

JUDGMENT OF THE GENERAL COURT (Second Chamber)

27 January 2021 (*)

(EU trade mark – Opposition proceedings – Application for EU figurative mark Hydrovision – Earlier EU word mark Hylo-Vision – 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-817/19,

Olimp Laboratories sp. z o.o., established in Dębica (Poland), represented by M. Kondrat, lawyer,

applicant,

v

European Union Intellectual Property Office (EUIPO), represented by D. Walicka, acting as Agent,

defendant,

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

OmniVision GmbH, established in Puchheim (Germany), represented by B. Sorg, D. Wiedemann and M. Ringer, lawyers,

ACTION brought against the decision of the Second Board of Appeal of EUIPO of 13 September 2019 (Case R [2371/2018-2](#)), relating to opposition proceedings between OmniVision and Olimp Laboratories,

THE GENERAL COURT (Second Chamber),

composed of V. Tomljenović, President, P. Škvařilová-Pelzl and I. Nõmm (Rapporteur), Judges,

Registrar: E. Coulon,

having regard to the application lodged at the Court Registry on 27 November 2019,

having regard to the response of EUIPO lodged at the Court Registry on 6 March 2020,

having regard to the response of the intervener lodged at the Court Registry on 6 March 2020,

having regard to the measures of organisation of procedure of 9 July 2020 and the reply of the applicant lodged at the Court Registry on 23 July 2020,

having regard to the observations of EUIPO and the intervener on the reply of the applicant lodged at the Court Registry on 13 and 17 August 2020, respectively,

having regard to the fact that no request for a hearing was submitted by the parties within three weeks following service of notification of the close of the written part of the procedure, and having decided to rule on the action without an oral part of the procedure, pursuant to Article 106(3) of the Rules of Procedure of the General Court,

gives the following

Judgment

I. Background to the dispute

1 On 25 January 2017, the applicant, Olimp Laboratories sp. z o.o., 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 following figurative mark:

3 The goods in respect of which registration was sought are in 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, Pharmaceutical preparations for the treatment of eye diseases and conditions; Medical preparations; Eye drops, Preparations for ocular lubrication, Medicated eye-washes, Eye lotions for medical use; Topical anti-infective substances for the treatment of infections of the eye; Cachets for pharmaceutical purposes, Capsules for medicines, Lozenges for pharmaceutical purposes, Lozenges for pharmaceutical purposes; Medicines for human purposes, Tonics [medicines], Medicines for medical purposes, Adjuvants for medical purposes, Medicaments in liquid form; Ointments for pharmaceutical purposes, Eye ointment for medical use; Eye pads for medical use, Eye compresses; analgesic and anti-inflammatory preparations; Medicinal herbs’.

4 The EU trade mark application was published in *European Union Trade Marks Bulletin* No 2017/052 of 16 March 2017.

5 On 14 June 2017, the intervener, OmniVision GmbH, 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 all the goods referred to in paragraph 3 above.

6 The opposition was based on the earlier EU word mark Hylo-Vision, which had been registered on 15 November 2016 under the number [15 692 866](#) covering goods in Class 5 corresponding to the following description: ‘Dietary supplements and dietetic preparations; Medical and veterinary preparations and articles’.

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 By decision of 8 October 2018, the Opposition Division upheld the opposition, holding that there was a likelihood of confusion in respect of all of the goods covered by the mark applied for.

9 On 4 December 2018, the applicant filed a notice of appeal with EUIPO, pursuant to Articles 66 to 71 of Regulation 2017/1001, against the decision of the Opposition Division.

10 By decision of 13 September 2019 (‘the contested decision’), the Second Board of Appeal of EUIPO dismissed the applicant’s appeal. In the first place, it observed, in essence, that the relevant public was made up of medical professionals and pharmacists and consumers belonging to the general public with a higher than average degree of attentiveness. Moreover, it relied, for the purposes of assessing the likelihood of confusion, on the German-speaking portion of the public.

11 In the second place, the Board of Appeal took the view, as had the Opposition Division, that the goods covered by the mark applied for were identical to those designated by the earlier mark.

12 In the third place, the Board of Appeal observed that no element making up the signs in question could be regarded as being more dominant than the others. It considered that the element ‘vision’ in the marks at issue and the element ‘hydro’ in the mark applied for had a weak distinctive character in relation to the goods in question and that the element ‘hylo’ of the earlier mark was distinctive in relation to those goods. It compared those signs as a whole and found that they were visually similar to an average degree, highly similar phonetically and that, conceptually, either they were partially similar or the conceptual comparison was neutral.

13 In the fourth place, regarding the distinctive character of the earlier mark, the Board of Appeal took the view that, even though the earlier mark contained elements that either were not distinctive or had weak distinctive character, namely the element ‘vision’, the combination of that element with the element ‘hylo’ conferred on it an average inherent degree of distinctiveness.

14 In the fifth and last place, the Board of Appeal observed, in essence, that the goods in question were identical and that the signs in question were visually and phonetically similar overall, and, to a certain extent, conceptually similar. It thus concluded that there was a likelihood of confusion at the very least for a portion of the German-speaking public.

II. Forms of order sought

15 The applicant claims that the Court should:

- annul the contested decision and refer the case back to EUIPO for reconsideration; or
- alter the contested decision by holding that there are no grounds for refusal of registration of the mark applied for in respect of all the goods in Class 5 and that that mark must be registered;
- order EUIPO to pay the costs.

16 EUIPO contends that the Court should:

- dismiss the action for annulment in its entirety;
- order the applicant to pay the costs incurred by EUIPO.

17 The intervener contends that the Court should:

- dismiss the action in its entirety;
- order the applicant to pay the costs.

III. Law

A. *The regularity of the document provided by the applicant's representative certifying that he is authorised to practise before the courts of a Member State*

18 In its response, EUIPO submits that the certificate provided by the applicant's representative, produced as Annex 2 to the application, does not satisfy the requirements of Article 19 of the Statute of the Court of Justice of the European Union in so far as that document raises doubts as to whether that representative is authorised to practise before the courts of a Member State.

19 In response to the measure of organisation of procedure of 9 July 2020 addressed to it, the applicant, by letter of 23 July 2020, lodged an additional document certifying that its representative was authorised to practise before the courts of a Member State in accordance with Article 19 of the Statute of the Court of Justice of the European Union at the time when the action was brought.

20 In its written observations of 17 August 2020, the intervener observes that the document lodged by the applicant is not translated into the language of the case, namely English, and submits that, as a result, it does not comply with the formal requirements imposed by the Rules of Procedure and cannot be taken into account.

21 In that regard, it should be borne in mind that, under Article 51(2) of the Rules of Procedure, a lawyer acting for a party must lodge at the Court Registry a certificate attesting to the fact that he or she is authorised to practise before a court of a Member State or of another State which is a party to the European Economic Area (EEA) Agreement. That provision does not require that such a certificate be translated into the language of the case.

22 Although it is true that Article 46(2) of the Rules of Procedure provides that any material produced or annexed that is expressed in a language other than the language of the case must be translated, it should be noted that the document produced by the applicant was lodged pursuant to Article 51(2) of those rules and that the certificates showing that the parties' representatives are members of the Bar are intended first and foremost for the Court, so that it can ascertain whether the parties are properly represented. This admissibility criterion relates to public policy and the Court must verify of its own motion that it is satisfied. For such purposes, translation into the language of the case is not necessary (judgment of 7 October 2014, *Tifosi Optics v OHIM – Tom Tailor (T)*, T-531/12, not published, EU:T:2014:855, paragraph 22).

23 The intervener's argument relying on the fact that a translation into the language of the case was not provided must therefore be rejected and it must be found that a certificate attesting to the fact that the applicant's representative is authorised to practise before the courts of a Member State was duly produced in the present case by the applicant.

B. *Admissibility of Annexes 4 to 9 to the application*

24 EUIPO disputes the admissibility of Annexes 4 to 9 to the application, with the exception of the printed extracts from EUIPO's database in Annexes 8 and 9 to the application, on the ground that they contain documents produced for the first time before the Court.

25 In that regard, it should be noted that the purpose of actions before the Court is to review the legality of decisions of the Boards of Appeal of EUIPO for the purposes of Article 72 of Regulation 2017/1001, with the result that it is not the Court's function to review the facts in the light of evidence produced for the first time before it (judgments of 24 November 2005, *Sadas v OHIM – LTJ Diffusion (ARTHUR ET FELICIE)*, T-346/04, EU:T:2005:420, paragraph 19, and of 15 March 2018, *La Mafia Franchises v EUIPO – Italy (La Mafia SE SIENNA A LA MESA)*, T-1/17, EU:T:2018:146, paragraph 16).

26 Consequently, the review of the legality of the contested decision must be carried out in the light solely of the evidence which was produced during the administrative proceedings and which appears in EUIPO's case file (see, to that effect, judgments of 15 July 2014, *Łaskiewicz v OHIM – Capital Safety Group EMEA (PROTEKT)*, T-576/12, not published, EU:T:2014:667, paragraph 25, and of 13 September 2016, *Globo Comunicação e Participações v EUIPO (Sound mark)*, T-408/15, EU:T:2016:468, paragraph 20).

C. *Substance of the pleas*

27 At the outset, it must be noted that, in view of the date on which the application for registration at issue was filed, namely 25 January 2017, which is decisive for the purpose of identifying the applicable substantive law, the facts of the case are governed by the substantive provisions of Regulation No 207/2009 (see, to that effect, judgments of 8 May 2014, *Bimbo v OHIM*, C-591/12 P, EU:C:2014:305, paragraph 12, and of 18 June 2020, *Primart v EUIPO*, C-702/18 P, EU:C:2020:489, paragraph 2 and the case-law cited).

28 Accordingly, in the present case, so far as the substantive rules are concerned, the references made by the Board of Appeal in the contested decision and by the applicant in the arguments put forward to Article 8(1)(b) of Regulation 2017/1001 must be understood as referring to Article 8(1)(b) of Regulation No 207/2009, the wording of which is identical.

29 In support of the action, the applicant relies, in essence, on two pleas, alleging, first, infringement of Article 8(1)(b) of Regulation No 207/2009 and, second, infringement of the principle of the protection of legitimate expectations and of the principle of legal certainty.

1. The first plea, alleging infringement of Article 8(1)(b) of Regulation No 207/2009

30 First of all, the applicant submits, in essence, that the earlier mark is entirely devoid of distinctive character and that a mark which is not distinctive cannot enjoy valid protection and cannot be relied on in support of an opposition.

31 The applicant then goes on to observe that the element ‘vision’, common to the marks at issue, is commonly used on the market by other manufacturers to designate goods in Class 5, a fact which, it argues, confirms its descriptive character in respect of such goods and its lack of distinctive character.

32 Lastly, the applicant argues that the signs in question are visually, phonetically and conceptually different. It observes that the element common to the marks at issue is descriptive in respect of the goods in Class 5 and that the similarities which concern weak elements alone are not sufficient to establish the possibility of a likelihood of confusion. Accordingly, it submits that the initial components of those marks and the fanciful elements of the mark applied for are sufficient to establish that there is no likelihood of confusion.

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

34 As provided in Article 8(1)(b) of Regulation No 207/2009, upon opposition by the proprietor of an earlier trade mark, the trade mark applied for may not be registered if, because of its identity with or similarity to the earlier trade mark and the identity or similarity of the goods or services covered by the two marks, there exists a likelihood of confusion on the part of the public in the territory in which the earlier mark is protected. The likelihood of confusion includes the likelihood of association with the earlier mark.

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

36 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).

37 It is in the light of those considerations that it is appropriate to examine whether, as the applicant claims, the Board of Appeal infringed Article 8(1)(b) of Regulation No 207/2009 in finding that there might be a likelihood of confusion in the present case.

(a) The relevant public

38 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).

39 Where the goods in question are medicinal or 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 judgment of 15 December 2010, *Novartis v OHIM – Sanochemia Pharmazeutika (TOLPOSAN)*, T-331/09, EU:T:2010:520, paragraph 21 and the case-law cited; judgment of 5 October 2017, *Forest Pharma v EUIPO – Ipsen Pharma (COLINEB)*, T-36/17, not published, EU:T:2017:690, paragraph 49).

40 Moreover, it is apparent from case-law that, first, medical professionals display a high degree of attentiveness when prescribing medicinal products and, second, with regard to end consumers, in cases where pharmaceutical products are sold without prescription, it must be assumed that those goods will be of concern to consumers, who are deemed to be reasonably well informed and reasonably observant and circumspect where those goods affect their state of health, and that these consumers are less likely to confuse different versions of such goods. Furthermore, even assuming that a medical prescription is mandatory, consumers are likely to demonstrate a high level of attentiveness upon prescription of the goods at issue in the light of the fact that those goods are pharmaceutical products. Thus, medicinal products, whether or not issued on prescription, can be regarded as receiving a heightened level of attentiveness on the part of consumers who are normally well informed and reasonably observant and circumspect (see judgment of 15 December 2010, *TOLPOSAN*, T-331/09, EU:T:2010:520, paragraph 26 and the case-law cited).

41 Furthermore, it must be recalled that, where the protection accorded to the earlier trade mark extends to the entirety of the European Union, it is necessary to take into account the perception of the marks at issue by the consumer of the goods or services in question in that territory. However, it must be borne in mind that, for an EU trade mark to be refused registration, it is sufficient that a relative ground for refusal for the purposes of Article 8(1)(b) of Regulation No 207/2009 exists in part of the European Union (see, to that effect, judgment of 14 December 2006, *Mast-Jägermeister v OHIM – Licorera Zacapaneca (VENADO with frame and others)*, T-81/03, T-82/03 and T-103/03, EU:T:2006:397, paragraph 76 and the case-law cited).

42 In the present case, having regard to the nature of the goods concerned, namely medical or pharmaceutical products in Class 5, the Board of Appeal acted correctly in finding in paragraphs 18 to 21 of the contested decision – which, moreover, is not disputed by the applicant – that, in essence, the relevant public was made up of medical professionals and pharmacists and consumers belonging to the general public with a higher than average degree of attentiveness.

43 Furthermore, it must be held, in accordance with the case-law cited in paragraph 41 above, that, since the Board of Appeal found that there was a likelihood of confusion with regard to the German-speaking public of the European Union, in particular that of Germany and Austria, it was not necessary for it to assess whether such a risk existed in other parts of the European Union.

(b) The comparison of the goods

44 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, 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).

45 In the present case, the Board of Appeal took the view, as had the Opposition Division, that the goods covered by the mark applied for were identical to those designated by the earlier mark. That assessment is correct and is not, moreover, disputed by the applicant.

(c) The comparison of the signs

46 According to case-law, two marks are similar when, from the point of view of the relevant public, they are at least partially identical as regards one or more relevant aspects, that is to say, the visual, phonetic and conceptual aspects (see judgment of 17 February 2011, *Anncò v OHIM – Freche et fils (ANN TAYLOR LOFT)*, T-385/09, EU:T:2011:49, paragraph 26 and the case-law cited).

47 The global assessment of the likelihood of confusion must, so far as concerns the visual, phonetic or conceptual similarities of the signs at issue, be based on the overall impression given by the signs, bearing in mind, in particular, their distinctive and dominant elements (see judgment of 12 June 2007, *OHIM v Shaker*, C-334/05 P, EU:C:2007:333, paragraph 35 and the case-law cited).

48 It is therefore necessary, before examining whether there is any visual, phonetic and conceptual similarity between the signs in question, to determine which are the distinctive and dominant elements of those signs.

(1) The distinctive and dominant elements of the signs in question

49 Assessment of the similarity between two marks means more than taking just one component of a composite trade mark and comparing it with another mark. On the contrary, the comparison must be made by examining each of the marks in question as a whole, which does not mean that the overall impression conveyed to the relevant public by a composite trade mark may not, in certain circumstances, be dominated by one or more of its components (see judgment of 12 June 2007, *OHIM v Shaker*, C-334/05 P, EU:C:2007:333, paragraph 41 and the case-law cited). It is only if all the other components of the mark are negligible that the assessment of the similarity can be carried out solely on the basis of the dominant element. That could be the case, in particular, where that component is capable on its own of dominating the image of that mark which members of the relevant public retain, with the result that all the other components are negligible in the overall impression created by that mark (judgment of 20 September 2007, *Nestlé v OHIM*, C-193/06 P, not published, EU:C:2007:539, paragraphs 42 and 43).

50 For the purpose of assessing the distinctive character of an element making up a mark, an assessment must be made of the greater or lesser capacity of that element to identify the goods for which the mark was registered as coming from a particular undertaking, and thus to distinguish those goods from those of other undertakings. In making that assessment, account should be taken, in particular, of the inherent characteristics of the element in question in the light of whether it is at all descriptive of the goods for which the mark has been registered (see judgments of 13 June 2006, *Inex v OHIM – Wiseman (Representation of a cowhide)*, T-153/03, EU:T:2006:157, paragraph 35, and of 13 December 2007, *Cabrera Sánchez v OHIM – Industrias Cárnicas Valle (el charcutero artesano)*, T-242/06, not published, EU:T:2007:391, paragraph 51).

51 According to settled case-law, a term with a clear meaning is considered to be descriptive only if there is a sufficiently direct and specific relationship between that term and the goods and services in question to enable the public concerned immediately to perceive, without further thought, a description of the goods and services in question or of one of their characteristics (see judgment of 24 February 2016, *Tayto Group v OHIM – MIP Metro (REAL HANDCOOKED)*, T-816/14, not published, EU:T:2016:93, paragraph 63 and the case-law cited).

52 It should also be borne in mind that, where some elements of a trade mark are descriptive of the goods and services in respect of which that mark is protected or of the goods and services covered by the application for registration, those elements are recognised as having only a low, or even very low, distinctive character (see, to that effect, judgments of 12 September 2007, *Koipe v OHIM – Aceites del Sur (La Española)*, T-363/04, EU:T:2007:264, paragraph 92, and of 13 December 2007, *el charcutero artesano*, T-242/06, not published, EU:T:2007:391, paragraph 52 and the case-law cited). Most often, it will be possible to recognise those elements as having distinctive character only because of their combination with the other elements of the mark. In view of their low, or even very low, distinctive character, descriptive elements of a trade mark are not generally regarded by the public as being dominant in the overall impression conveyed by that mark, unless, particularly because of their position or their size, they appear likely to make an impression on the public and to be remembered by the public (see, to that effect, judgment of 13 December 2007, *el charcutero artesano*, T-242/06, not published, EU:T:2007:391, paragraph 53 and the case-law cited).

53 As a preliminary matter, it should be noted that, first, the earlier mark is a word mark made up of the elements ‘hylo’ and ‘vision’ connected by a hyphen. Second, the mark applied for is a figurative mark made up of the word element ‘hydrovision’ in dark blue, the dots on the letters ‘i’ of which are light blue and the second letter ‘o’, in the same colour, is replaced by a figurative element resembling an eye, the iris of which is represented by a dark-blue drop of water.

54 In the present case, regarding the earlier mark, the Board of Appeal took the view, in paragraph 34 of the contested decision, that none of the elements making up that mark should be regarded as the dominant element. It added that the element ‘vision’, common to the marks at issue, was descriptive and had a low degree of distinctiveness, and that the element ‘hylo’ was distinctive, not being perceived by the relevant public as having any particular meaning.

55 As for the mark applied for, the Board of Appeal found that the stylistic components of the word elements of that sign were used primarily for decorative purposes and that the additional figurative element had a weak distinctive character. It further observed that none of the elements of that sign was more visually dominant than the others. It added that the prefix ‘hydro’ had a weak distinctive character, in so far as it was likely to refer to the characteristics of the relevant goods.

56 In the first place, regarding the distinctive character of the elements making up the signs in question, it should be borne in mind that, although the consumer normally perceives a mark as a whole and does not engage in an analysis of its various details, the fact remains that, when perceiving a word sign, the consumer will break it down into word elements which, for that consumer, suggest a concrete meaning or which resemble words known to him or her (see judgment of 6 September 2013, *Eurocool Logistik v OHIM – Lenger (EUROCOOL)*, T-599/10, not published, EU:T:2013:399, paragraph 104 and the case-law cited).

57 With regard to the earlier mark, it must be noted that it is made up of the element ‘hylo’ and the element ‘vision’. The first element of that mark is a Greek-language prefix used in relation to wood or materials. In German, it is used in the word ‘hylotrop’, which, according to the *Duden* online dictionary (www.duden.de), relates to ‘chemical compositions that can be converted into other forms’. Like the Board of Appeal, it is appropriate to take the view that, for a significant portion of the relevant public, that term, infrequently used in German, does not have any meaning. Therefore, as it is not perceived by a significant portion of that public as being descriptive of the goods designated by the earlier mark, it is distinctive in relation to those goods.

58 The arguments put forward by the applicant cannot call that assessment into question. Contrary to what it submits, no document in the case file makes it possible to conclude that the relevant public will immediately perceive the term ‘hylo’ as being a reference to sodium hyaluronate, much less that that same public will understand the meaning of that reference. Admittedly, sodium hyaluronate is referred to in the extracts from websites contained in the EUIPO case file. However, this is not sufficient to conclude, first, that the public in question will perceive that term as referring to sodium hyaluronate or, second, that that public is familiar with that reference in such a way that it will immediately understand its scope without further thought. As previously found, the use of a term in extracts from Internet sites cannot suffice to establish the frequency with which that term is used, even by a specialist public (judgment of 16 December 2010, *Fidelio v OHIM (Hallux)*, T-286/08, EU:T:2010:528, paragraph 47). The applicant has not, therefore, succeeded in establishing that that public perceives the element ‘hylo’ of the earlier mark as being a common designation of sodium hyaluronate and understands the meaning of ‘sodium hyaluronate’ with the result that, in perceiving it, it will establish a sufficiently direct and specific connection with the goods in question such as to enable it immediately to perceive, without further thought, a description of those goods.

59 In any event, even assuming that a portion of the relevant public, more specifically, the specialist public, in the present case pharmacists and doctors, might associate the term ‘hylo’ with sodium hyaluronate, the fact nonetheless remains that, first, the connection between that term and the goods covered by the earlier mark can be established only by passing through several stages of reasoning, with the result that it is neither direct nor specific, and, second, it does not prevent a significant part of the relevant public from not associating it with that concept.

60 Thus, the view must be taken that the Board of Appeal correctly noted, in paragraph 50 of the contested decision, that the element ‘hylo’ of the earlier mark was distinctive.

61 As for the second element of the earlier mark, namely the term ‘vision’, also present in the contested mark, this is an English word which, according to the online *Oxford English Dictionary*, means ‘the action of seeing with the bodily eye; the exercise of the ordinary faculty of sight, or the faculty itself’. Although other meanings can be attributed to it, such as referring to an image in a dream or an imagined experience, that element, in relation to the goods in question, will be perceived by the relevant public as referring to sight.

62 That finding cannot be called into question by the intervener’s argument that the term ‘vision’ has other meanings in German and will not be perceived by the German-speaking public as a descriptive term referring to the action of seeing with physical eyes.

63 First, it should be noted that the term ‘vision’ is part of everyday English vocabulary, understandable for a substantial number of EU consumers (see, to that effect, judgments of 13 October 2009, *Deutsche Rockwool Mineralwoll v OHIM – Redrock Construction (REDROCK)*, T-146/08, not published, EU:T:2009:398, paragraph 53; of 11 May 2010, *Wessang v OHIM – Greinwald (star foods)*, T-492/08, not published, EU:T:2010:186, paragraph 52; and of 15 October 2018, *Apple and Pear Australia and Star Fruits Diffusion v EUIPO – Pink Lady America (WILD PINK)*, T-164/17, not published, EU:T:2018:678, paragraph 58). In any event, that term has an equivalent in the language known by the non-English-speaking public, namely the German word ‘Vision’, and the German-speaking part of the relevant public will be able to establish a connection between that term and its German translation, with the result that it will understand its meaning. Thus, even if the average German-speaking consumer does not have an advanced knowledge of English, it cannot be ruled out that the term ‘vision’ is known by that part of the public.

64 Moreover, it should be borne in mind that, in order to assess the distinctiveness or descriptiveness of a sign, account must be taken of the meaning of that sign which refers to the goods covered or designates one of their characteristics (see judgment of 8 July 2015, *Deutsche Rockwool Mineralwoll v OHIM – Redrock Construction (REDROCK)*, T-548/12, EU:T:2015:478, paragraph 47 and the case-law cited).

65 Thus, since the goods in question are medical or pharmaceutical products, both professionals and the general public will associate the term ‘vision’ with sight, with the result that it is largely descriptive of those products.

66 Having regard to the foregoing considerations, it must be found that the Board of Appeal correctly took the view, in paragraph 52 of the contested decision, that the element ‘vision’ common to the marks at issue has a weak distinctive character.

67 With regard to the mark applied for, it is common ground that the prefix ‘hydro’ will be perceived by the relevant public as referring to water (see, to that effect, order of 30 November 2015, *August Brötje v OHIM (HydroComfort)*, T-845/14, not published, EU:T:2015:934, paragraph 21). To the extent that it is capable of referring to the characteristics of the goods in question, namely that the pharmaceutical preparations ensure sufficient moisture for the eyes, it should be noted, as did the Board of Appeal, that that term has weak distinctive character.

68 So far as concerns the figurative elements of the mark applied for, it must be noted that, according to case-law, where a mark is composed of word elements and figurative elements, the former should, as a rule, be regarded as more distinctive than the latter, since the average consumer will more easily refer to the goods in question by citing the name rather than by describing the figurative element of the mark (judgment of 14 July 2005, *Wassen International v OHIM – Stroschein Gesundkost (SELENIUM – ACE)*, T-312/03, EU:T:2005:289, paragraph 37).

69 In the present case, the stylistic components of the word elements of the mark applied for are not distinctive, as the colours are used primarily for decorative purposes, and the figurative element, namely an eye, the iris of which is represented by a dark-blue drop of water, refers to the fact that the goods are preparations for the eyes and moisten the eyes, and therefore has weak distinctive character.

70 In the second place, regarding the dominant elements of the signs in question, the Board of Appeal considered that none of the elements making up those signs was dominant and that they should be compared in their entirety.

71 That assessment is free from error. As is apparent from paragraph 52 above, although as a general rule the public will not regard a descriptive element forming part of a mark as the distinctive and dominant element in the overall impression produced by that mark, the fact remains that the low level of distinctiveness of an element of a mark does not necessarily mean, when its size or its position in the sign is taken into account, that that element is negligible in the overall impression produced by that mark (judgment of 8 February 2011, *Lan Airlines v OHIM – Air Nostrum (LINEAS AEREAS DEL MEDITERRANEO LAM)*, T-194/09, EU:T:2011:34, paragraph 30, and order of 3 May 2018, *Siberian Vodka v EUIPO – Schwarze und Schlichte (DIAMOND ICE)*, T-234/17, not published, EU:T:2018:259, paragraph 41).

72 In the present case, first, the element ‘hylo’ of the earlier mark and the prefix ‘hydro’ of the mark applied for are shorter than the element ‘vision’ common to those marks and, second, those prefixes are not original or fanciful in such a way that they are likely to attract the public’s attention. In those circumstances, those prefixes cannot be regarded as leading, on account of their presence and position, to the element referred to above, the size of which is not negligible in the overall impression, being disregarded when the signs in question are compared.

73 In the light of all of the foregoing, it must be held that the Board of Appeal did not err in taking into consideration all the elements of the signs in question in the context of their comparison.

(2) *The visual, phonetic and conceptual comparisons*

(i) *Visual similarity*

74 The Board of Appeal found that the signs in questions were visually similar in so far as they shared the letters ‘h’, ‘y’, ‘o’, ‘v’, ‘i’, ‘s’, ‘i’, ‘o’ and ‘n’ and were of similar length. It observed that those signs differed in the letter ‘l’ and the hyphen in the earlier mark and in the letters ‘d’ and ‘r’ and the figurative elements in the mark applied for. However, it took the view that those differences were not sufficient to counteract the overall impression of visual similarity created by the letters which they have in common and concluded that those signs are visually similar to an average degree.

75 The applicant submits that the only element common to the signs in question is the word ‘vision’, which is descriptive in respect of the goods in Class 5, that consumers generally tend to focus on the first element of a mark and that the mark applied for is characterised by significant stylisation consisting of fanciful graphic elements. Therefore, according to the applicant, those signs are clearly different visually.

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

77 In that regard, it must be noted that, according to settled case-law, where a figurative mark containing a word element is visually compared with a word mark, the marks are considered to be visually similar if that word element and the word mark have in common a significant number of letters in the same position and if that word element is not highly stylised, notwithstanding the graphic representation of the letters in different type fonts, in italics or bold, in lower case or upper case, or in colour (see, to that effect, judgment of 24 October 2017, *Keturi kambariai v EUIPO – Coffee In (coffee inn)*, T-202/16, not published, EU:T:2017:750, paragraph 101 and the case-law cited).

78 In the present case, 9 of the 11 letters of the mark applied for are identical to 9 of the 10 letters of the earlier mark, namely 'h', 'y', 'o', 'v', 'i', 's', 'i', 'o' and 'n'. In addition, the word element of the mark applied for and the earlier mark share the combination of letters 'hy', placed at the beginning, and the ending 'vision'. By contrast, they differ as regards their middle sections, namely the letter 'l' and the hyphen in the earlier mark and the letters 'd' and 'r' in the mark applied for, and as regards the figurative element in the latter, that is to say, an eye, the iris of which is represented by a dark-blue drop of water.

79 Thus, the comparison between the earlier mark and the mark applied for shows that the signs in question have a certain degree of visual similarity. First, the word element of the mark applied for and the earlier mark have in common a significant number of letters in the same position. Second, the graphic characteristics of that word element have a limited impact, since the stylisation of the letters of which it is made up is minimalist and the figurative element replacing the letter 'o', which is not larger than the other letters, is not such as to create a graphic design that is particularly striking for the relevant public and that is likely to attract its attention. It follows that the differences between those signs are not such as to counteract that similarity.

80 The applicant's argument that consumers generally tend to focus on the first element of a mark cannot succeed in the present case. In that regard, it must be observed that, admittedly, the first part of word marks is more likely to catch the consumer's attention than are the subsequent components (see, to that effect, judgments of 17 March 2004, *El Corte Inglés v OHIM – González Cabello and Iberia Líneas Aéreas de España (MUNDICOR)*, T-183/02 and T-184/02, EU:T:2004:79, paragraph 81, and of 16 March 2005, *L'Oréal v OHIM – Revlon (FLEXI AIR)*, T-112/03, EU:T:2005:102, paragraphs 64 and 65). However, that consideration cannot hold good in all cases (see, to that effect, judgment of 6 July 2004, *Grupo El Prado Cervera v OHIM – Héritiers Debuschewitz (CHUFAFIT)*, T-117/02, EU:T:2004:208, paragraph 48) and cannot, in any event, undermine the principle that the assessment of the similarity of the signs must take into account the overall impression which they produce.

81 In the present case, the first parts of the signs in question are similar, inasmuch as they begin with the combination of letters 'hy' and end with the letter 'o', while they differ in their second syllable alone. Further, in the context of the assessment of the overall impression produced by those signs, it must be stated that, in addition to being identical as far as concerns the suffix 'vision', the first parts of those signs are also similar, with the result that the differences between the prefixes 'hylo' and 'hydro' are not capable of ruling out an average visual similarity.

82 Therefore, the Board of Appeal did not err in finding, in paragraph 63 of the contested decision, that the signs in question had an average degree of visual similarity.

(ii) Phonetic similarity

83 The Board of Appeal found that the signs in question were made up of five syllables and were pronounced in the same way, at the very least as regards three of the five syllables in those signs. So far as concerns the syllables that differ in their pronunciation, it took the view that those syllables were similar, given that they ended with the same vowel 'o'. It concluded that, as those signs were of the same length, had the same number of syllables and the pronunciation of those signs followed a similar rhythm, they had a high degree of phonetic similarity.

84 The applicant submits that, on account of the different prefixes, the different number of letters and the fact that the earlier mark contains a hyphen, the signs in question are not phonetically similar.

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

86 In that regard, it must be stated, in a similar manner to the Board of Appeal, that the signs in question are made up of five syllables, the pronunciation of three of which, namely 'vi', 'si' and 'on', is identical and one of which, namely 'hy', is similar. Moreover, the pronunciation of those signs follows a similar rhythm.

87 The difference in the second syllable of the signs in question, namely the syllable 'lo' for the earlier mark and the syllable 'dro' for the mark applied for – which, moreover, both end in 'o' – is not such as to counteract the existing similarities. Furthermore, the figurative stylisation of the mark applied for has no impact on the pronunciation of the sign.

88 With regard to the applicant's argument that the signs in question are different on account of the presence in the earlier mark of a hyphen and of the fact that the earlier mark is made up of two words, that argument must be rejected, since those differences have no impact on the pronunciation of those signs.

89 The Board of Appeal therefore did not err in finding, in paragraph 67 of the contested decision, that the signs in question had a high degree of phonetic similarity.

(iii) *Conceptual similarity*

90 From a conceptual standpoint, the Board of Appeal found that, for the part of the relevant public who will understand the term ‘vision’, the signs in question were similar in part, and, for the part of the relevant public who will not understand any of the terms that make up those signs, the conceptual comparison was neutral.

91 The applicant submits that, by reason of the presence of prefixes, the signs in question are conceptually different.

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

93 With regard to the relevant public, the Board of Appeal did not err in finding, in paragraph 52 of the contested decision – a finding which, moreover, the applicant does not dispute – that the element ‘vision’, common to the signs in question, was such as to be perceived as being a reference to sight.

94 The view must also be taken that the Board of Appeal did not err in finding, in paragraphs 50 and 69 of the contested decision, that the element ‘hylo’ of the earlier mark had no meaning for the relevant public. Likewise, as stated in paragraph 67 above, the prefix ‘hydro’ of the mark applied for conveys the concept of water. Consequently, the signs in question differ conceptually as a result of the presence of the prefixes ‘hylo’ and ‘hydro’.

95 The Board of Appeal therefore did not err in finding, in paragraph 71 of the contested decision, that the signs in question were, for the part of the relevant public which understands the term ‘vision’, conceptually similar in part.

(d) *The distinctive character of the earlier mark*

96 In paragraph 77 of the contested decision, the Board of Appeal found that, even though the earlier mark contained elements that were either not distinctive or had weak distinctive character, namely the term ‘vision’, the combination of that term with the prefix ‘hylo’ conferred on that mark an average degree of distinctiveness.

97 The applicant takes the view that the Board of Appeal’s finding relating to the average degree of distinctiveness of the earlier mark is incorrect, in view of the descriptive character of the elements ‘hylo’ and ‘vision’. It submits that that mark has a specific meaning for the relevant public, that is to say, products composed of sodium hyaluronate used for protecting eyesight, and is therefore devoid of distinctive character. It concludes that marks which are not distinctive cannot enjoy valid protection and therefore cannot be relied on in support of an opposition.

98 Moreover, the applicant submits that the element ‘vision’ of the earlier mark is purely descriptive in respect of the goods in Class 5 and is commonly used by manufacturers, and it sets out a list of registrations containing that element.

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

100 In the first place, it must be held that, as is apparent from paragraphs 57 to 60 above, the relevant public will not perceive the allusive character of the element ‘hylo’ of the earlier mark. Therefore, the Board of Appeal did not err in finding that, even though that mark contained the element ‘vision’, which has a low degree of distinctiveness, that mark had an average degree of distinctiveness on account of the presence of the element ‘hylo’.

101 In any event, on the assumption that a portion of the relevant public, the specialist public in the medical and pharmaceutical fields in particular, perceives the allusive character of the element ‘hylo’ of the earlier mark, it must be held that, contrary to what the applicant submits, the view cannot be taken that that mark is devoid of distinctive character.

102 First, it must be specified that the validity of an earlier mark cannot be called into question in proceedings for registration of an EU trade mark, but only in cancellation proceedings (see, to that effect and by analogy, judgments of 24 May 2012, *Formula One Licensing v OHIM*, C-196/11 P, EU:C:2012:314, paragraph 38, and of 11 September 2014, *Continental Wind Partners v OHIM – Continental Reifen Deutschland (CONTINENTAL WIND PARTNERS)*, T-185/13, not published, EU:T:2014:769, paragraph 59).

103 Second, it must be noted that the registered mark has, by virtue of its having been registered, a minimum of distinctive character. In that regard, the Court of Justice has held that, in order to avoid infringing Article 8(1)(b) of Regulation No 207/2009, it is necessary to acknowledge that an earlier registered mark must have a certain degree of distinctiveness. It follows that registered marks cannot be found to be generic, descriptive or devoid of any distinctive character, without calling into question the validity of the earlier mark in the procedure for registering an EU trade mark, which would give rise to an infringement of Article 8(1)(b) of Regulation No 207/2009 (see, to that effect, judgment of 24 May 2012, *Formula One Licensing v OHIM*, C-196/11 P, EU:C:2012:314, paragraphs 47, 51 and 52).

104 Thus, even if the registered mark had to be regarded as devoid of a high degree of distinctive character, a minimum of distinctive character should nevertheless be acknowledged for it, by virtue of its having been registered (see judgment of 13 September 2016, *hyphen v EUIPO – Skylovec (Representation of a polygon)*, T-146/15, EU:T:2016:469, paragraph 44).

105 Therefore, contrary to the applicant’s argument, in the context of the present proceedings, the earlier mark cannot be regarded as purely descriptive, as this would amount to denying its distinctive character and, as a result, its validity (see, by analogy, judgment of 24 May 2012, *Formula One Licensing v OHIM*, C-196/11 P, EU:C:2012:314, paragraphs 41 and 42).

106 In the second place, regarding the applicant's argument that the word 'vision' is commonly used to refer to medicinal products in Class 5, it must be stated that, first, 'allusive' marks are common in the medicinal-product sector. References to the field of application and to the active ingredients of goods are more frequent in the field of pharmacology (judgment of 14 July 2011, *Winzer Pharma v OHIM – Alcon (OFTAL CUSI)*, T-160/09, not published, EU:T:2011:379, paragraph 80).

107 Second, it must be stated, as is apparent from paragraphs 52, 77 and 81 of the contested decision, that the Board of Appeal took into account the low degree of distinctiveness of the element 'vision' present in the marks at issue.

108 Therefore, the Board of Appeal did not err in finding that the earlier mark had an average degree of distinctiveness.

(e) The overall assessment of the likelihood of confusion

109 The Board of Appeal observed that the goods covered by the mark applied for were identical to the goods designated by the earlier mark and that the signs in question were similar overall visually and phonetically and, to a certain extent, conceptually. It considered that the suffix 'vision', common to those signs, was likely to have a low degree of distinctiveness for part of the relevant public. However, it took the view that the average degree of visual similarity and high degree of phonetic similarity between the prefixes 'hylo' and 'hydro' were sufficient to establish a likelihood of confusion, as the figurative elements of the mark applied for were perceived solely as decorative. Thus, it found that there was a likelihood of confusion within the meaning of Article 8(1)(b) of Regulation No 207/2009 at the very least for the German-speaking portion of the relevant public.

110 The applicant submits that, in so far as the signs in question are different, the first of the two cumulative conditions provided for in Article 8(1)(b) of Regulation No 207/2009 is not satisfied and it cannot be concluded that there is a likelihood of confusion between the marks at issue. It submits that the single common element is purely descriptive of the goods in question and that the similarities concerning the weak elements alone are not sufficient to establish such a likelihood. Accordingly, it argues that the element 'hylo' of the earlier mark and the fanciful elements of the mark applied for must be sufficient to establish that there is no likelihood of confusion. It adds that, on account of its descriptive character, the earlier mark is devoid of distinctive character and there is therefore no such likelihood.

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

112 It must be borne in mind, in this regard, that 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 that of the goods or services covered. Accordingly, a low degree of similarity between those goods or services may be offset by a high degree of similarity between the marks, and vice versa (judgments of 29 September 1998, *Canon*, C-39/97, EU:C:1998:442, paragraph 17, and of 14 December 2006, *VENADO with frame and others*, T-81/03, T-82/03 and T-103/03, EU:T:2006:397, paragraph 74).

113 As is apparent from recital 8 of Regulation No 207/2009, the assessment of the likelihood of confusion depends on numerous elements, in particular the public's recognition of the trade mark on the market in question. The more distinctive the trade mark, the greater will be the likelihood of confusion, and therefore marks with a highly distinctive character, either per se or because of their recognition by the public, enjoy broader protection than marks with less distinctive character (see, by analogy, judgment of 11 November 1997, *SABEL*, C-251/95, EU:C:1997:528, paragraph 24; of 29 September 1998, *Canon*, C-39/97, EU:C:1998:442, paragraph 18; and of 22 June 1999, *Lloyd Schuhfabrik Meyer*, C-342/97, EU:C:1999:323, paragraph 20).

114 Conversely, a finding that the earlier mark has weak distinctive character does not preclude a finding that there is a likelihood of confusion. Although the distinctive character of the earlier mark must be taken into account in assessing the likelihood of confusion, it is only one factor among others involved in that assessment. Consequently, even in a case involving an earlier mark with a weak distinctive character, there may be a likelihood of confusion on account, in particular, of a similarity between the signs and between the goods or services covered (see judgment of 13 December 2007, *Xentral v OHIM – Pages jaunes (PAGESJAUNES.COM)*, T-134/06, EU:T:2007:387, paragraph 70 and the case-law cited).

115 In the present case, it must be stated that, first, the goods covered by the mark applied for and those designated by the earlier mark are identical. Second, the signs in question have an average degree of visual and conceptual similarity and a high degree of phonetic similarity. As a result, in accordance with the principle of interdependence referred to in paragraph 112 above, it must be concluded, as the Board of Appeal did, that there is a likelihood of confusion on the part of the relevant public, despite that public's higher than average degree of attentiveness.

116 Although the applicant insists, in essence, that the earlier mark is devoid of distinctive character, it must be stated that, first, contrary to its claim, the earlier mark has an average degree of distinctiveness. Second, it must be observed that, although the distinctive character of the earlier mark must be taken into account in assessing the likelihood of confusion (judgment of 29 September 1998, *Canon*, C-39/97, EU:C:1998:442, paragraph 24), as is apparent from paragraph 114 above, it is only one factor among others to be taken into account in that assessment. Thus, even in a case involving an earlier mark of weak distinctive character, there may be a likelihood of confusion on account, in particular, of a similarity between the signs and between the goods or services covered (judgments of 16 March 2005, *FLEXI AIR*, T-112/03, EU:T:2005:102, paragraph 61; of 15 March 2006, *Athinaiiki Oikogeniaki Artopoiia v OHIM – Ferrero (FERRÓ)*, T-35/04, EU:T:2006:82, paragraph 69; and of 13 December 2007, *PAGESJAUNES.COM*, T-134/06, EU:T:2007:387, paragraph 70). In so far as, in the present case, the goods concerned are identical and the signs in question are similar, such an argument cannot therefore succeed.

117 In any event, it must be highlighted that both the Court of Justice and the General Court have held that the weak distinctive character of an earlier mark cannot, on its own, exclude a likelihood of confusion. Indeed, giving predominant relevance to the weak distinctiveness of the earlier mark would have the effect of neutralising the factor of the similarity of the marks in favour of one based on the distinctive character of the earlier mark, which would then be given undue importance. The result would be that, where the earlier mark is of only weak distinctive character, a likelihood of confusion would exist only where there was a complete reproduction of that mark by the mark applied for, whatever the degree of similarity between the signs at issue. Such a result would not, however, be consistent with the very nature of the global assessment that the competent authorities are required to undertake by virtue of Article 8(1)(b) of Regulation No 207/2009 (judgment of 25 April 2018, *Perfumes y Aromas Artesanales v EUIPO – Aromas Selective (Aa AROMAS artesanales)*, T-426/16, not published, EU:T:2018:223, paragraph 108; see also, to that effect, judgment of 15 March 2007, *T.I.M.E. ART v OHIM*, C-171/06 P, not published, EU:C:2007:171, paragraph 41 and the case-law cited).

118 Consequently, even if the earlier mark has weak distinctive character, the identity between the goods and the similarities between the signs will be sufficient to support the conclusion that there is a likelihood of confusion on the part of the relevant public (see, to that effect, judgment of 14 November 2018, *Foodterapia v EUIPO – Sperlari (DIETOX)*, T-486/17, not published, EU:T:2018:778, paragraph 93).

119 It follows from all of those considerations that the Board of Appeal was fully entitled to hold that there is a likelihood of confusion on the part of the relevant public within the meaning of Article 8(1)(b) of Regulation No 207/2009.

120 The first plea must therefore be rejected as unfounded.

2. The second plea, alleging infringement of the principles of the protection of legitimate expectations and of legal certainty

121 The applicant claims, in essence, that the number of marks accepted by EUIPO which contain the element ‘vision’ and of decisions of EUIPO rejecting an opposition based on the similarity of marks that share their descriptive element alone can be interpreted as meaning that there is no likelihood of confusion. It adds that the effect of the contested decision is, according to its submissions, that no other mark containing the element ‘vision’ could be registered in the future in so far as there would be a likelihood of confusion, even though the marks at issue were similar only as regards their descriptive element. In that respect, it provides several examples of opposition proceedings in which EUIPO had decided to reject an opposition in its entirety on account of the non-distinctive character of the earlier mark or where the sole common element of the earlier mark and of the mark applied for was descriptive, in order to show that EUIPO’s previous decision-making practice supports the registration of the mark applied for in the light of the principles of the protection of legitimate expectations and of legal certainty.

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

123 In that regard, it must be stated, in the first place, that, according to settled case-law, the decisions concerning the registration of signs as EU trade marks which the Boards of Appeal take under Regulation No 207/2009 are adopted in the exercise of circumscribed powers and are not a matter of discretion. Accordingly, the legality of decisions of the Boards of Appeal must be assessed solely on the basis of that regulation, as interpreted by the EU Courts, and not on the basis of a previous decision-making practice (see judgments of 12 January 2006, *Deutsche SiSi-Werke v OHIM*, C-173/04 P, EU:C:2006:20, paragraph 48 and the case-law cited, and of 9 November 2016, *Smarter Travel Media v EUIPO (SMARTER TRAVEL)*, T-290/15, not published, EU:T:2016:651, paragraph 71 and the case-law cited; judgment of 22 March 2018, *Dometic Sweden v EUIPO (MOBILE LIVING MADE EASY)*, T-235/17, not published, EU:T:2018:162, paragraph 58).

124 It follows that EUIPO’s earlier decisions cannot give rise to legitimate expectations (judgments of 7 October 2015, *The Smiley Company v OHIM (Shape of a smiley with heart-shaped eyes)*, T-656/13, not published, EU:T:2015:758, paragraph 48, and of 9 November 2016, *SMARTER TRAVEL*, T-290/15, not published, EU:T:2016:651, paragraph 72).

125 In the second place, according to the case-law, EUIPO is under a duty to exercise its powers in accordance with the general principles of EU law. Although, having regard to the principles of equal treatment and of sound administration, EUIPO must take into account the decisions previously taken in respect of similar applications and consider with special care whether it should decide in the same way or not, the way in which those principles are applied must, however, be consistent with respect for the principle of legality. Consequently, a person who files an application for registration of a sign as a trade mark cannot rely, to his or her advantage and in order to secure an identical decision, on a possibly unlawful act committed to the benefit of someone else (see, to that effect, judgments of 10 March 2011, *Agencja Wydawnicza Technopol v OHIM*, C-51/10 P, EU:C:2011:139, paragraphs 73 to 76, and of 21 March 2014, *FTI Touristik v OHIM (BigXtra)*, T-81/13, not published, EU:T:2014:140, paragraph 52).

126 Moreover, for reasons of legal certainty and sound administration, the examination of any trade mark application must be stringent and full, 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 (see, to that effect, judgments of 10 March 2011, *Agencja Wydawnicza Technopol v OHIM*, C-51/10 P, EU:C:2011:139, paragraph 77, and of 9 March 2017, *Maximum Play v EUIPO (MAXPLAY)*, T-400/16, not published, EU:T:2017:152, paragraph 49).

127 In the present case, in so far as the Board of Appeal conducted a full and specific assessment as to whether there was a likelihood of confusion between the marks at issue before refusing to register the mark applied for, the applicant cannot successfully cite previous decisions of EUIPO for the purpose of casting doubt on the finding that registration of the mark applied for is incompatible with Regulation No 207/2009 (see, to that effect, judgment of 14 November 2017, *Claranet Europe v EUIPO – Claro (claranet)*, T-129/16, not published, EU:T:2017:800, paragraph 97).

128 Nor can the applicant validly rely on the argument that, in essence, no other mark containing the term ‘vision’ could be registered, even if the similarity of the marks in question were due to their descriptive element. The individual assessment of each sign, as required by the settled case-law of the Court of Justice, must be carried out in the light of the particular circumstances of the case and cannot therefore be regarded as being subject to general presumptions (see judgment of 8 May 2014, *Bimbo v OHIM*, C-591/12 P, EU:C:2014:305, paragraph 36 and the case-law cited).

129 Thus, the fact that the intervener does not have a monopoly over the word ‘vision’, to which the earlier mark alludes, cannot, in principle, preclude a finding, in the light of all the other relevant factors, that the allusion to that word in the respective word elements of the signs contributes to a likelihood of confusion. By contrast, excluding a likelihood of confusion on the sole ground that that element has weak distinctive character, as requested by the applicant, would mean that the proprietor of the earlier mark would be improperly denied the rights attached to its registration by reason of an incorrect reliance on general presumptions (see, to that effect, judgments of 28 April 2016, *Gervais Danone v EUIPO – Mahou (B’lue)*, T-803/14, not published, EU:T:2016:251, paragraph 36, and of 25 April 2018, *Aa AROMAS artesanales*, T-426/16, not published, EU:T:2018:223, paragraph 112).

130 Accordingly, in the light of all of the foregoing, the second plea must be rejected and, as a result, the applicant’s first head of claim must be rejected in its entirety, without it being necessary to rule on the admissibility of the applicant’s request for the case to be referred back to EUIPO for reconsideration.

131 In the light of all of the foregoing considerations, the action must be dismissed in its entirety, without it being necessary to rule on the admissibility of the second head of claim, disputed by EUIPO, that the Court should alter the contested decision by finding that there are no grounds for refusing registration of the mark applied for in respect of the goods referred to in paragraph 3 above and that that mark should be registered.

IV. Costs

132 Under Article 134(1) 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 forms of order sought by EUIPO and the intervener.

On those grounds,

THE GENERAL COURT (Second Chamber)

hereby:

- 1. Dismisses the action;**
- 2. Orders Olimp Laboratories sp z o.o. to pay the costs.**

Tomljenović

Škvařilová-Pelzl

Nömm

Delivered in open court in Luxembourg on 27 January 2021.

E. Coulon

M. van der Woude

Registrar

President

* Language of the case: English.