JUDGMENT OF THE COURT OF FIRST INSTANCE (Third Chamber)

8 December 2005 *

In Case T-29/04,

Castellblanch, SA, established in Sant Sadurni d'Anoia (Spain), represented by F. de Visscher, E. Cornu, É. De Gryse and D. Moreau, lawyers,

applicant,

v

Office for Harmonisation in the Internal Market (Trade Marks and Designs) (OHIM), represented by I. de Medrano Caballero, acting as Agent,

defendant,

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

* Language of the case: English.

Champagne Louis Roederer SA, established in Reims (France), represented by P. Cousin, lawyer,

ACTION brought against the decision of the Second Board of Appeal of OHIM of 17 November 2003 (Case R 37/2000-2), relating to opposition proceedings between Castellblanch, SA and Champagne Louis Roederer SA,

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

composed of M. Jaeger, President, V. Tiili and O. Czúcz, Judges,

Registrar: K. Andova, Administrator,

having regard to the application lodged at the Registry of the Court of First Instance on 26 January 2004,

having regard to OHIM's responses lodged at the Registry of the Court of First Instance on 4 June and 28 September 2004,

having regard to intervener's response lodged at the Registry of the Court of First Instance on 1 June 2004,

further to the hearing on 4 July 2005,

gives the following

Judgment

Background to the dispute

1 On 1 April 1996, Castellblanch, SA filed an application for a Community trade mark with the Office for Harmonisation in the Internal Market (Trade Marks and Designs) (OHIM), pursuant to Council Regulation (EC) No 40/94 of 20 December 1993 on the Community trade mark (OJ 1994 L 11, p. 1), as amended.

2 The mark in respect of which registration was sought is the following figurative sign ('the mark CRISTAL CASTELLBLANCH'):



3 The goods in respect of which registration was sought fall within Class 33 of the Nice Agreement concerning the International Classification of Goods and Services for the Purposes of the Registration of Marks of 15 June 1957, as revised and amended, and correspond to the following description: 'wines and sparkling wines'.

4 On 24 November 1997, the application was published in *Community Trade Marks Bulletin* No 29/1997.

5 On 23 February 1998, Champagne Louis Roederer SA filed a notice of opposition pursuant to Article 42 of Regulation No 40/94 to registration of that Community trade mark. The opposition was based on the following registrations of the word sign CRISTAL:

— French trade mark registration No 1 114 613 of 27 November 1979, renewed on 13 November 1989 (No 1 559 904) and on 20 December 1991 (No 1 713 576) for 'wines originating from France, namely champagne, sparkling wines and alcoholic beverages (except beers)', belonging to Class 33;

— international trade mark registration No 451 185, requested on 29 January 1980, applicable in Austria, the Benelux countries, Italy and Portugal for 'wines originating from France, namely champagne and sparkling wines', belonging to Class 33;

— German trade mark registration No DD 647 501 of 18 April 1991 for 'alcoholic beverages (except beers)', belonging to Class 33;

— United Kingdom trade mark registration No 1 368 211 applied for on 22 December 1988 for 'wines from Champagne', belonging to Class 33;

— Irish trade mark registration No 150 404 of 30 October 1992 for 'alcoholic beverages (except beers)', belonging to Class 33;

— Danish trade mark registration VR 06.021 1995 of 15 September 1995 for 'champagne, sparkling wines, wine and Cognac', belonging to Class 33.

6 The opposition was also based on well-known trade marks in Belgium, France, Great Britain and Germany for 'wines from Champagne'.

7 The opposition concerned all of the goods covered by the earlier registrations for the sign CRISTAL and was directed against all of the goods covered by the trade mark applied for. The reasons given in support of that opposition were those laid down in Article 8(1)(a) and (b) of Regulation No 40/94.

8 By decision of 26 October 1999, the Opposition Division upheld the opposition. It based its decision solely on the earlier French mark ('the earlier mark'). It held, firstly, that the evidence submitted by the intervener was sufficient to prove genuine use of the earlier mark, and secondly that, given the identity of the goods at issue and the similarity of the conflicting signs, as well as the highly distinctive character of the earlier mark on the French market, there was a likelihood of confusion on the part of the relevant public, namely the French consumer.

9 On 22 December 1999, the applicant filed a notice of appeal with OHIM, under Articles 57 to 62 of Regulation No 40/94, against the Opposition Division's decision.

10 During the procedure before the Board of Appeal the applicant limited its trade mark application to the following products, belonging to Class 33: 'Spanish sparkling wines of the cava variety'.

11 By decision of 17 November 2003 ('the contested decision'), the Board of Appeal dismissed the appeal. It found that the earlier mark had been used both genuinely and effectively and it concluded that there was similarity between the goods in question, along with similarity between the opposing signs which could have resulted in likelihood of confusion including likelihood of association on the part of the French public.

Forms of order sought

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

— annul the contested decision;

— order OHIM to pay the costs.

13 OHIM contends that the Court of First Instance should:

— dismiss the application;

— order the applicant to pay the costs.

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

— dismiss the application;

— order the applicant to pay the costs.

The admissibility of the documents produced for the first time before the Court of First Instance

15 The applicant submits that Annexes 23 to 30 of the intervener's response must be declared inadmissible because they were produced for the first time before the Court of First Instance.

16 It should be noted that Annexes 23 and 24 are copies of national judicial decisions. Although produced for the first time before the Court of First Instance those documents do not serve as evidence in the narrow sense, but concern national case-law to which, even after the procedure before OHIM, a party is entitled to refer.

17 Annex 25 consists of a copy of an extract from a bilingual French-Spanish dictionary. It is not established that that document was produced before OHIM. However, that document demonstrates a fact which is set out in the contested decision, namely that the Spanish word 'cava' is the equivalent of the French term 'champagne'. Thus, the fact that the intervener referred to a dictionary is immaterial given that what is actually shown by that reference is part of the factual framework of the procedure before the Board of Appeal.

18 Annexes 26 to 29 are copies of the correspondence between the Registry of the Court of First Instance and the intervener's representative in relation to the current proceedings. The applicant cannot, therefore, plead that they are inadmissible.

19 Annex 30 consists of photos of the box in which bottles bearing the mark CRISTAL are marketed. It is apparent from the administrative file before OHIM that the documents produced before it include photos of that box. Thus, the Court of First Instance may take that annex into account.

20 Consequently, the allegations of inadmissibility in Annexes 23 to 30 of the response of the intervener must be rejected.

Substance

21 The applicant submits two pleas in support of its action. The first plea alleges infringement of Article 15(2)(a) and Article 43(2) and (3) of Regulation 40/94 and of Rule 22(2) of Commission Regulation (EC) No 2868/95 of 13 December 1995 implementing Regulation (EC) No 40/94 (OJ 1995 L 303, p. 1, 'the implementing regulation'). The second plea alleges infringement of Article 8(1)(b) of Regulation No 40/94.

The first plea, alleging infringement of Article 15(2)(a) and Article 43(2) and (3) of Regulation No 40/94 and of Rule 22(2) of the implementing regulation

Preliminary observations

22 In the context of the first plea the intervener submitted a 'preliminary observation' regarding the application of Article 43(2) and (3) of Regulation No 40/94 and Rule 22(1) of the implementing regulation which OHIM interpreted as a plea based on an argument relating to infringement of those provisions which had not been raised in the application, as permitted by Article 134(3) of the Rules of Procedure of the Court of First Instance, but which is inadmissible because it was not submitted before OHIM.

23 The intervener submits that the applicant never requested, in application of Article 43(2) and (3) of Regulation No 40/94, that it show use of the earlier mark and that OHIM never invited it, in application of Rule 22(1) of the implementing regulation, to prove such use, setting a deadline for it to do so. Thus, according to the intervener, as is evidenced by the judgment in Joined Cases T-183/02 and T-184/02 *El Corte Inglés* v *OHIM — González Cabello and Iberia Líneas Aéreas de España (MUNDICOR)* [2004] ECR II-965, contrary to the Board of Appeal's approach it is unnecessary to consider whether the documentation produced by the intervener to prove the reputation of its mark does or does not attest to genuine use of that mark. The applicant's first plea must therefore be rejected.

24 It is sufficient to note that, as the intervener does not contest the scope of the contested decision, which upheld the opposition, and is not seeking annulment or alteration of that decision (see, to that effect, Joined Cases T-160/02 to T-162/02 *Naipes Heraclio Fournier* v *OHIM — France Cartes (sword in a pack of cards, knight of clubs and king of swords)* [2005] ECR II-1643, paragraphs 17 to 20), its preliminary observation cannot be used in support of its submissions.

25 Therefore, it is not necessary to consider that preliminary observation.

The alleged alteration of the distinctive character of the earlier mark

26 The applicant submits that the intervener has not provided evidence of genuine use of the earlier mark and that the contested decision thus infringes Article 15(2)(a) and Article 43(2) and (3) of Regulation No 40/94 and Rule 22(2) of the implementing regulation. Where a mark is composed of several elements only

one or some of which are distinctive and have rendered the mark as a whole registrable, an alteration of that element or its omission or exchange for another element will generally mean that the distinctive character of that mark is altered. It refers in that respect to OHIM's decisions in the past.

27 OHIM and the intervener contest the applicant's arguments and affirm that use of the mark CRISTAL has been shown.

28 The Court of First Instance points out that, as is apparent from the ninth recital in the preamble to Regulation No 40/94, the Council considered that there was no justification for protecting an earlier trade mark except where that mark had actually been used. In accordance with that recital, Article 43(2) and (3) of Regulation No 40/94 provide that an applicant for a Community trade mark may request proof that the earlier mark has been put to genuine use in the territory where it is protected during the period of five years preceding the date of publication of the Community trade mark application against which an opposition has been filed (Case T-39/01 *Kabushiki Kaisha Fernandes* v *OHIM — Harrison (HIWATT)* [2002] ECR II-5233, paragraph 34, and Case T-356/02 *Vitakraft-Werke Wührmann* v *OHIM — Krafft (VITAKRAFT)* [2004] ECR II-3445, paragraph 25).

29 Under Rule 22(2) of the implementing regulation, proof of use must cover the place, time, extent and nature of use of the earlier mark.

30 In addition, it must be noted that, under the combined provisions of Article 15(2)(a) and Article 43(2) and (3) of Regulation No 40/94, proof of genuine use of an earlier national or Community trade mark which forms the basis of an opposition against a Community trade mark application also includes proof of use of the earlier mark in a form differing in elements which do not alter the distinctive character of that mark in the form under which it was registered (see, to that effect, Case T-156/01 *Laboratorios RTB* v *OHIM — Giorgio Beverly Hills (GIORGIO AIRE)* [2003] ECR II-2789, paragraph 44).

31 In the present case the applicant submits that it is evident from the proof of use and of repute produced by the intervener that the latter used the earlier mark in a form different to the one under which it was registered. The earlier mark is used for bottles which have on their main and neck labels, in addition to the word 'cristal', the denomination 'Louis Roederer' several times, as well as a symbol that includes the letters 'l' and 'r' and some complementary figurative elements which appear several times. According to the applicant, the combination of the word 'cristal' with the denomination 'Louis Roederer', the letters 'lr' and the accompanying figurative elements substantially alters the identity of the earlier mark, especially when account is taken of the strong distinctive character of the words 'Louis Roederer', and does not constitute genuine use of the earlier mark CRISTAL. Therefore, the opposition filed by the intervener and, consequently, the contested decision are wholly unfounded.

32 The Court of First Instance points out, first, following the example of OHIM, that the applicant does not contest the place, time or extent of use of the earlier mark but only the nature of that use.

33 In the contested decision the Board of Appeal found that there is no precept in the Community trade mark system that obliges the opponent to prove the use of his earlier mark on its own, independently of any other mark. According to the Board of

Appeal, the case could arise where two or more trade marks are used jointly and autonomously, with or without the name of the manufacturer's company, as is the case particularly in the context of the automobile and wine industries.

34 That approach must be followed. The situation is not that the intervener's mark is used under a form different to the one under which it was registered, but that several signs are used simultaneously without altering the distinctive character of the registered sign. As OHIM rightly pointed out, in the context of the labelling of wine products joint affixing of separate marks or indications on the same product, in particular the name of the winery and the name of the product, is a common commercial practice.

35 In the present case the mark CRISTAL appears clearly four times on the neck of the bottle marketed by the intervener and twice on the main label, accompanied by the symbol *. On the neck that mark is separate from the other elements. In addition, the mark CRISTAL appears alone on the boxes in which bottles of the mark CRISTAL are marketed. Equally, on the invoices produced by the intervener reference is made to the term 'cristal' with the mention '1990 coffret'. It should be noted that the mark CRISTAL thus identifies the product marketed by the intervener.

36 As regards the mention 'Louis Roederer' on the main label, it merely indicates the name of the manufacturer's company, which may provide a direct link between one or more product lines and a specific undertaking. The same reasoning applies to the group of letters 'lr' which represents the initials of the intervener's name. As pointed out by OHIM, joint use of those elements on the same bottle does not undermine the function of the mark CRISTAL as a means of identifying the products at issue.

37 Furthermore, OHIM's finding that the use of the word mark together with the geographical indication 'Champagne' cannot be considered to be an addition capable of altering the distinctive character of the trade mark when used for champagne must be endorsed. In the wine sector the consumer is often particularly interested in the precise geographical origin of the product and the identity of the wine producer, since the reputation of such products often depends on whether the wine is produced in a certain geographical region by a certain winery.

38 In those circumstances it must be held that the use of the word mark CRISTAL together with other indications is irrelevant and that the Board of Appeal did not infringe Article 15(2)(a) of Regulation No 40/94, Article 43(2) and (3) thereof, or Rule 22(2) of the implementing regulation.

39 Consequently, the applicant's first plea must be rejected.

The second plea, alleging infringement of Article 8(1)(b) of Regulation No 40/94

40 The applicant submits that in view of the dissimilarity between the products, the dissimilarity between the marks, the low distinctive character of the earlier mark and all the other relevant factors, such as the national decisions regarding this case and the peaceful coexistence of the opposing signs, there is no likelihood of confusion between them.

41 OHIM and the intervener contend that the Board of Appeal correctly assessed that there is a likelihood of confusion.

42 Under Article 8(1)(b) of Regulation No 40/94, upon opposition by the proprietor of an earlier trade mark the trade mark applied for is not to be registered if because of its identity with or similarity to the earlier trade mark and the identity or similarity of the goods or services covered by the trade marks there exists a likelihood of confusion on the part of the public in the territory in which the earlier trade mark is protected. The likelihood of confusion includes the likelihood of association with the earlier trade mark. Moreover, under Article 8(2)(a)(ii) and (iii) of Regulation No 40/94,'earlier trade marks' is to be understood as meaning trade marks registered in a Member State and trade marks registered under international arrangements which have effect in a Member State, with a date of application for registration which is earlier than the date of application for registration of the Community trade mark.

43 According to settled case-law, likelihood of confusion is the likelihood that the public might believe that the goods or services in question come from the same undertaking or, as the case may be, from economically-linked undertakings.

44 According to the same line of case-law, the likelihood of confusion must be assessed globally, according to the perception which the relevant public has of the signs and the products or services at issue, and taking into account all factors relevant to the circumstances of the case, in particular the interdependence of the similarity between the signs and between the goods or services (see Case T-162/01 *Laboratorios RTB* v *OHIM — Giorgio Beverly Hills (GIORGIO BEVERLY HILLS)* [2003] ECR II-2821, paragraphs 31 to 33, and the case-law cited).

45 In the present case, the marks on which the opposition relied are national marks registered in France, Germany, Great Britain, Ireland and Denmark and an international mark protected in Austria, the Benelux countries, Italy and Portugal. The decision of the Opposition Division and the contested decision were based solely on the earlier French mark, a fact which is not contested by the parties. Therefore, the Court of First Instance's assessment must be restricted to French territory.

46 The relevant public is the average French consumer who is deemed to be reasonably well informed and reasonably observant and circumspect. That public also includes professionals and specialists from the wine-growing and restaurant sectors.

— Comparison of the products

47 The applicant points out that the use made by the intervener is exclusively limited to 'wines originating from France, namely Champagne', whereas the trade mark applied for, after limitation of the list of products claimed, covers 'Spanish sparkling wines of the cava variety'. Those products are not even similar, given the differences as to origin, characteristics and price of champagne and 'cava' and the relevant public.

48 It should be noted that, in both the Opposition Division's decision and the contested decision, use of the earlier mark was considered to be shown for all the products covered by the earlier mark, that is to say not only for champagne.

49 It is thus necessary to compare the 'Spanish sparkling wines of the cava variety' covered by the mark applied for with the 'wines originating from France, namely

champagne, sparkling wines and alcoholic beverages (except beers)' covered by the earlier mark.

50 In order to assess the similarity of the goods or services concerned, all the relevant factors pertaining to the relationship between those goods and services are to be taken into account. Those factors include, inter alia, their nature, intended purpose and their method of use and whether they are in competition with one another or are complementary (see, by way of analogy, Case C-39/97 *Canon* [1998] ECR I-5507, paragraph 23).

51 Moreover, where the goods covered by the earlier mark include the goods covered by the trade mark application those goods are considered to be identical (see, to that effect, Case T-104/01 *Oberhauser* v *OHIM — Petit Liberto (Fifties)* [2002] ECR II-4359, paragraphs 32 and 33).

52 It should be noted that 'wines originating from France, namely champagne, sparkling wines and alcoholic beverages (except beers)' and 'Spanish sparkling wines of the cava variety' are of the same nature, that they are to be used in the same way and consumed in the same conditions, for example on special occasions, and that they are sold in the same establishments or on the same shelves in supermarkets in such a way as to compete. Although the goods claimed by the applicant are limited to those originating from Spain, that is not sufficient to exclude similarity of the products in the context of the assessment of likelihood of confusion. There may be a likelihood of confusion even where the public perception is that the goods are produced in different places (see, by way of analogy, *Canon*, cited above, paragraphs 29 and 30). In addition, it must be remembered that the goods covered by the earlier trade mark are not only wines originating from France, but also sparkling wines in general which could, therefore, also be produced in Spain. Accordingly, sparkling wines include 'Spanish sparkling wines of the cava variety', and thus, those goods are identical.

53 Even if only champagne may be taken into account for the earlier mark, the goods at issue are similar. In that respect, the applicant's argument in relation to the price difference between champagne of the mark CRISTAL and the 'cava' which it markets is unfounded. The specific product champagne of the mark CRISTAL should not be compared with the goods covered by the trade mark application but champagnes in general. It should be noted that champagnes exist which are priced relatively similarly to a good quality 'cava'. Furthermore, as recalled above, if the French consumer is aware that 'cava' may only be produced in Spain, the fact that they are produced in different places is irrelevant: the same company may produce both 'cava' and champagne but in different places.

54 Consequently, the goods in dispute are identical or, at the very least, highly similar.

— Comparison of the signs

55 As is clear from settled case-law, the global assessment of the likelihood of confusion, as far as concerns the visual, aural or conceptual similarity of the opposing signs, must be based on the overall impression given by the signs, bearing in mind, inter alia, their distinctive and dominant components (Case T-292/01 *Phillips-Van Heusen* v *OHIM — Pash Textilvertrieb und Einzelhandel (BASS)* [2003] ECR II-4335, paragraph 47, and case-law cited).

56 The applicant considers that the comparison of the signs must be made bearing the earlier mark in mind as it is actually used and not how it was registered.

57 The applicant's submission cannot be upheld. As the Board of Appeal rightly found, the comparison must be made between the signs as they were registered or as they appear in the trade mark application, regardless of whether they are used alone or together with other marks or mentions. The signs to be compared are thus the following:

CRISTAL

The earlier mark



The mark applied for

58 Adopting the Opposition Division's findings, the Board of Appeal held as follows:

'It is indicated in [the decision of the Opposition Division] that, although there are certain similarities between the [opposing] signs, the trade marks are not considered similar from the visual point of view. On the other hand, the phonetic differences between both signs are not sufficient to consider them to be different, thus confirming their similarity from the phonetic point of view. Finally, the Opposition Division considered that the signs are conceptually similar, confirming that the word "Cristal" could have a suggestive character for the goods identified by the [opposing] signs, but never descriptive of them.'

59 As regards the comparison of the signs from the visual point of view it must be noted that the earlier mark is made up solely of the word element 'cristal' whereas the mark applied for is a figurative mark made up of a picture of a castle and the words 'cristal' and 'castellblanch' which are all placed together in an oval frame formed by a dotted line. The word 'castellblanch' is written in bold letters which are bigger than the letters in the word 'cristal'. Therefore, given that the figurative elements of the mark are purely secondary, the consumer's attention is, as the applicant rightly claims, drawn first and foremost to the word 'castellblanch'. However, considering the central position occupied by the word 'cristal' in the mark applied for and the fact that the earlier mark is entirely reproduced in the mark applied for, there is a certain amount of visual similarity between the opposing signs.

60 As for the phonetic comparison, although, as submitted by the applicant, the opposing marks differ in terms of the number of words, letters, syllables, vowels and consonants it should be noted that there is phonetic similarity between those marks since the earlier mark is entirely reproduced in the mark applied for. Furthermore, the common element between the two marks at issue coincides with the first word of the mark applied for and is thus the first to be pronounced. The addition of the separate word 'castellblanch' does not affect that similarity. Since the word 'cristal' is short and striking the consumer may, when ordering orally, pronounce only the first word. The term 'cristal' therefore constitutes the dominant element of the mark applied for from the phonetic point of view. In addition, it is identical to the single element of the earlier mark. Therefore, there is phonetic similarity between the opposing signs.

61 As regards the comparison from a conceptual point of view, the signs are similar. They both contain the word 'cristal', which has a conceptually clear import for the relevant public in so far as that term conveys the idea of transparency and purity. By contrast, the word 'castellblanch' does not have any obvious meaning for the relevant public. In those circumstances, the word 'castellblanch' cannot be held to be the dominant element of the mark applied for from a conceptual point of view. The applicant's argument that the word 'cristal' is descriptive or at least evocative of the characteristics of the products in question, which makes it of secondary importance

within the mark applied for, is irrelevant in that regard, as that circumstance does not alter the conceptual content of the mark applied for. Moreover, an evocative element may be perceived as the dominant element if the other elements of the sign are even less characteristic (Case T-288/03 *TeleTech Holdings* v *OHIM — Teletech International (TELETECH GLOBAL VENTURES)* [2005] ECR II-1767, paragraph 86).

62 There are therefore important resemblances between the opposing marks. It is now necessary to consider whether, as a whole, there is likelihood of confusion between the two.

— Likelihood of confusion

63 The applicant submits that the earlier mark has only weak distinctive character as the word 'cristal' is descriptive and evocative of the goods at issue, it has not acquired a distinctive character through use and there are numerous other trade marks on the market containing the word 'cristal' which are registered for goods in Class 33.

64 In the contested decision the Board of Appeal rejected the argument that the word 'cristal' was a descriptive indication of the goods at issue, holding that that word is an evocative indication which suggests the crystalline character of wines, but which in no way describes the product. Furthermore, the Board of Appeal considered, in particular on the basis of a survey on renown carried out in February 1999 in France, the United Kingdom and Italy by the French Gallup Institute ('the Gallup survey'), that the highly distinctive character of the mark CRISTAL on the French market had been shown.

65 It is apparent from the Gallup survey that the mark CRISTAL enjoys almost the same renown as the mark Dom Pérignon both in France and in Italy and the United Kingdom.

66 The Gallup survey studied the 'reputation of prestige champagne vintages in France, Italy and in the United Kingdom' in February 1999. It is apparent from the part entitled 'Context, objectives and methodology' that the intervener's representatives wished to carry out a brand awareness survey of champagne of the mark CRISTAL 'among hotels, restaurants and upscale wine cellars' and that the 'information was collected from wine waiters or chief cellarmen in hotels, restaurants and upscale wine cellars'. In each of the countries studied 100 interviews were carried out.

67 It must be noted that the survey shows the renown of the mark CRISTAL for only a part of the relevant public. It did not look into the renown of the mark CRISTAL amongst average consumers, but amongst professional consumers who, moreover, are highly specialised in the field. In addition, the other documents produced by the intervener also show renown only for a specialised public, since they are mostly extracts from specialist newspapers in the wine-producing business. It cannot be established from those documents that the mark CRISTAL enjoys a reputation amongst average French consumers.

68 However, even though renown or reputation of the earlier mark cannot be found for the whole of the relevant public there is a likelihood of confusion between the opposing marks, including a likelihood of association, given the identity or, at least,

the high degree of similarity between the goods in dispute and the similarity of the respective signs. It is also immaterial whether the earlier mark has intrinsically high distinctive character or not.

69 Although the distinctive character of the earlier mark must be taken into account when assessing the likelihood of confusion (see, by way of analogy, *Canon*, cited above, paragraph 24), it is only one factor among others to be included 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 (see, to that effect, Case T-112/03 *L'Oréal* v *OHIM — Revlon (FLEXI AIR)* [2005] ECR II-949, paragraph 61).

70 In any event, the word 'cristal' is in no way descriptive of the products in dispute, but it may be considered to be evocative. Consequently, the mark CRISTAL has average distinctive character, but not a weak one as claimed by the applicant.

71 As for the applicant's argument that other marks exist which contain the word 'cristal' and are registered for goods in Class 33, thus showing the weak distinctive character of the earlier mark and that both of the marks in question coexist peacefully, it is sufficient to find that it is not established that those marks have their effects or correspond to a usage in relation to the goods in dispute and in particular to sparkling wines.

72 Moreover, even if the possibility cannot be entirely dismissed that, in certain cases, the coexistence of earlier marks on the market could reduce the likelihood of confusion which the Opposition Division and the Board of Appeal have found to exist between the two marks, that possibility can be taken into consideration only if,

at the very least, during the proceedings before OHIM concerning relative grounds of refusal the applicant for the Community trade mark duly demonstrated that such coexistence was based upon the absence of any likelihood of confusion on the part of the relevant public between the earlier marks upon which it relies and the intervener's earlier mark on which the opposition is based, and provided that the earlier marks concerned and the marks at issue are identical (Case T-31/03 *Grupo Sada* v *OHIM — Sadia (GRUPO SADA)* [2005] ECR II-1667, paragraph 86).

73 In the present case, it must be noted that during the administrative proceedings the applicant adduced no evidence, other than copies of photos of some of the trade mark registrations claimed and registration certificates in support of the claim that those registrations coexisted on the market with the intervener's earlier mark. It is sufficient to note that the earlier marks at issue are not identical to the opposing marks. Furthermore, that information is insufficient to show that the likelihood of confusion between the marks at issue is reduced, still less eliminated (see, to that effect, *GRUPO SADA*, cited above, paragraph 87).

74 As regards the alleged coexistence of the earlier mark CRISTAL and the applicant's national mark CRISTAL CASTELLBLANCH, it is sufficient to note that the applicant also did not show that that coexistence was based on the absence of likelihood of confusion. On the contrary, it is apparent from the file that the applicant's and the intervener's marks have been the subject of a number of disputes, which shows that that alleged coexistence has not been peaceful.

75 As regards the various national decisions relied on by the parties, it is sufficient to observe that the Community trade mark regime is an autonomous system, comprising a set of rules and pursuing objectives which are peculiar to it, and it applies independently of any national system (Case T-32/00 *Messe München* v *OHIM (electronica)* [2000] ECR II-3829, paragraph 47).

76 In those circumstances, the applicant's second plea must be rejected.

77 The action must therefore be dismissed in its entirety.

Costs

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

On those grounds,

THE COURT OF FIRST INSTANCE (Third Chamber)

hereby:

1. Dismisses the action;

2. Orders the applicant to pay the costs.

Jaeger Tiili Czúcz

Delivered in open court in Luxembourg on 8 December 2005.

E. Coulon M. Jaeger

Registrar President