes of that global assessment, the average consumer of the products concerned is deemed to be reasonably well-informed and reasonably observant and circumspect. Furthermore, account should be taken of the fact that the average consumer only rarely has the chance to make a direct comparison between the different marks but has to rely on the imperfect image of them that he has retained in his mind. It should also be borne in mind that the average consumer's level of attention is likely to vary according to the category of goods or services in question (*Lloyd Schuhfabrik Meyer*, paragraph 26, *Fifties*, paragraph 28).

33 Finally, it follows from the unitary character of the Community trade mark laid down in Article 1(2) of Regulation No 40/94 that an earlier Community trade mark is protected in the same way in all Member States. Earlier Community trade marks may therefore be relied on in opposition to any subsequent application to register a trade mark which infringes their protection, even if it does so only in the perception of the consumers of part of the Community. It follows that the principle laid down in Article 7(2) of Regulation No 40/94, according to which it suffices, in order for registration of a trade mark to be refused, that an absolute ground for refusal exists only in part of the Community, also applies by analogy to a relative ground for refusal under Article 8(1)(b) of Regulation No 40/94 (Case T-6/01 *Matratzen Concord* v *OHIM — Hukla Germany (MATRATZEN)* [2002] ECR II-4335, paragraph 59; *ZIRH*, paragraph 36; Joined Cases T-117/03 to T-119/03 and T-171/03 *New Look* v *OHIM — Naulover (NLSPORT, NLJEANS, NLACTIVE and NLCollection)* [2004] ECR II-3471, paragraph 34; and Case T-185/03 *Fusco* v *OHIM — Fusco International (ENZO FUSCO)* [2005] ECR II-715, paragraph 33).

34 Firstly, with regard to the definition of the relevant public, it is to be noted, as did the Board of Appeal (paragraphs 8 and 9 of the contested decision) and the parties, that the goods which are the subject of the trade mark application and the goods covered

by the earlier mark are likely to be marketed to a very wide public, both professional and non-professional. The relevant public is therefore composed of all consumers within the Community.

35 Secondly, as regards the comparison of the goods, the Board of Appeal essentially considered, at paragraph 21 of the contested decision, that the definition of the goods in the trade mark application, which is very wide-ranging, encompasses goods covered by the earlier mark. Of the latter, the Board of Appeal referred, in particular, to certain goods in Class 20, namely, products of plastic not included in other classes, mats, mattresses and pads, which, the Board of Appeal observed, in essence, are goods that can be manufactured from the same basic material as the goods that are the subject of the trade mark application. The Board of Appeal therefore concluded that the goods covered by the conflicting marks are very similar, if not identical (paragraph 21 of the contested decision).

36 The applicant states, without providing any specific explanation, that the goods covered by the conflicting marks are not similar. Moreover, it maintains, in essence, that the fact that the goods covered by the marks can be manufactured from the same basic material is not enough to make those goods similar within the meaning of Article 8(1)(b) of Regulation No 40/94. The Board of Appeal therefore misinterpreted the requirement of similarity of goods.

37 OHIM, whilst sharing the Board of Appeal's conclusion that the goods are similar, arrives at that conclusion with different reasoning. Unlike that body, it takes the view that it is not the goods in the trade mark application that encompass certain goods covered by the earlier mark but, rather, it is the goods covered by the earlier mark, in particular 'products [listed in Class 20] of plastic not included in other classes' — a category which, according to OHIM, is unlimited both as to the kind of plastic used and as to the use to which the goods made of plastic are put — that encompasses the goods covered by the trade mark application.

38 The intervener submits that the applicant's arguments relating to the goods are inadmissible before the Court of First Instance under Article 135(4) of the Rules of Procedure since they were not raised in the proceedings before OHIM. In the alternative, the intervener shares the view of the Board of Appeal that, with regard to the goods covered, the wording of the trade mark application is so broadly couched as to encompass the goods covered by the earlier mark in Class 20. The intervener produced a number of commercial documents which it had previously produced to OHIM.

39 With regard, firstly, to whether the applicant's arguments concerning the goods are, as alleged, inadmissible, it is to be borne in mind that the purpose of an action brought before the Court pursuant to Article 63(2) of Regulation No 40/94 is to obtain a review of the legality of decisions of the Boards of Appeal (see Case T-247/01 *eCopy* v *OHIM (ECOPY)* [2002] ECR II-5301, paragraph 46, and Case T-311/01 *Éditions Albert René* v *OHIM — Trucco (Starix)* [2003] ECR II-4625, paragraph 70 and the case-law cited). Pursuant to Article 74 of Regulation No 40/94, the review must be carried out in the light of the factual and legal context of the dispute as it was brought before the Board of Appeal (Case T-194/01 *Unilever* v *OHIM (Ovoid tablet)* [2003] ECR II-383, paragraph 16, and Case T-57/03 *SPAG* v *OHIM — Dann and Backer (HOOLIGAN)* [2005] ECR II-287, paragraph 17). Furthermore, under Article 135(4) of the Rules of Procedure, the parties' pleadings may not alter the subject-matter of the proceedings before the Board of Appeal.

40 It is therefore necessary to consider whether, by claiming for the first time before the Court of First Instance that the goods covered by the marks are different, the applicant has altered the subject-matter of the proceedings.

41 It is clear that, where it is based on Article 8(1)(b) of Regulation No 40/94, opposition to the registration of a Community trade mark requires OHIM to adjudicate on whether the goods and services covered by the conflicting marks are similar or identical.

42 That is also the case even where OHIM, or one of the parties to the proceedings, considers it unnecessary to examine whether the goods or services in question are identical or similar because of the considerable differences between the marks, which, in any event, rule out a likelihood of confusion. Next, the fact that, in the present case, the applicant agreed in the proceedings before the Opposition Division that the goods covered by the marks may potentially be identical, since it stated before the Board of Appeal that the question whether the goods are similar could be left undecided on account of the alleged differences between the marks, did not in any way divest OHIM of the power to adjudicate on whether the goods covered by those marks are similar or identical. Likewise, therefore, that fact has not deprived the applicant of the right to challenge, in the factual and legal context of the dispute before the Board of Appeal, the findings of that body on this point (see, by analogy, Case T-360/03 *Frischpack* v *OHIM (shape of a cheese box)* [2004] ECR II-4097, paragraphs 32 to 35).

43 Clearly, the applicant's arguments relating to the comparison of the goods before the Court of First Instance do not depart from the context of the dispute as it was brought before the Board of Appeal. Indeed, the applicant merely questions that body's findings and its reasoning on this point. It follows that the applicant has not altered the subject-matter of the proceedings by those arguments, which are therefore admissible before the Court.

44 It has been held that in order to assess the similarity of the products or services concerned, all the relevant features of the relationship between those products or services should be taken into account, including their nature, their intended purpose, their method of use and whether they are in competition with each other or are complementary (*Canon*, paragraph 23; Case T-203/02 *Sunrider* v *OHIM — Espadafor Caba (VITAFRUIT)* [2004] ECR II-2811, paragraph 65; and Case T-359/02 *Chum* v *OHIM — Star TV (STAR TV)* [2005] ECR II-1515, paragraph 31).

45 In the present case, the definition of the goods covered by the trade mark application is extremely broad, as far as the nature of those goods is concerned, since it designates goods as 'system component or as end use application' — in other words, almost all kinds of goods. The only limitation to that definition relates to the material from which those goods are manufactured: foam goods made from elastomerics, thermoplastics or thermosets.

46 In addition to a small number of products in Class 20 referred to by the Board of Appeal at paragraph 21 of the contested decision, the earlier mark covers a wide range of goods, the majority of which may fulfil the description of 'system components' or 'end use application' made of foam.

47 At no time has the applicant claimed that the foam materials that are the subject of its trade mark application have chemical or physical properties that make them suitable only for the manufacture of very specific products that are not included in the list of products covered by the earlier mark.

48 The applicant merely states, at paragraph 65 of the application, that the foam goods and the products made of plastic listed in Class 20 are not similar and adds that the same applies to the other goods covered by the earlier mark.

49 That assertion on the part of the applicant, which, moreover, is not at all substantiated, cannot affect the finding of the Board of Appeal at paragraph 21 of the contested decision that 'plastic, rubber and elastic polymers' are similar substances and is, in any event, refuted in the light of the following considerations.

50 Firstly, as OHIM observes in its response, elastomers, thermoplastics and thermosets are nothing more than plastic substances. The applicant, moreover, would appear to admit that fact when it refers, at paragraph 63 of its application, to the fact that the goods covered by the marks can be manufactured from the same basic material.

51 Secondly, the applicant's assertion contradicts the position it defended in the context of the examination of the similarity of the signs, namely, that the suffix 'foam' is 'purely descriptive' of the goods covered by the marks (paragraph 43 of the application). The applicant thus admits by implication that the goods covered by the intervener's trade mark are also goods made of foam.

52 Thirdly, it is clear from the documents produced by the intervener in the proceedings before OHIM and annexed to its response that the applicant manufactures goods under the trade mark ARMAFOAM which correspond to the definition set out in the trade mark application and are identical with or similar to certain goods marketed by the intervener under the trade mark NOMAFOAM, namely, foam protection profiles for the packaging of fragile goods. Those documents therefore provide a concrete illustration, albeit limited to certain goods, of the similar or identical nature of the goods covered by the conflicting marks. Moreover, at the hearing, in response to a question from the Court, the applicant was not able seriously to deny that some of the goods that are the subject of the trade mark application were in direct competition with goods marketed by the intervener under the earlier trade mark.

53 It follows from the above that the applicant has not succeeded in calling into question the correctness of the Board of Appeal's finding that 'the wording of the application (foam goods of elastomers, thermoplastics) is certainly broad enough to comprise the items detailed in the earlier registration (products of plastics not included in other classes)' (paragraph 21 of the contested decision).

54 Moreover, contrary to the applicant's suggestion, the effect of the Board of Appeal's assessment is not to make the finding that there is a similarity between the goods solely dependent on the fact that the same basic material is used to manufacture those goods. If the Board of Appeal found itself compelled to mention, at paragraph 21 of the contested decision, the materials used to manufacture those goods, it was only because the trade mark application defined the goods it covered not so much according to their nature, which is potentially very wide-ranging ('system components and as end use application'), as according to their constituent material ('foam').

55 Accordingly, the Board of Appeal was right to state, at paragraph 21 of the contested decision, that the description of the goods covered by the trade mark application and that of the goods covered by the earlier mark overlap with each other and therefore to find that the goods covered by the marks are similar, if not identical, within the meaning of Article 8(1)(b) of Regulation No 40/94.

56 With regard, thirdly, to the comparison of the marks, the Board of Appeal found that they are similar, particularly from the point of view of the relevant non-English-speaking public (paragraph 23 of the contested decision).

57 As regards, firstly, the conceptual comparison of the marks, the Board of Appeal stated that, considered in their entirety, they were fanciful constructions that did not convey any coherent meaning and were therefore not suitable for conceptual comparison (paragraph 18 of the contested decision). Nevertheless, the Board of Appeal considered that, of all the consumers of the goods in question, only English-speaking consumers were likely automatically to separate the suffix 'foam', an English word, within the conflicting marks (paragraph 13 of the contested decision).

58 The applicant claims, in essence, that there is not conceptual similarity between the marks. To that end, it maintains that as the suffix 'foam' is perceived automatically by the whole of the relevant public as being purely descriptive of the goods, that public will not pay attention to that suffix but will concentrate on the first components of the marks, 'arma' and 'noma', which, if not devoid of meaning, are at least devoid of any conceptual similarity in any Community language.

59 With regard to non-English-speaking consumers, OHIM and the intervener agree with the Board of Appeal that a conceptual comparison is not necessary. As for English-speaking consumers, OHIM considers that the fact that they are able to identify the English word 'foam' in the conflicting marks is not sufficient for it to be possible to conclude that there is a conceptual similarity. For its part, the intervener considers that a relative conceptual similarity between the marks can be inferred from that fact.

60 The Court considers that the Board of Appeal's assessment is well founded, at the very least as far as non-English-speaking consumers are concerned, in relation to whom it is not necessary to make a conceptual comparison of the marks. The applicant's submission that non-English-speaking consumers will, in the same way as their English-speaking counterparts, automatically identify the suffix 'foam', an English word, and understand its meaning and therefore identify it as descriptive of the goods covered by the marks, is manifestly wrong. Nor, moreover, is that submission substantiated by evidence in the file.

61 With regard to the visual and phonetic comparison of the marks, the Board of Appeal concluded, in essence, that there are great similarities as far as the non-English-speaking public is concerned (paragraphs 11 to 19 of the contested decision). It noted that the marks have six letters and three syllables in common out of a total of eight letters, each mark having four syllables, and that, although placed at the beginning of the marks, the prefixes 'ar' and 'no' are not liable to call into question the visual and phonetic similarity of those marks. The intervener and OHIM share that view.

62 As far as the English-speaking public is concerned, the Board of Appeal considered that the descriptive nature of the suffix 'foam' is more liable than not to increase the overall visual and phonetic similarity of the marks for that public (paragraphs 16 and 17 of the contested decision). OHIM considers, on the other hand, that the descriptive nature of that suffix would lead that public to focus on the first components of the marks, 'arma' and 'noma', which are sufficiently differentiated.

63 The applicant maintains that, on account of their position at the beginning of the marks, the prefixes 'ar' and 'no' clearly differentiate those marks visually and phonetically. It also claims that the prefixes 'arma' and 'noma', which, in its view, are the dominant components of the marks, are clearly visually and phonetically differentiated.

64 The Court finds that the only visual and phonetic differences between the marks that can objectively be detected by the non-English-speaking public derive from the prefixes 'ar' and 'no'.

65 Admittedly, the first component of word marks may be more likely to catch the consumer's attention than the following components (see, to that effect, 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 81, and Case T-112/03 *L'Oréal* v *OHIM — Revlon (FLEXI AIR)* [2005] ECR II-949, paragraphs 64 and 65). However, that consideration cannot apply in all cases (see, to that effect, Case T-292/01 *Phillips-Van Heusen* v *OHIM — Pash Textilvertrieb und Einzelhandel (BASS)* [2003] ECR II-4335, paragraph 50, and Case T-117/02 *Grupo El Prado Cervera* v *OHIM — Héritiers Debuschewitz (CHUFAFIT)* [2004] ECR II-2073, paragraph 48). It cannot, in any event, undermine the principle expressed in the case-law cited at paragraphs 29 to 32 above that the examination of the similarity between the marks must take account of the overall impression given by them, since the average consumer normally perceives a mark as a whole and does not examine its individual details.

66 In the present case, the Court agrees with the Board of Appeal, the intervener and OHIM that, for the non-English-speaking public, the difference between the prefixes 'ar' and 'no', despite their position at the beginning of the marks, is unlikely to remove the impression of great visual and phonetic similarity given by those marks, which arises both from the fact that they are identical in length (each having eight letters and four syllables) and from the fact that, setting aside the abovementioned difference, those marks are absolutely identical both visually (six letters in the same order: 'm', 'a', 'f', 'o', 'a', 'm') and phonetically ('ma', 'fo', 'am').

67 It follows that, visually and phonetically, the marks are similar, at the very least as far as the non-English-speaking public is concerned. Accordingly, and taking account of the fact that, for that public, a conceptual comparison of those marks is irrelevant, it must be concluded that, for those people, the marks are similar.

68 In the light of that conclusion and the case-law cited at paragraph 33 above, according to which earlier Community trade marks may be relied on in opposition to any subsequent application to register a trade mark which infringes their protection, even if it does so only in the perception of the consumers of part of the Community, it must be held that the Board of Appeal was right to consider, at paragraph 19 of the contested decision, that the conflicting marks are similar within the meaning of Article 8(1)(b) of Regulation No 40/94, and it is not necessary to determine whether those marks are also similar for the English-speaking public.

69 It follows from the foregoing that the single plea of annulment alleging infringement of Article 8(1)(b) of Regulation No 40/94 must be dismissed as unfounded. The action must therefore be dismissed.

Costs

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

On those grounds,

THE COURT OF FIRST INSTANCE (Fifth Chamber)

hereby:

1. **Dismisses the action;**

2. **Orders Armacell Enterprise GmbH to bear its own costs and to pay those incurred by the Office for Harmonization in the Internal Market (Trade Marks and Designs) and nmc SA.**

Vilaras Dehousse Šváby

Delivered in open court in Luxembourg on 10 October 2006.

E. Coulon M. Vilaras

Registrar President