

JUDGMENT OF THE GENERAL COURT (Third Chamber)

25 September 2018 (*)

(EU trade mark — Opposition proceedings — Application for EU word mark AKANTO — Earlier EU word mark KANTOS — Relative ground for refusal — Likelihood of confusion — Article 8(1)(b) of Regulation (EC) No 207/2009 (now Article 8(1)(b) of Regulation (EU) 2017/1001)

In Case T-182/17,

Novartis AG, established in Basel (Switzerland), represented by L. Junquera Lara, lawyer,

applicant,

v

European Union Intellectual Property Office (EUIPO), represented initially by P. Duarte Guimarães and J. Ivanauskas, and subsequently by J. Ivanauskas and D. Walicka, acting as Agents,

defendant,

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

Chiesi Farmaceutici SpA, established in Parma (Italy), represented by T. de Haan, P. Péters, and F. Folmer, lawyers,

ACTION brought against the decision of the First Board of Appeal of EUIPO of 9 January 2017 (Case R 531/2016-1) relating to opposition proceedings between Chiesi Farmaceutici and Novartis,

THE GENERAL COURT (Third Chamber),

composed of S. Frimodt Nielsen, President, V. Kreuschitz and N. Póltorak (Rapporteur), Judges,

Registrar: X. Lopez Bancalari, Administrator,

having regard to the application lodged at the Court Registry on 20 March 2017,

having regard to the response of EUIPO lodged at the Court Registry on 8 June 2017,

having regard to the response of the intervener lodged at the Court Registry on 2 June 2017,

further to the hearing on 17 April 2018,

gives the following

Judgment

Background to the dispute

1 On 23 September 2014, the applicant, Novartis AG, 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 trade mark was sought for the word sign AKANTO.

3 The goods in respect of which registration was sought come within Class 5 of the Nice Agreement concerning the International Classification of Goods and Services for the Purposes of the Registration of Marks of 15 June 1957, as revised and amended, and correspond to the following description: ‘Pharmaceutical preparations, excluding pharmaceutical preparations for the treatment of burns, scars, injuries and consequences of surgical intervention.’

4 The trade mark application was published in *Community Trade Marks Bulletin* No 201/2014 of 27 October 2014.

5 On 22 January 2015, the intervener, Chiesi Farmaceutici SpA, 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 mark applied for in respect of the goods referred to in paragraph 3 above.

6 The opposition was based on the earlier EU word mark KANTOS, filed on 20 April 2011 and registered on 26 September 2011 under No 9908815, covering goods in Class 5 and corresponding to the following description: ‘Pharmaceutical products for human use for sale with a medical prescription.’

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 21 January 2016, the Opposition Division rejected the opposition on the ground that there was no likelihood of confusion within the meaning of Article 8(1)(b) of Regulation (EC) No 207/2009.

9 On 18 March 2016, the intervener filed a notice of appeal with EUIPO, pursuant to Articles 58 to 64 of Regulation No 207/2009 (now Articles 66 to 71 of Regulation 2017/1001), against the Opposition Division’s decision.

10 By decision of 9 January 2017 (‘the contested decision’), the First Board of Appeal of EUIPO upheld the appeal brought by the intervener and annulled the Opposition Division’s decision in so far as it had rejected the opposition. In particular,

the Board of Appeal found that the goods at issue were identical, that the marks at issue were highly similar visually, that the greater parts of the marks would be pronounced in an identical manner for phonetic purposes, that the two marks were extremely similar overall, that a conceptual comparison of the signs at issue was not possible and that, to that extent, the signs therefore had a high degree of similarity. Consequently, the Board of Appeal found that the strong visual and phonetic similarities between the signs created a genuine likelihood of confusion between the marks in the mind of the relevant public for the goods at issue.

Forms of order sought

11 The applicant claims that the Court should:

- annul the contested decision;
- declare that Article 8(1)(b) of Regulation No 207/2009 does not preclude the registration of the sign at issue in respect of the goods in Class 5 described in the application for registration;
- order EUIPO to pay the costs.

12 EUIPO contends that the Court should:

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

13 The intervener claims that the court should:

- dismiss the application;
- order the applicant to pay the costs, including those incurred by the intervener before the First Board of Appeal of EUIPO.

Law

14 By its single plea in law, the applicant alleges a failure to comply with Article 8(1)(b) of Regulation No 207/2009. According to the applicant, the Board of Appeal erred in finding that there was a likelihood of confusion between the mark applied for and the earlier mark. It argues that, contrary to what was held by the Board of Appeal, the mark applied for is not similar to the earlier mark and that there is no likelihood of confusion between the signs at issue.

15 Under Article 8(1)(b) of Regulation No 207/2009, upon opposition by the proprietor of an earlier trade mark, the trade mark applied for is not to be registered if, because of its identity with, or similarity to, an 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. Moreover, under Article 8(2)(a) of Regulation No 207/2009 (now

Article 8(2)(a) of Regulation 2017/1001), the term ‘earlier trade marks’ refers to trade marks registered in the European Union with a date of application for registration which is earlier than the date of application for registration of the EU trade mark.

16 According to settled case-law, the risk that the public might believe that the goods or services in question come from the same undertaking or from economically linked undertakings constitutes a likelihood of confusion. According to the same line of 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).

17 For the purposes of applying Article 8(1)(b) of Regulation No 207/2009, a likelihood of confusion presupposes both 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).

18 It is in the light of those considerations that it is necessary to examine whether the Board of Appeal was right to hold that there was a likelihood of confusion between the two marks at issue, within the meaning of Article 8(1)(b) of Regulation No 207/2009.

The relevant public

19 According to the case-law, in the global assessment of the likelihood of confusion, account should be taken of the average consumer of the category of goods concerned, who is reasonably well informed and reasonably observant and circumspect. 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 (see judgment of 13 February 2007, *Mundipharma v OHIM — Altana Pharma (RESPICUR)*, T-256/04, EU:T:2007:46, paragraph 42 and the case-law cited).

20 As regards the identification of the relevant public, it is apparent from paragraphs 12 to 14 of the contested decision that the relevant public is that living in the European Union, that the goods in question are pharmaceuticals products and may be directed at the public at large as well as at a specialised public in the pharmaceutical and medical fields, that the relevant public’s degree of attention will be high, taking into account the fact that the goods concern personal health care, and that the average consumer of those goods is deemed to be reasonably well informed and reasonably observant and circumspect.

21 It follows from the case-law that, where the goods at issue are pharmaceutical products, the relevant public is composed of medical professionals, on the one hand, and patients, as end users of those goods, on the other (see judgments of 13 February 2008, *Sanofi-Aventis v OHIM — GD Searle (ATURION)*, T-146/06, not published, EU:T:2008:33, paragraph 23 and the case-law cited, and of 21 October 2008, *Aventis*

Pharma v OHIM — Nycomed (PRAZOL), T-95/07, not published, EU:T:2008:455, paragraph 27). Furthermore, in the case of pharmaceutical products, the relevant public displays a higher than average degree of attentiveness (see judgments of 15 December 2010, *Novartis v OHIM — Sanochemia Pharmazeutika (TOLPOSAN)*, T-331/09, EU:T:2010:520, paragraph 26 and the case-law cited, and of 10 February 2015, *Boehringer Ingelheim International v OHIM — Lehning entreprise(ANGIPAX)*, T-368/13, not published, EU:T:2015:81, paragraph 33 and the case-law cited).

22 The Board of Appeal was thus correct to hold that the relevant public was composed of the public at large as well as of a specialised public in the pharmaceutical and medical fields, living in the European Union and displaying a high degree of attentiveness. Those assessments must be endorsed, which are, moreover, not contested by the parties.

Comparison of the goods

23 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, in particular, 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).

24 The goods in respect of which registration of the mark applied for is sought are ‘pharmaceutical preparations, excluding pharmaceutical preparations for the treatment of burns, scars, injuries and consequences of surgical intervention’ and are included in Class 5.

25 The opposition is based on the earlier mark, registered for ‘pharmaceutical products for human use for sale with a medical prescription’, also included in Class 5. As the Board of Appeal held in paragraph 16 of the contested decision, without being challenged by the applicant, the goods covered are identical. The latter takes the view that there is an ‘overlap’ between the goods at issue and that they are ‘identical’.

Comparison of the signs

26 According to the case-law, the global assessment of the likelihood of confusion, in relation to the visual, phonetic or conceptual similarity of the signs in question, must be based on the overall impression given by the signs, bearing in mind, inter alia, their distinctive and dominant elements. The perception of the marks by the average consumer of the goods or services in question plays a decisive role in the global assessment of that likelihood of confusion. In this regard, the average consumer normally perceives a mark as a whole and does not engage in an analysis of its various details (see judgment of 12 June 2007, *OHIM v Shaker*, C-334/05 P, EU:C:2007:333, paragraph 35 and the case-law cited).

27 The Board of Appeal established that the conflicting word marks KANTOS and AKANTO both consist of six letters. Visually, it found that the marks are highly similar

because of their common elements, namely the letters ‘k’, ‘a’, ‘n’, ‘t’, and ‘o’, placed in the same sequence. Phonetically, it found in particular that, in the two words, the accent is on the ‘kan’ syllable and that the marks are highly similar. It also found that, in response to an argument by the intervener and thus confirming the Opposition Division’s assessment on this point, it is unlikely that the Italian public would associate AKANTO with the words ‘a canto’ and KANTOS with the word ‘canto’. According to the Board of Appeal, there is therefore no conceptual similarity between the word ‘akanto’ and the word element ‘kantos’ from the earlier mark. Similarly, it held that there is insufficient evidence on file that the relevant consumers throughout the whole of the European Union would be able to discern any difference in meaning such that the applicant’s mark alludes to acanthus-based products with respect to the goods at issue. The Board of Appeal concluded from this that a conceptual comparison could not be made and that the overall assessment of similarity had to be based only on the visual and phonetic impressions made by the two marks. The Board of Appeal concluded from the overall comparison of the signs at issue that they are similar to a high degree.

Visual similarity

28 In the present case, the applicant takes issue with the Board of Appeal’s assessment that the marks at issue are highly similar in visual terms. In this sense, it argues that the marks at issue are merely similar, and it maintains that the relevant public will be able to distinguish the marks on a visual level.

29 EUIPO and the intervener dispute the applicant’s arguments.

30 On this matter, it should first be noted that, as the Board of Appeal correctly remarked, each of the marks at issue consists of single word elements each composed of six letters, namely ‘a’, ‘k’, ‘a’, ‘n’, ‘t’ and ‘o’, and ‘k’, ‘a’, ‘n’, ‘t’, ‘o’ and ‘s’. They thus have five letters in common out of the six of which they are composed, namely ‘k’, ‘a’, ‘n’, ‘t’, and ‘o’. Moreover, those five letters are placed in the same sequence.

31 However, the applicant argues that the two marks differ on two important points by reason of the presence, first, of the initial letter ‘a’ of the mark applied for as opposed to the letter ‘k’ of the earlier mark, and, second, of the end letter ‘o’ of the mark applied for, as opposed to the letter ‘s’ of the earlier mark. It states on this point that the average consumer will perceive the beginnings of marks more easily than the latter parts of words. In the present case, it submits, this highly contributes to the overall difference between the marks.

32 While it is, admittedly, true that the beginning of word marks may be more likely to catch the consumer’s attention than the subsequent components, this assumption does not, however, hold good in all cases. That assumption cannot, in any event, undermine the principle, expressed in the case-law, that the examination of the similarity between 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 (see judgment of 12 June 2007, *OHIM v Shaker*, C-334/05 P, EU:C:2007:333, paragraph 35 and the case-law cited).

33 In the present case, it must be held that the differences between the first letters in the signs at issue, namely ‘k’ and ‘a’, notwithstanding their position at the beginning of

the marks, are unlikely to remove the visual similarity in the overall impression which those signs have on the perception of the end users of the goods concerned. A fortiori, an identical conclusion must be drawn from the differences that distinguish the end letters of those signs, namely ‘s’ and ‘o’.

34 That visual similarity arises, first, from the fact that the marks at issue are, in visual terms, of a similar length, namely six letters. That similarity arises, second, from the fact that those marks are strictly identical as regards five of those six letters, which compose their common element, ‘kanto’, (see, to that effect, judgment of 10 October 2006, *Armacell v OHIM — nmc (ARMAFOAM)*, T-172/05, EU:T:2006:300, paragraph 66). Thus, the differences established in paragraph 33 above do not appear to be sufficient to offset the similarities observed.

35 It must consequently be held that the Board of Appeal did not err in concluding that the signs at issue are visually highly similar.

Phonetic similarity

36 Phonetically, the mark applied for is pronounced as ‘a-kan-to’, while the earlier mark is pronounced as ‘kan-tos’.

37 The applicant argues inter alia on this point that the difference between the number and the layout of the syllables, as illustrated above, contributes to the phonetic aspect of the two marks at issue stressing their ‘marked visual difference’. It adds that the differences in pronunciation lie in the first syllable, ‘a’, of the contested sign, which has no counterpart in the earlier sign, and in the sound of the letter ‘s’ in the earlier sign, which has no counterpart in the contested sign, relying again on the two decisions of the Opposition Division and of the First Board of Appeal referred to above.

38 EUIPO and the intervener dispute the applicant’s arguments.

39 It must be held in this regard that the conclusion set out in paragraph 35 above invalidates the applicant’s assertion that a ‘marked visual difference’ distinguishes the two signs at issue.

40 It is true, however, that differences may be identified in regard to the pronunciation of the two marks at issue. They are thus distinguishable by their number of syllables and by the fact that the mark applied for begins with the vowel ‘a’, whereas the earlier mark begins with the consonant ‘k’. In addition, the pronunciation of the mark applied for concludes with the sound ‘o’, whereas that of the earlier mark concludes with the sound ‘os’.

41 However, it should be noted that, despite the differences put forward by the applicant and noted in paragraph 37 above, and despite the assessment set out in paragraph 40 above, the pronunciation of the element ‘kanto’, which makes up the greater part of the two marks at issue, is common to both of them. The difference in sound by reason of the pronunciation of the ‘a’ sound at the beginning of the mark applied for, and in the absence of the pronunciation of the ‘s’ sound at the end, is thus of lesser importance than the identity in sound of the element ‘kanto’ (see, to that effect,

judgment of 15 February 2011, *Yorma's v OHIM — Norma Lebensmittelfilialbetrieb (YORMA'S)*, T-213/09, not published, EU:T:2011:37, paragraph 81).

42 In the light of the foregoing, it must be held that the Board of Appeal did not err in finding that the marks at issue are phonetically highly similar.

Conceptual similarity

43 The applicant argues that the mark applied for refers to the word 'acanto', one of many similar language variants of the original Greek word 'akanthos'. It points out that this word refers to a relatively common plant used for medicinal purposes, and that the meaning of this word will be understood by the relevant public, a fact which, in its view, contributes significantly to the overall difference between the marks.

44 In support of its argument, the applicant submitted three documents for the first time in the course of the proceedings before the Court. Thus, Annex A.7, which consists of a definition of the plant *Acanthus mollis* from the internet site Wikipedia, Annex A.8, which consists of a definition of the term *Acanthus mollis L.* from an internet site with a database of global invasive species, 'Global Invasive Species Database', and Annex A.9, which consists of an English translation of the definition of the plant *Acanthus mollis* from the internet site 'Plantas Medicinales', were not presented before the Board of Appeal. EUIPO and the intervener dispute the admissibility of those documents.

45 Moreover, by letter of 28 March 2018, the applicant also requested permission from the Court to make a PowerPoint presentation at the hearing.

46 The Court acceded to that request, and the applicant made the PowerPoint presentation referred to in paragraph 45 above during the hearing held on 17 April 2018.

47 In the course of that hearing, EUIPO raised an objection with regard to the applicant's PowerPoint presentation on the ground that, in essence, the content of that presentation had the effect of producing documents for the first time before the Court.

48 In that regard, it must be held that those documents consisted of definitions and of translations seeking to support the applicant's argument, already presented before the Board of Appeal, that the relevant public would be capable of perceiving the mark applied for as referring to the word 'acanto'. However, those considerations, which relate only to the definition and meaning of the name of the plant *Acanthus mollis*, cannot suffice to establish by themselves the frequency of its use or, a fortiori, that the relevant public would be able to perceive a specific meaning in the contested sign AKANTO.

49 Without it being necessary to rule on the admissibility of the documents and the disputed PowerPoint presentation, the applicant's claims must thus be rejected as being unfounded.

50 It follows that the Board of Appeal was right to find that it was impossible to base a conceptual comparison of the signs at issue solely on the meaning put forward by the applicant, and that assessment must thus be endorsed.

The overall comparison

51 It follows from the overall comparison of the signs at issue that the degrees of visual and phonetic similarity between the signs at issue are high. In addition, it follows from paragraphs 43 to 50 above that the Board of Appeal was right to conclude that it was impossible to establish a conceptual comparison between the signs at issue. As the Board of Appeal correctly pointed out, the global assessment of similarity must thus be based solely on the visual and phonetic impressions produced by the two marks. Therefore, it must be held that there is a high degree of similarity between the signs at issue, when assessed overall.

52 However, in support of its overall argument, the applicant refers to two decisions of the Opposition Division and of the first Board of Appeal.

53 Moreover, during the hearing and in support of that same argument, the applicant produced before the Court printed versions of two other decisions of the Opposition Division and one decision of the First Board of Appeal. EUIPO and the intervener both disputed the admissibility of those three documents, on the ground that they had been produced before the Court for the first time by the applicant and that the applicant had not put forward any justification for the late submission of that evidence.

54 The documents at issue were placed on the case file by the Court, without prejudice to the final decision on their admissibility.

55 In this regard, it must first of all be noted that the three documents at issue, although produced for the first time before the Court, are not strictly evidence but relate to EUIPO's decision-making practice, to which, even after the procedure before EUIPO is complete, a party has the right to refer (judgments of 24 November 2005, *Sadas v OHIM — LTJ Diffusion (ARTHUR ET FELICIE)*, T-346/04, EU:T:2005:420, paragraph 20, and of 8 December 2005, *Castellblanch v OHIM — Champagne Roederer (CRISTAL CASTELLBLANCH)*, T-29/04, EU:T:2005:438, paragraph 16). Consequently, the assertion that those documents are inadmissible must be rejected.

56 On that point, it has, it is true, been held that EUIPO must, when examining an application for registration of an EU trade mark, take into account the decisions already taken in respect of similar applications and consider with special care whether it should decide in the same way or not (judgments of 10 March 2011, *Agencja Wydawnicza Technopol v OHIM*, C-51/10 P, EU:C:2011:139, paragraph 74, and of 28 April 2015, *Volkswagen v OHIM (EXTRA)*, T-216/14, not published, EU:T:2015:230, paragraph 30). EUIPO is under a duty to exercise its powers in accordance with the general principles of EU law, such as the principle of equal treatment and the principle of sound administration.

57 However, the manner in which the principles of equal treatment and sound administration are applied must be consistent with respect for legality. Consequently, a person who files an application for registration of a sign as a trade mark cannot rely, for his own benefit, on any unlawful act committed in favour of another person in order to secure an identical decision (judgments of 10 March 2011, *Agencja Wydawnicza Technopol v OHIM*, C-51/10 P, EU:C:2011:139, paragraphs 75 and 76, and of 28 April 2015, *EXTRA*, T-216/14, not published, EU:T:2015:230, paragraph 31).

58 Moreover, for reasons of legal certainty and, specifically, of sound administration, the examination of any trade mark application must be stringent and comprehensive, in order to prevent trade marks from being improperly registered. That examination must be undertaken in each individual case. The registration of a sign as a mark depends on specific criteria, which are applicable in the factual circumstances of the particular case and the purpose of which is to ascertain whether the sign at issue is caught by a ground for refusal (judgments of 10 March 2011, *Agencja Wydawnicza Technopol v OHIM*, C-51/10 P, EU:C:2011:139, paragraph 77, and of 28 April 2015, *EXTRA*, T-216/14, not published, EU:T:2015:230, paragraph 32).

59 Thus, in the present case, the decisions mentioned by the applicant cannot call into question the assessments contained in the contested decision, the legality of which has been previously established.

The likelihood of confusion

60 It should be borne in mind that a global assessment of the likelihood of confusion implies some interdependence between the relevant factors, and in particular between the similarity of the trade marks and that of the goods or services designated. 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, *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).

61 The Board of Appeal held that the word marks AKANTO and KANTOS designated identical goods, which met the same needs, were offered in the same sales outlets and were interchangeable, and that the two undertakings concerned were direct competitors in the area of pharmaceuticals. It also noted that those two marks were highly similar on a visual and phonetic level. It thus concluded that there was a likelihood of confusion in the mind of the relevant public.

62 The applicant disputes that conclusion, expressing the view that, regard being had to the arguments previously set out and to the relevant public's high level of attentiveness, the marks at issue differ visually, phonetically and conceptually, even if they cover identical goods in Class 5. There cannot therefore, in its view, be any likelihood of confusion between them. The applicant specifies that, in similar cases, the case-law has consistently held that the marks concerned were visually and phonetically dissimilar to a sufficient degree to avoid any likelihood of confusion. It adds that the fact that the marks at issue in the present case are not, in its view, similar from a conceptual point of view corroborates this conclusion.

63 EUIPO and the intervener dispute the applicant's arguments.

64 It must be recalled that, as has already been established in paragraph 51 above, the goods covered by the marks at issue are identical, the signs at issue present a high degree of visual and phonetic similarity, and no conceptual comparison can be established between them.

65 It must therefore be held, as the Board of Appeal rightly did in the contested decision, that, overall, there is a likelihood of confusion in the present case in the mind of the relevant public, even though that public displays a high level of attentiveness.

66 The applicant's argument that medical professionals display a high level of attentiveness when prescribing medicines, and that non-professionals also display an increased level of attentiveness — whether pharmaceutical goods are sold on prescription or not, since those goods affect their health — is not sufficient, given the identical nature of the goods concerned and the similarity of the signs in dispute, to rule out the possibility that those consumers might believe that the goods come from the same undertaking or, as the case may be, from economically linked undertakings (see, to that effect, judgment of 21 October 2008, *PRAZOL*, T-95/07, not published, EU:T:2008:455, paragraph 56).

67 Therefore, the single plea in law raised by the applicant must be rejected and the contested decision upheld.

68 The present action must accordingly be dismissed in its entirety, without it being necessary to examine the applicant's second head of claim to the effect that the Court should declare that Article 8(1)(b) of Regulation No 207/2009 does not preclude the registration of the sign at issue in respect of the Class 5 goods described in the application for registration.

Costs

69 Under Article 134(1) of the Rules of Procedure of the General Court, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the applicant has been unsuccessful, it must be ordered to pay the costs, including those incurred by the intervener, in accordance with the forms of order sought by EUIPO and the intervener.

70 In addition, the intervener has submitted that the applicant should be ordered to pay the costs incurred by the intervener in the administrative proceedings before the First Board of Appeal of EUIPO. In that regard, it must be borne in mind that, under Article 190(2) of the Rules of Procedure, costs necessarily incurred by the parties for the purposes of the proceedings before the Board of Appeal are to be regarded as recoverable costs (see, to that effect, judgment of 7 March 2017, *Lauritzen Holding v EUIPO — DK Company (IWEAR)*, T-622/14, not published, EU:T:2017:143, paragraphs 50 and 51). The Court therefore upholds the intervener's request that the applicant, having been unsuccessful, be ordered to pay the costs necessarily incurred by the intervener for the purposes of the proceedings before the Board of Appeal.

On those grounds,

THE GENERAL COURT (Third Chamber)

hereby:

1. Dismisses the action;

2. Orders Novartis AG to pay the costs.

Frimodt Nielsen

Kreuschitz

Pótorak

Delivered in open court in Luxembourg on 25 September 2018.

E. Coulon

S. Frimodt Nielsen