JUDGMENT OF THE COURT OF FIRST INSTANCE (Third Chamber)

18 June 2008*

In Case T-175/06,

The Coca-Cola Company, established in Atlanta, Georgia (United States), represented by E. Armijo Chávarri and A. Castán Pérez-Gómez, lawyers,

applicant,

v

Office for Harmonisation in the Internal Market (Trade Marks and Designs) (OHIM), represented by O. Montalto and L. Rampini, acting as Agents,

defendant,

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

* Language of the case: Italian.

San Polo Srl, established in Montalcino (Italy), represented by G. Casucci and F. Luciani, lawyers,

ACTION brought against the decision of the First Board of Appeal of OHIM of 5 April 2006 (Case R 99/2005-1) concerning opposition proceedings between The Coca-Cola Company and San Polo Srl,

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

composed of J. Azizi (Rapporteur), President, E. Cremona and S. Frimodt Nielsen, Judges,

Registrar: J. Palacio González, Principal Administrator,

having regard to the application lodged at the Registry of the Court of First Instance on 29 June 2006,

having regard to the response of OHIM lodged at the Registry of the Court of First Instance on 5 February 2007,

having regard to the response of the intervener lodged at the Registry of the Court of First Instance on 25 January 2007,

further to the hearing on 22 January 2008,

gives the following

Judgment

Background

1 On 31 May 2001, the intervener — Azienda Agricola San Polo Exe Srl, now San Polo Srl — filed an application for a Community trade mark with the Office for Harmonisation 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 The mark for which registration was sought is the following figurative mark:



3 The goods in respect of which registration was sought fall within Class 33 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 ('the Nice Agreement'), and correspond to the following description: 'Wines'.

4 The Community trade mark application was published in *Community Trade Marks Bulletin* No 110/2001 of 24 December 2001.

5 On 25 March 2002, the applicant — The Coca-Cola Company — lodged an opposition against registration of the above mark, on the basis of Article 8(1)(b) and Article 8(5) of Regulation No 40/94.

6 That opposition was based on the likelihood of confusion between the mark applied for and the following earlier marks:

— the word mark MEZZO, registered in Austria on 28 November 1973, covering the following goods in Class 32: 'beers, ale and porter; mineral and aerated waters and other non-alcoholic drinks; syrups and other preparations for making beverages';

— the word mark MEZZOMIX, registered in Germany on 5 March 1975, covering the following goods in Class 32: 'mixed lemonade-based drinks'.

7 By decision of 30 November 2004, the Opposition Division upheld the opposition on the ground that there was a likelihood of confusion between the trade mark applied for and the Austrian trade mark MEZZO, in view of the similarity of the overall impression given by the signs in question and certain similarities between the beers and wines in question. The Opposition Division took the view that that analysis was a sufficient basis for refusing registration of the trade mark and that it was not therefore necessary to examine the opposition put forward on the basis of the German trade mark MEZZOMIX and its purported reputation.

8 On 27 January 2005, the intervener filed a notice of appeal with OHIM, pursuant to Articles 57 to 62 of Regulation No 40/94, against the decision of the Opposition Division.

9 By decision of 5 April 2006 ('the contested decision'), the First Board of Appeal upheld the intervener's application and annulled the decision of the Opposition

Division. According to the Board of Appeal, there was no likelihood of confusion within the meaning of Article 8(1)(b) of Regulation No 40/94 between the marks in question. Moreover, the Board of Appeal took the view that, since the Opposition Division had not ruled in its decision on the application of Article 8(5) of Regulation No 40/94, the case should be referred back to it for examination of that plea.

Forms of order sought

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

— grant the application and its annexes;

— declare that an appeal had been lodged against the contested decision within the time-limit and in the prescribed manner;

— annul the contested decision;

— order the defendant to pay the costs.

11 The defendant contends that the Court of First Instance should:

— dismiss the action;

— order the applicant to pay the costs.

12 The intervener contends that the Court should:

— dismiss the action;

— order the applicant to pay the costs.

Substance

1. *Preliminary observations*

13 At the hearing, the applicant confirmed that, in support of its action, it relied on a single plea, alleging infringement of Article 8(1)(b) of Regulation No 40/94.

14 In that respect, it should be noted that 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.

15 In addition, under Article 8(2)(a)(ii) of Regulation No 40/94, 'earlier trade marks' means trade marks registered in a Member State with a date of application for registration which is earlier than the date of application for registration of the Community trade mark.

16 It is settled case-law that the risk that the public may 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 (see Case T-162/01 *Laboratorios RTB* v *OHIM — Giorgio Beverly Hills (GIORGIO BEVERLY HILLS*) [2003] ECR II-2821, paragraph 30 and the case-law cited).

17 According to that same case-law, the likelihood of confusion must be assessed globally, according to the perception that the relevant public has of the signs and the goods or services at issue, account being taken of all factors relevant to the circumstances of the case, in particular the interdependence of the similarity between the signs and the similarity between the goods or services covered (see *GIORGIO BEVERLY HILLS*), paragraphs 31 to 33 and the case-law cited).

18 Further, according to settled case-law, the global assessment of the likelihood of confusion, as far as concerns the visual, phonetic or conceptual similarity of the opposing signs, must be based on the overall impression given by the signs, bearing in mind, inter alia, their distinctive and dominant components (see Order in Case C-3/03 P *Matratzen Concord* v *OHIM* [2004] ECR I-3657, paragraph 29; see, by analogy, Case C-251/95 *SABEL* [1997] ECR I-6191, paragraph 23; and Case C-342/97 *Lloyd Schuhfabrik Meyer* [1999] ECR I-3819, paragraph 25).

19 Even where a mark is identical to another with a highly distinctive character, it is still necessary to adduce evidence of similarity between the goods or services covered, because a likelihood of confusion within the meaning of Article 8(1)(b) of Regulation No 40/94 presupposes that the goods or services covered are identical or similar

(Order of 9 March 2007 in Case C-196/06 P *Alecansan* v *OHIM*, not published in the ECR, paragraph 24; see, by analogy, Case C-39/97 *Canon* [1998] ECR I-5507, paragraph 22).

20 It is in the light of those principles that it is necessary to analyse the various arguments put forward by the parties.

21 Prior to that analysis, the Court notes that the earlier marks on which the opposition is based are registered in Austria and Germany and cover staple goods. Accordingly, as the Board of Appeal rightly considered, without being challenged on that point by the parties, the targeted public by reference to which the likelihood of confusion must be assessed is composed of average consumers in those Member States (see, to that effect, *GIORGIO BEVERLY HILLS*, cited in paragraph 16 above, paragraph 34). The assessment of the meaning of the marks in question must therefore take account of the German-language context.

2. *Comparison of the signs in question*

Arguments of the parties

22 The applicant maintains that the conflicting marks are unquestionably visually similar, since the 'mezzo' element in the earlier marks is also the first element in the mark applied for: MEZZOPANE. It recalls in that connection the case-law relied on in the contested decision to the effect that the attention of the consumer is usually directed to the first part of the distinctive sign (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 83).

23 Further, the applicant considers that the 'mezzo' element is particularly arresting visually on account of the two letters 'z' in the middle of the word. In the mark applied for, the visually arresting nature of the word element is enhanced by the very finely-drawn frame enclosing it, which makes it look like a label.

24 Finally, the applicant states that all three marks in question are written in the same way, without any special script, design or font.

25 As regards phonetic similarity, the applicant argues that the fact that the marks in question are not made up of the same number of syllables does not prevent them from being phonetically similar. According to the applicant, there are clear phonetic similarities if account is taken of the fact that the pronunciation and the rhythm of the first two syllables of the mark applied for ('mez' and 'zo') and the two syllables making up the Austrian mark ('mez' and 'zo') are the same. According to the applicant, those considerations are also valid with regard to the comparison between the MEZZOMIX mark and the mark applied for, MEZZOPANE. Finally, the applicant states that, in the German pronunciation of those two trade marks, the accent is placed on the first two syllables. Because of its particular sound (centred around the two 'z's), the word element 'mezzo' dominates the word elements 'pane' and 'mix'.

26 As regards conceptual similarity, the applicant agrees with the Board of Appeal that the signs in question have no meaning in German. That factor cannot therefore play a role in distinguishing the marks in question, one from the other.

27 Moreover, the applicant states that it has previously been held that, where one of the two terms which alone constitute a word mark is identical, both visually and phonetically, to the single term which constitutes an earlier word mark and where those terms, taken together or in isolation, have no conceptual meaning for the public concerned, the marks at issue, each considered as a whole, are normally to be regarded as similar (Case T-286/02 *Oriental Kitchen* v *OHIM — Mou Dybfrost (KIAP MOU)* [2003] ECR II-4953, paragraph 39, and Case T-22/04 *Reemark* v

OHIM — Bluenet (Westlife) [2005] ECR II-1559, paragraphs 37 to 40). Accordingly, that case-law confirms the similarity between the MEZZO and MEZZOPANE trade marks.

28 The defendant and the intervener dispute that the Board of Appeal erred in its assessment of the similarities and differences between the marks in question.

Findings of the Court

Introduction

29 In the light of the case-law reproduced in paragraph 18 above, it is necessary to determine whether or not the overall impression given by the signs in question following a comparison of the visual, phonetic and conceptual levels, as found by the Board of Appeal, is incorrect.

Visual comparison

30 As regards the visual comparison, the Board of Appeal took the view that there were both points of similarity and differences between the marks in question. According to the Board of Appeal, the similarities reside in the element 'mezzo', which corresponds to the earlier Austrian mark and which is also the first part of the mark applied for (MEZZOPANE) and the earlier German mark (MEZZOMIX). The Board of Appeal states that, having regard to mezzo's position *ad initium*, it has a greater impact than the second part of the mark applied for or the remainder of the German

mark. As regards visual differences, the Board of Appeal takes the view that the 'pane' suffix makes the mark applied for longer than the Austrian mark and differentiates it from the German mark.

31 The Court considers that that assessment must be accepted. So far as concerns the comparison between the earlier German mark (MEZZOMIX) and the mark applied for (MEZZOPANE), it should be recalled that consumers generally take more note of a word's beginning than of its ending (see, to that effect, *MUNDICOR*, cited in paragraph 22 above, paragraph 81, and Case T-112/03 *L'Oréal* v *OHIM — Revlon (FLEXI AIR)* [2005] ECR II-949, paragraphs 64 and 65). However, that cannot be true in all cases (see, to that effect, Case T-117/02 *Grupo El Prado Cervera* v *OHIM — Héritiers Debuschewitz (CHUFAFIT)* [2004] ECR II-2073, paragraph 48, and judgment of 16 May 2007 in Case T-158/05 *Trek Bicycle* v *OHIM — Audi (ALLTREK)* [2007], not published in the ECR, paragraph 70).

32 In the present case, it is correct that the 'mezzo' element of the MEZZOMIX and MEZZOPANE marks particularly captures the attention of the relevant consumer owing to its position at the beginning of the marks. However, that heightened attention does not prevent the relevant consumer from perceiving the 'mix' element of the earlier German mark, a word well known to German-speaking consumers, or the 'pane' element of the MEZZOPANE mark.

33 Consequently, while the Board of Appeal correctly considered that, owing to its position *ad initium,* the 'mezzo' element had a greater impact than the rest of the mark applied for, the Board of Appeal was also correct to consider that the 'pane' suffix of the mark applied for and the 'mix' suffix of the early German mark serve to distinguish the marks, one from the other.

34 So far as concerns the comparison between the earlier Austrian mark (MEZZO) and the mark applied for (MEZZOPANE), it must also be acknowledged that there is a measure of similarity between those marks. As was appropriate with regard to the comparison between the MEZZOMIX and MEZZOPANE marks, it must be conceded that, owing to its position *ad initium*, the 'mezzo' element particularly captures the attention of the relevant consumer. However, it must also be stated that

the 'pane' element of the mark applied for distinguishes the latter from the earlier Austrian mark, MEZZO.

35 The applicant again argues that (i) the 'mezzo' element is particularly arresting on account of the two 'z's at the centre of the sign; (ii) the word element in the mark applied for is accentuated by means of the finely-drawn frame enclosing it; and (iii) the script used in the marks at issue is uniform. Those assessments by the applicant are correct. Nevertheless, they cannot call into question the Board of Appeal's assessment in the contested decision.

36 Specifically, as regards the two 'z's at the centre of the element 'mezzo', it is true that they are unusual in German and therefore confer a visual specificity which accentuates the similarity between the marks in question. However, they do not eclipse the differences between the marks at issue in the light of the 'pane' ending of the mark applied for. As regards the fact that the word element 'mezzopane' is accentuated by the graphic element, it should be pointed out that the contested decision took that factor into account. Contrary to the applicant's interpretation, that accentuation of the word element does not enable it to be concluded that there is a greater similarity between the mark applied for, MEZZOPANE, and the earlier marks, MEZZO and MEZZOMIX, than that found by the Board of Appeal. While, on the one hand, the finely-drawn 'label' serves to accentuate the word 'mezzopane', on the other hand, it serves to distinguish the mark applied for from the earlier marks. As regards the uniformity of the marks at issue in terms of the identical script used, that does not give rise to similarity over and above that recognised by the Board of Appeal. That point of similarity does not completely eclipse the differences between the marks at issue, having regard to the frame around the mark applied for, MEZZOPANE, and the differences between the term 'mezzopane', on the one hand, and the terms 'mezzo' and 'mezzomix', on the other (see paragraphs 31 to 35 above).

37 The Court therefore considers that the Board of Appeal was not wrong to take the view that, in the present case, there are both similarities and differences at the visual level between the mark applied for and the earlier marks. Accordingly, it must be recognised that the visual similarity between the mark applied for, MEZZOPANE, and the earlier marks, MEZZO and MEZZOMIX, is average.

Phonetic comparison

38 As regards the phonetic comparison, the Board of Appeal considered that, although the marks in question have a different syllabic structure and therefore a different sound rhythm, they are phonetically identical so far as concerns the element 'mezzo.'

39 That assessment of the Board of Appeal must be accepted. It is correct that the marks at issue are phonetically identical as regards the element 'mezzo'. However, the mark applied for (MEZZOPANE) differs from both the earlier marks (MEZZO and MEZZOMIX) in its syllabic structure and its sound rhythm. Further, although it must be acknowledged that the relevant consumer in the present case will stress the first syllable of the signs at issue, in line with German pronunciation, that does not, however, eclipse the phonetic differences between the mark applied for and the earlier marks, owing to the final syllables 'pa' and 'ne' of the mark applied for. Those final syllables add a different sound to the mark applied for as compared with the earlier Austrian mark. In addition, as compared with the earlier German mark, the final syllables 'pa' and 'ne' of the mark applied for contrast with the final syllable 'mix' of the earlier German mark.

40 The applicant claims, however, that because of its particular resonance centred on the double 'z', the 'mezzo' sound will dominate, prevailing over the aural elements 'pane' and 'mix'. In that regard, the Court considers that it has not been proved that — at least in German — the double 'z' of 'mezzo' lends that term a particular aural resonance for the relevant public. Thus, the applicant's argument that that aural resonance leads the relevant public to think that the sound 'mezzo' prevails over the aural elements 'pane' and 'mix' is unfounded.

41 The Court considers, accordingly, that the Board of Appeal did not err in recognising that, phonetically, there are both similarities and differences between the mark applied for and the earlier marks. It must therefore be recognised that the phonetic

similarity between the mark applied for (MEZZOPANE) and the earlier marks (MEZZO and MEZZOMIX) is average.

Conceptual comparison

42 The Board of Appeal took the view that it was not possible to compare the conflicting signs conceptually, given that, as a whole, they have no meaning.

43 In that regard, it must be stated that, for the relevant public, the terms 'mezzo', 'mezzomix' and 'mezzopane' do not have any particular significance since those terms have no meaning in German. Consequently, it is not possible to establish any conceptual similarity between MEZZOPANE and MEZZO, or between MEZZOPANE and MEZZOMIX. That assessment cannot be called into question by the fact, relied on by the intervener, that the word 'mix' can be understood by the relevant public as designating a mixture. Even if the relevant public were to understand the term 'mezzomix' as designating a mixture of 'mezzo', the fact remains that the word 'mezzopane' has no meaning in German, so that there cannot be any conceptual similarity between MEZZOPANE, on the one hand, and MEZZOMIX, on the other. That is true *a fortiori* because the term 'mezzopane' comprises not only the 'mezzo' element, but also the 'pane' element, and neither of those elements, even taken separately, has any conceptual meaning in German.

Conclusion

44 In the light of all of the preceding factors, it must be recognised that, according to a global assessment of the signs in question, the similarity between them is average. Notwithstanding the element common to those three signs — the term 'mezzo' — the

signs differ, one from the other, with regard to the term 'mix' in the earlier German mark and the term 'pane' in the mark applied for. On balance, those considerations taken together reveal an average similarity between those signs.

45 That assessment cannot be called into question by the case-law relied on by the applicant to the effect that, prima facie, where one of the two terms which alone constitute a word mark is identical, both visually and aurally, to the single term which constitutes an earlier word mark, and where those terms, taken together or in isolation, have no conceptual meaning for the public concerned, the marks at issue, each considered as a whole, are normally to be regarded as similar within the meaning of Article 8(1)(b) of Regulation No 40/94 (*KIAP MOU*, cited above in paragraph 27, paragraph 39, and *Westlife*, cited above in paragraph 27, paragraph 37).

46 In the first place, the application of that case-law can result only in a preliminary analysis. Consequently, it cannot exclude a supplementary analysis in order to ensure that the likelihood of confusion between the marks in question is fully assessed. Secondly, that case-law relates to the comparison between two word marks. In the present case, however, the MEZZOPANE mark is a figurative mark and, in consequence, the relevance of that case-law to the present case is relative. Finally, it must be borne in mind, as stated above, that there is a measure of similarity in the present case between the mark applied for, MEZZOPANE, and the earlier marks, MEZZO and MEZZOMIX, which, in any event, must be acknowledged.

47 The Court considers, therefore, that the case-law reproduced in paragraph 45 above cannot call into question the conclusion set out in paragraph 44 above.

3. *Comparison between the goods in question*

Arguments of the parties

48 The applicant challenges the assessment carried out by the Board of Appeal of the similarities and differences between the goods covered by the marks at issue.

49 So far as concerns the comparison between the wines covered by the mark applied for and the beers, ale and porter to which the MEZZO mark refers, the applicant considers that (i) the goods are of the same kind: alcoholic beverages; (ii) the goods at issue have the same intended purpose: human consumption; (iii) the goods are used in a similar way by consumers: to accompany a meal or as an aperitif; (iv) those goods are aimed at the same public: end consumers; (v) they are goods marketed in the same form: in bottles; (vi) the goods are distributed through the same channels: bars, restaurants, supermarkets, hypermarkets, and so on; and it is usual to place them side by side in those outlets and they appear side by side on menus in restaurants and so on; (vii) the advertising of those goods is carried out by the same means: television, radio, magazines and so on; (viii) the goods are, to a certain extent, competing goods: a consumer may choose to drink wine or beer with his meals, as an aperitif, and so on.

50 The applicant maintains that those points common to the goods in question — combined with the fact that identical or similar signs are affixed to the goods in order to market them — are such as to make the targeted public believe that those goods have been produced under the control of a single undertaking which is responsible for their quality (see, by analogy, *Canon*, cited above, paragraph 28).

51 According to the applicant, those considerations are not invalidated by the fact that the goods in question are different as regards their ingredients and their methods of production.

52 First, the applicant considers that it is incorrect to state that the ingredients and production methods of beers and wines are different. It notes that wine and beer are both alcoholic beverages and that beer is obtained through the fermentation of barley, whereas wine is obtained through the fermentation of crushed grapes.

53 Secondly, the applicant considers that the difference in composition of wine and beer does not prevent those beverages from being interchangeable in so far as they are intended to satisfy the same need.

54 Thirdly, the applicant argues that, even if the relevant public were aware, and noticed the characteristics distinguishing those goods as regards their composition and method of production, it would not draw the inference — rightly or wrongly — that those differences prevent the same undertaking from producing or marketing the two types of beverages at the same time. According to the applicant, the points of similarity listed in paragraph 49 above prevail over the only two factors differentiating the goods, as relied on by the Board of Appeal; particularly because the Board of Appeal did not provide any objective information capable of substantiating its claim that the average Austrian consumer considers it normal for wines and beers to come from different undertakings.

55 The applicant maintains that those considerations also apply to the comparison between the wines covered by the mark applied for and the mixed lemonade-based drinks to which the MEZZOMIX mark refers. It states that the latter could include alcoholic beverages, which would make them capable of replacing wine.

56 According to the applicant, those considerations can be extended, albeit to a lesser extent, to the other goods covered by its MEZZO mark, namely mineral and aerated waters and other non-alcoholic drinks, syrups and other preparations for making beverages. Even if alcoholic beverages are not expressly included in that category, the applicant maintains that the relevant public may see them as belonging to the same family of goods. A priori, there is nothing to prevent 'preparations for making beverages' from being understood as including preparations for making alcoholic beverages, as well as non-alcoholic beverages.

57 The applicant states that its argument is consistent with that put forward by the Opposition Division in the decision which was annulled by the contested decision.

58 Finally, the applicant cites Case T-99/01 *Mystery Drinks* v *OHIM — Karlsberg Brauerei (MYSTERY)* [2003] ECR II-43, paragraph 40, in which the Court acknowledged the similarity of drinks on the basis of their common nature, intended purpose and marketing, despite the differences between their ingredients and methods of production. Likewise, in Case T-203/02 *Sunrider* v *OHIM — Espadafor Caba (VITAFRUIT)* [2004] ECR II-2811, paragraphs 66 and 67, similarity was recognised between, on the one hand, 'mineral and aerated waters and other non-alcoholic drinks; fruit and vegetable drinks, fruit juices; syrups and other preparations for making beverages; herbal and vitamin beverages' and, on the other, 'concentrated fruit juices'.

59 The applicant concludes that there is an obvious similarity between the goods covered by the conflicting marks.

60 The defendant and the intervener contest the applicant's assessment and consider, essentially, that the Board of Appeal made a fair assessment of the likelihood of confusion between the goods in question.

Findings of the Court

Introduction

61 In order to assess the similarity between the goods in question, account must be taken of all the relevant factors which characterise the relationship between those goods. Those factors include, inter alia, their nature, their end-users and their method of use and whether they are in competition with each other or are complementary (see, by analogy, *Canon*, cited above in paragraph 19, paragraph 23).

62 In the present case, it is necessary to compare (i) the wines covered by the mark applied for, MEZZOPANE, and the 'beers, ale and porter; mineral and aerated waters and other non-alcoholic drinks; syrups and other preparations for making beverages' covered by the earlier Austrian mark, MEZZO, and (ii) the wines covered by MEZZOPANE and the mixed lemonade-based drinks covered by the earlier German mark, MEZZOMIX.

Comparison between wine and beer

63 So far as concerns, first, the nature, end-users and method of use of wines and beers, ale and porter, it is correct, as argued by the applicant, that those goods constitute alcoholic beverages obtained by a fermentation process and consumed during a meal or drunk as an aperitif.

64 However, it must be stated — as did the Board of Appeal — that the basic ingredients of those beverages do not have anything in common. Alcohol is not an ingredient used in the production of those beverages, but is one of the constituents generated by that production. Moreover, although the production of each of those beverages

requires a fermentation process, their respective methods of production are not limited to fermentation and are fundamentally different. Thus, crushing grapes and pouring the must into barrels cannot be assimilated to the brewing processes of beer.

65 Moreover, the fact that beer is obtained through the fermentation of malt, whereas wine is produced through the fermentation of the must of grapes, means that the end products generated differ in colour, aroma and taste. That difference in colour, aroma and taste leads the relevant consumer to perceive those two products as being different.

66 In addition, despite the fact that wine and beer may, to a certain extent, satisfy the same need — enjoyment of a drink during a meal or as an aperitif — the Court considers that the relevant consumer perceives them as two distinct products. The Board of Appeal was therefore correct to consider that wines and beers do not belong to the same family of alcoholic beverages.

67 As regards, next, the complementary nature of wine and beer as referred to in the case-law cited in paragraph 61 above, it should be borne in mind that complementary goods are goods which are closely connected in the sense that one is indispensable or important for the use of the other (see Case T-169/03 *Sergio Rossi* v *OHIM — Sissi Rossi (SISSI ROSSI)* [2005] ECR II-685, paragraph 60). In the present case, the Court considers that wine is neither indispensable nor important for the use of beer and vice versa. There is indeed nothing to support the conclusion that a purchaser of one of those products would be led to purchase the other.

68 As to whether wine and beer are in competition with each other, it has previously been held, in a different context, that there is a degree of competition between those

goods. The Court of Justice thus considered that wine and beer are, to a certain extent, capable of meeting identical needs, which means that a certain measure of mutual substitutability must be acknowledged. Nevertheless, the Court of Justice pointed out that, in view of the significant differences in quality — and, accordingly, in price — between wines, the decisive competitive relationship between wine and beer, a popular and widely consumed beverage, must be established by reference to those wines which are the most accessible to the public at large, that is to say, generally speaking, the lightest and least expensive varieties (see, by analogy, Case 356/85 *Commission* v *Belgium* [1987] ECR 3299, paragraph 10; see also, Case 170/78 *Commission* v *United Kingdom* [1983] ECR 2265, paragraph 8; and Case C-166/98 *Socridis* [1999] ECR I-3791, paragraph 18). There appears to be nothing to indicate that that assessment does not also apply in the present case. Accordingly, it must be acknowledged, as the applicant indicates, that wine and beer are, to a certain extent, competing goods.

69 Finally, in accordance with the Board of Appeal's assessment, it must be accepted that the average Austrian consumer will consider it normal for wines, on the one hand, and beers, ale and porter, on the other, to come from different undertakings — and will therefore expect this — and that those beverages do not belong to the same family of alcoholic beverages. There is nothing to suggest that the Austrian public is not aware, and does not notice the characteristics distinguishing beer and wine as regards their composition and method of production. On the contrary, the Court considers that those differences are perceived as making it unlikely that the same undertaking would produce and market the two types of beverage at the same time. For the sake of completeness, it should be noted that it is well known that, in Austria, there is a tradition of producing both beer and wine, and that this is done by different undertakings. Consequently, the average Austrian consumer expects beers, ale and porter, on the one hand, and wines on the other, to come from different undertakings.

70 In the light of all of the preceding factors, the Court considers that, for average Austrian consumers, there is little similarity between wines and beers.

Comparison between the wine covered by the mark applied for and the beverages — other than beers — covered by the earlier marks

— Introduction

71 So far as concerns the comparison between, on the one hand, the wine covered by the mark applied for (MEZZOPANE) and, on the other, the 'mineral and aerated waters and other non-alcoholic drinks; syrups and other preparations for making beverages' covered by the earlier mark, MEZZO, and the 'mixed lemonade-based drinks' covered by the earlier mark, MEZZOMIX, it is necessary first to determine whether the goods covered by the earlier marks at issue include both non-alcoholic beverages and alcoholic beverages.

72 In that regard, the Board of Appeal considered — as does the applicant — that the beverages covered by the earlier marks could contain alcoholic beverages other than beers. The defendant challenges that assessment on the ground that it is contrary both to the systematic nature of the classification of the goods in Classes 32 and 33 to which the goods in question belong and to the explanatory notes to the list of the classes of goods and services of the Nice Agreement (the 'explanatory notes').

73 The 'mineral and aerated waters and other non-alcoholic drinks; syrups and other preparations for making beverages' covered by the MEZZO mark and the 'mixed lemonade-based drinks' covered by the MEZZOMIX mark were registered in Class 32.

74 However, according to the clear and unambiguous wording of Class 33, that class includes all alcoholic beverages with the sole exception of beers. Consequently, the mere fact that, in Class 32, the words 'non-alcoholic' do not refer expressly to 'fruit

drinks and fruit juices' and 'syrups and other preparations for making beverages' has no bearing on the question whether or not that class could contain alcoholic products other than beer. Not only does the wording of Class 33 leave no scope for interpreting it other than as including all alcoholic beverages except for beers but, in addition, the explanatory notes to Classes 32 and 33 support the interpretation that Class 33 includes all alcoholic beverages except beers. According to the explanatory note to Class 33, as soon as an alcoholic beverage is 'de-alcoholised', it is taken out of Class 33 and is included in Class 32. The explanatory note to Class 32 confirms that by stating that it includes 'de-alcoholised' drinks.

75 Consequently, the general description set out in the explanatory note to Class 32 to the effect that it includes 'mainly' non-alcoholic beverages must be read in a manner consistent with the wording of Class 33. Accordingly, the beginning of the explanatory note to that class and the other clarification in the explanatory note to Class 32 must be read as meaning that Class 32 includes, in principle, only non-alcoholic drinks and preparations, with beers being the sole exception to the non-alcoholic nature of beverages included in that class.

76 That assessment is not called into question by the case-law resulting from Case T-296/02 *Lidl Stiftung* v *OHIM — REWE Zentral (LINDENHOF)* [2005] ECR II-563, since that judgment only acknowledges the theoretical possibility that fruit drinks and fruit juices could be regarded as including alcoholic drinks, without systematically interpreting Classes 32 and 33. Moreover, in *LINDENHOF* it was considered that the terms 'fruit juice drinks' and 'fruit juices' were reserved to products without alcohol (paragraph 53 of the judgment).

77 Thus, the 'mineral and aerated waters and other non-alcoholic drinks; syrups and other preparations for making beverages' covered by the earlier mark, MEZZO, and the 'mixed lemonade-based drinks' covered by the earlier mark, MEZZOMIX, belonging to Class 32, must be regarded as including only products without alcohol.

78 It is in the light of that clarification that an analysis must be made of the likelihood of confusion between, on the one hand, the wine covered by the MEZZOPANE mark and, on the other, the 'mineral and aerated waters and other non-alcoholic drinks; syrups and other preparations for making beverages' covered by the earlier mark, MEZZO, and the 'mixed lemonade-based drinks' covered by the earlier mark, MEZZOMIX.

— Comparison between wine, on the one hand, and mineral and aerated waters and other non-alcoholic drinks, syrups and other preparations for making beverages and mixed lemonade-based drinks, on the other

79 First, as regards the nature, end-users and method of use of the wine covered by the mark applied for and the non-alcoholic beverages covered by the earlier marks, it must be observed that the very nature of those goods differs in terms of the presence or absence of alcohol.

80 In that respect, it has already been held that the average German consumer is used to and aware of the distinction between alcoholic and non-alcoholic drinks, which is, moreover, necessary, since some consumers do not wish to — or cannot — consume alcohol (*LINDENHOF*, cited above in paragraph 76, paragraph 54). Accordingly, the average German consumer will make that distinction when comparing the wine covered by the mark applied for and the non-alcoholic beverages covered by the earlier mark, MEZZOMIX.

81 The applicant has put forward nothing which would give grounds for stating that that assessment is not also true of the average Austrian consumer. It must be considered that the latter is also used to and aware of the distinction between alcoholic and non-alcoholic drinks. It follows that the average Austrian consumer will make that distinction when comparing the wine covered by the mark applied for and the non-alcoholic beverages covered by the earlier mark, MEZZO.

82 The Board of Appeal was therefore correct to take the view that 'wines [were] alcoholic beverages and, as such, clearly distinct from the goods covered by the earlier

MEZZO mark, both in shops and drinks menus' and that, in the present case, 'the average consumer [was] used to the distinction between alcoholic and non-alcoholic drinks, and such a distinction [was] necessary, since some consumers [did] not wish to or [could] not consume alcohol'.

83 In respect of the end-users and method of use of wine and non-alcoholic beverages, they overlap in part. The consumption of wine does not rule out the consumption of non-alcoholic beverages and vice versa, but the consumption of one of those beverages does not necessarily lead to consumption of the other. Moreover, wine is generally intended to be savoured and is not designed to quench thirst, whereas the non-alcoholic beverages covered by the earlier marks are generally intended to quench thirst, indeed exclusively to do so in the case of mineral and aerated waters. For the relevant consumer, the presence or absence of alcohol and the difference in taste between wine and the other, non-alcoholic, beverages covered by the earlier marks outweigh the fact that the end-users and method of use are the same.

84 Secondly, as regards the complementary nature of the goods in question within the meaning of the case-law cited in paragraphs 61 and 67 above, it must be stated that there is no close link between those goods in the sense that the purchase of one is indispensable or important for the use of the other and there is nothing to support the conclusion that the purchaser of one of those types of products would be led to purchase the other.

85 Moreover, as regards the competing nature of the goods in question, the Court considers that the difference in taste and the difference owing to the presence or absence of alcohol have the result, in general, that an average German or Austrian consumer seeking to buy wine will not compare it with the non-alcoholic beverages covered by the earlier marks, but will buy either wine or one of those non-alcoholic beverages. In that sense, the Board of Appeal could legitimately consider that wine is not a beverage that is interchangeable with the beverages covered by the earlier marks.

86 That latter assessment is confirmed by the case-law resulting from *LINDENHOF*, cited above in paragraph 76, in which it was held that sparkling wines could not be considered to be in competition with non-alcoholic drinks given that sparkling wines were no more than an atypical replacement for non-alcoholic drinks (paragraph 56 of the judgment).

87 Finally, according to the same line of authority, the average German consumer will consider it normal for sparkling wines, on the one hand, and drinks denoted as 'mineral and aerated waters and other non-alcoholic drinks; fruit drinks and fruit juices', on the other, to come from different companies, and will therefore expect this (*LINDENHOF*, cited above in paragraph 76, paragraph 51). The Court added, specifically, that sparkling wines and the abovementioned drinks could not be regarded as belonging to the same family of beverages or even as items in a general range of drinks likely to have a common commercial origin (*LINDENHOF*, cited above in paragraph 76, paragraph 51).

88 That assessment can be transposed to the context of the present case. An average Austrian consumer confronted with wine covered by the mark applied for, MEZZOPANE, on the one hand, and non-alcoholic beverages covered by the MEZZO mark, on the other, or an average German consumer confronted with wine covered by MEZZOPANE, on the one hand, and non-alcoholic beverages covered by MEZZOMIX, on the other, will not expect those drinks to have the same commercial origin.

89 The Board of Appeal was right, therefore, to consider that the relevant consumer will not expect wines to come from the same undertaking as the non-alcoholic beverages covered by the earlier marks, and that those drinks cannot be regarded as items in a general range of drinks likely to have a common commercial origin.

90 In the light of all of those factors, the Court considers that wine, on the one hand, and the non-alcoholic products covered by the earlier marks, on the other, must be considered not to be similar.

91 That conclusion confirming the Board of Appeal's assessment cannot be called into question by the applicant's arguments to the effect that all those goods are served in restaurants and bars, sold in shops and bars side by side, sold in the form of bottles, intended for human consumption and with the same distribution and advertising channels. Those facts apply to almost all drinks, even the most varied (see, to that effect, *LINDENHOF*, cited above in paragraph 76, paragraph 58), and do not therefore suffice to show that, in the minds of average German and Austrian consumers, wine and the drinks covered by the earlier marks come from the same undertaking.

— *MYSTERY* and *VITAFRUIT* case-law

92 The *MYSTERY* and *VITAFRUIT* judgments relied on by the applicant, cited above in paragraph 58, do not affect the preceding assessments concluding that the goods in question are different.

93 In particular, the Court observes that, in the case giving rise to the judgment in *MYSTERY*, cited above in paragraph 58 (paragraphs 3 and 4), it was necessary to compare, on the one hand, non-alcoholic beverages, with the exception of non-alcoholic beer and, on the other, beer and beverages containing beer. Having regard to the difference between wine and beer (paragraphs 63 et seq. above), that comparison is not relevant to the comparison in the present case between wine, covered by MEZZOPANE, and non-alcoholic beverages, covered by the earlier marks, MEZZO and MEZZOMIX.

94 Specifically, in answer to the applicant's arguments that, in the case giving rise to the judgment in *MYSTERY*, cited above in paragraph 58, the Court acknowledged the similarity of drinks, notwithstanding the differences in their ingredients and methods of production, on the basis of their common nature, intended purpose

and marketing, it must be observed that, in that case, the Court considered that, in the minds of average German consumers, mixed beverages based on beer could be substituted for either beer or non-alcoholic beverages (*MYSTERY*, cited above in paragraph 58, paragraphs 37 and 40). However, the same degree of substitutability cannot be recognised in relation to the comparison, by the relevant German or Austrian consumer, of wine covered by the mark applied for, MEZZOPANE, and the beverages covered by the earlier marks, MEZZO and MEZZOMIX. For the reasons set out in paragraphs 66 et seq. above, it cannot be held that the relevant German or Austrian consumer can easily substitute wine for beer. In addition, for the reasons set out in paragraph 85 et seq. above, it cannot be held that the relevant German or Austrian consumer can substitute wine for the other, non-alcoholic, beverages covered by the earlier marks.

95 As regards the case giving rise to the judgment in *VITAFRUIT*, cited above in paragraph 58, relied on by the applicant, the Court stated that the question of similarity between the goods concerned only herbal and vitamin beverages, on the one hand, and fruit juices on the other (*VITAFRUIT,* cited above in paragraph 58, paragraph 64). That case certainly did not concern the comparison between wine and other beverages and therefore has no bearing on the comparison between the goods in question in the present case.

— Conclusion

96 In the light of all the preceding factors, the Board of Appeal's conclusion that the goods in question are not similar must be upheld.

4. *The global assessment of the likelihood of confusion*

Arguments of the parties

97 The applicant states that, in the global assessment of the likelihood of confusion, the average consumer only rarely has the opportunity to compare different trade marks directly and must rely on the imperfect picture which he has of them in his mind. It follows, according to the applicant, that particular importance should be given to the element 'mezzo' in the trade marks when comparing the signs in question.

98 Further, the applicant maintains that the fact that the MEZZOMIX trade mark is widely known in Germany calls for greater rigour — and stronger protection for that mark — when comparing it with the mark applied for. The applicant states, in that connection, that the reputation of the MEZZOMIX sign was expressly recognised by the intervener during the proceedings.

99 The applicant infers from the case-law resulting from *Canon*, cited above in paragraph 19 (paragraph 19), that even if the Court were to hold that the similarity between the goods covered by the trade marks in question is not obvious, that lack of similarity cannot outweigh the similarity between the marks and the distinctive character of the earlier mark, MEZZOMIX.

100 In conclusion, the applicant argues that the marks at issue have sufficient similarities from the point of view of their application and their visual and phonetic similarity to mean that they may be confused by the average Austrian or German consumer, who will usually perceive them as a whole, without taking time to worry about details, and who rarely has the opportunity to make a direct comparison between them. The applicant therefore maintains that there is a likelihood of confusion between the conflicting signs within the meaning of Article 8(1)(b) of Regulation No 40/94, making the contested decision unlawful.

101 The defendant and the intervener challenge that assessment and consider that an overall assessment of the likelihood of confusion between the mark applied for and the earlier marks indicates that there is no likelihood of confusion between them.

Findings of the Court

102 The global assessment of the likelihood of confusion implies a certain interdependence between the factors taken into account and, in particular, the similarity of the marks and the similarity of the goods or services covered. Thus, a low degree of similarity between the goods or services covered may be offset by a high degree of similarity between the marks and vice versa (see, by analogy, *Canon*, cited above in paragraph 19, paragraph 17, and *Lloyd Schuhfabrik Meyer*, cited above in paragraph 18, paragraph 19).

103 In addition, it has been held that the more distinctive the earlier mark, the greater the likelihood of confusion (*SABEL*, cited above in paragraph 18, paragraph 24). It has also been held that registration of a trade mark may have to be refused, despite a lesser degree of similarity between the goods or services covered, where the marks are very similar and the earlier mark, in particular its reputation, is highly distinctive (see, by analogy, *Canon*, paragraph 19).

104 In the present case, after making a global assessment of the likelihood of confusion, the Board of Appeal was of the opinion that, despite the visual and phonetic similarities between the signs at issue, there was no likelihood of confusion between those marks.

105 In particular, as regards the comparison between the mark applied for and the earlier Austrian mark, the Board of Appeal considered that, in the light of the average distinctive character of that earlier mark and the clear distance between the goods in question, there was no significant likelihood of confusion in the minds of the targeted public in Austria. As regards the comparison between the mark applied for and the earlier German mark, the Board of Appeal considered that, despite the reputation of the earlier German mark for mixed cola and lemonade drinks, the average German consumer does not believe that the wines covered by the mark applied for and the mixed lemonade-based drinks covered by the earlier German mark have the same origin. The Board of Appeal formed the opinion in the global assessment of the likelihood of confusion that the obvious differences between the goods in question had the consequence that the similarities between the marks in question were neutralised.

106 That assessment by the Board of Appeal is not incorrect. It is true that the relevant consumer will have only an imperfect picture of the marks in question in his mind, so that the common element between them — the element 'mezzo' — gives rise to similarity between them. Moreover, the uncontested reputation of the MEZZOMIX mark increases the likelihood of confusion between that earlier mark and the mark applied for, MEZZOPANE.

107 However, the Court holds that, in the present case, taking into account the interdependence of the different factors to be taken into consideration and the reputation of the earlier mark, MEZZOMIX, it cannot be held that there is a likelihood of confusion between, on the one hand, MEZZOPANE and, on the other, the earlier marks MEZZO and MEZZOMIX. The Court holds that, despite the reputation of MEZZOMIX, the lack of similarity between the goods in question, combined with the average similarity of the marks at issue from the visual and phonetic points of view and the absence of meaning of the marks at issue in German, prevents a likelihood of confusion in the mind of relevant consumers as to the commercial origin of the goods covered by MEZZOPANE, on the one hand, and the earlier marks, MEZZO and MEZZOMIX, on the other. The differences between the marks and the goods covered, set out respectively in paragraphs 29 et seq. and paragraphs 61 et seq. above, are sufficiently significant, considered overall, to exclude the possibility that the relevant public may believe that the wines covered by the mark applied for and the beers and other beverages covered by the earlier marks have a common origin,

even when the reputation of the earlier mark, MEZZOMIX, for mixed lemonade-based drinks is taken into account.

108 The Court therefore considers that the applicant wrongly inferred from the case-law resulting from *Canon*, cited above in paragraph 19, that in the present case the lack of similarity between the goods in question cannot outweigh the similarity between the marks in question and the distinctive character of the earlier mark, MEZZOMIX.

109 In the light of all of the preceding factors, the Court holds that the global assessment of the likelihood of confusion shows that there is no likelihood of confusion between the mark applied for and the earlier marks.

Costs

110 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.

111 In the present case, the applicant has been unsuccessful. The applicant must therefore be ordered to pay the costs of both the defendant and the intervener, as applied for by those parties.

On those grounds,

THE COURT OF FIRST INSTANCE (Third Chamber)

hereby:

1. Dismisses the action;

2. Orders The Coca-Cola Company to pay the costs.

Azizi Cremona Frimodt Nielsen

Delivered in open court in Luxembourg on 18 June 2008.

E. Coulon J. Azizi

Registrar President