

Court of First Instance EC, 25 March 2009, Anheuser-Busch v OHIM – Budweiser



## TRADEMARK RIGHTS

### Evidence of genuine use earlier trademark

- The Board of Appeal referred, in particular, to advertisements showing images of Budvar beer bearing the mark BUDWEISER, to invoices sent to customers in Germany and Austria and to the fact that those advertisements and invoices related to the relevant period.

106 In the present case, the Board of Appeal found that the evidence which Budvar produced was clearly sufficient to prove genuine use of the earlier international word mark BUDWEISER (R 238 203). The Board of Appeal referred, in particular, to advertisements showing images of Budvar beer bearing the mark BUDWEISER, to invoices sent to customers in Germany and Austria and to the fact that those advertisements and invoices related to the relevant period. In addition, the Board of Appeal found that the invoices in question were relevant, especially in the light of the order in Case C-259/02 La Mer Technology [2004] ECR I-1159. The Board of Appeal notes that, in that case, the Court of Justice stated that even minimal use by a single importer in the Member State concerned

may be sufficient if the use serves a real commercial purpose (paragraph 26 of the contested decision).

### Stated reasons for obvious similarities beer and malted non-alcoholic beverages

- It is necessary to point out in that regard that in the grounds supporting the notice of opposition of 28 September 1999, Budvar expressly indicated that ‘malted non-alcoholic beverages’ and ‘beer of any kind’ were similar, in particular because those goods in fact designated ‘malted’ beverages. Those factors were fully known by the applicant for the mark which is, moreover, a well-known professional in the sector concerned. Moreover, Anheuser-Busch did not submit observations in that regard before the Board of Appeal, even though the Opposition Division had also found, albeit in connection with another earlier mark but also for beers, that the goods were ‘identical or similar to a high degree’.
- In those circumstances, Anheuser-Busch was in a position to understand the reasons which led the Board of Appeal to consider that the goods in question presented ‘obvious similarities’.

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### Court of First Instance EC, 25 March 2009

(V. Tiili, F. Dehousse (rapporteur) en I. Wiszniewska-Białecka)

JUDGMENT OF THE COURT OF FIRST INSTANCE (First Chamber)

25 March 2009 (\*)

*(Community trade mark – Opposition proceedings – Application for Community word mark BUDWEISER – Earlier international word and figurative marks BUDWEISER and Budweiser Budvar – Relative grounds for refusal – Article 8(1)(a) and (b) of Regulation (EC) No 40/94 – Genuine use of the earlier trade mark – Article 43(2) and (3) of Regulation No 40/94 – Infringement of rights of defence – Statement of reasons – Article 73 of Regulation No 40/94 – Late submission of documents – Discretion granted by Article 74(2) of Regulation No 40/94)*

In Case T-191/07,

Anheuser-Busch, Inc., established in Saint Louis, Missouri (United States), represented by V. von Bomhard and A. Renck, lawyers,  
applicant,

v

Office for Harmonisation in the Internal Market (Trade Marks and Designs) (OHIM), represented by A. Foliard-Monguiral, 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

Budějovický Budvar, národní podnik, established in České Budějovice (Czech Republic), represented by K. Čermák, lawyer,

ACTION brought against the decision of the Second Board of Appeal of OHIM of 20 March 2007 (Case R 299/2006-2) relating to opposition proceedings between Budějovický Budvar, národní podnik and Anheuser-Busch, Inc.,

THE COURT OF FIRST INSTANCE OF THE EUROPEAN COMMUNITIES (First Chamber), composed of V. Tiili, President, F. Dehousse (Rapporteur) and I. Wiszniewska-Białecka, Judges, Registrar: N. Rosner, Administrator, having regard to the application lodged at the Registry of the Court of First Instance on 31 May 2007, having regard to the response of OHIM lodged at the Registry on 5 October 2007, having regard to the response of the intervener lodged at the Registry on 8 October 2007, further to the hearing on 30 September 2008, gives the following

### Judgment

#### Background to the dispute

1 On 1 April 1996, Anheuser-Busch, Inc. lodged an application for registration of 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 That application was for registration of the word sign BUDWEISER.

3 The goods in respect of which registration was sought fall within Class 32 of the Nice Agreement on 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: 'beer, ale, porter, malted alcoholic and non-alcoholic beverages'.

4 The application for registration of the Community trade mark was published in Community Trade Marks Bulletin No 50/99 of 28 June 1999.

5 On 28 September 1999, Budějovický Budvar, národní podnik, ('Budvar') brought opposition proceedings pursuant to Article 42 of Regulation No 40/94 against the registration of the mark applied for in respect of all goods specified in the application for registration.

6 In support of its opposition, Budvar relied, first, under Article 8(1)(a) and (b) of Regulation No 40/94, on:

- international word mark BUDWEISER (R 238 203), registered for 'beer of any kind', with effect in Germany, Austria, Benelux and Italy;
- international figurative mark (No 674 530), registered for 'malt' and 'beer', with effect in Austria, Benelux, France and Italy, reproduced below:



- international figurative mark (No 614 536), registered for 'beers', with effect in Germany, Austria, Benelux, France and Italy, reproduced below:



7 Budvar relied, second, under Article 8(4) of Regulation No 40/94, on a number of appellations of origin including the word 'Budweiser'.

8 On 8 July 2002, Anheuser-Busch requested, pursuant to Article 43(2) and (3) of Regulation No 40/94, that Budvar furnish proof that the marks referred to in support of its opposition had been put to genuine use. Budvar responded to that request on 8 November 2002.

9 By a first decision of 10 June 2004, the Opposition Division upheld the opposition filed by Budvar and, consequently, rejected the application for the Community trade mark concerned. The Opposition Division essentially considered that there was a likelihood of confusion in Austria and France between the mark applied for and the earlier international figurative mark No 674 530.

10 On 23 June 2004, Anheuser-Busch appealed, pursuant to Articles 57 to 62 of Regulation No 40/94, against the decision of the Opposition Division.

11 By decision of 11 July 2005 (Case R 509/2004-2), the Second Board of Appeal of OHIM upheld Anheuser-Busch's appeal. The Board of Appeal was of the view that the Opposition Division had erred in considering that the earlier international figurative mark No 674 530 was protected in Austria and France from 5 December 1960, whereas it was protected, in those countries, from 19 May 1997, that is, from a date later than that of the application for the registration of the Community trade mark concerned.

12 The Board of Appeal referred the case back to the Opposition Division.

13 By a second decision of 22 December 2005, the Opposition Division once again upheld the opposition filed by Budvar and, accordingly, rejected the application for the Community trade mark concerned.

14 The Opposition Division considered first of all that the proof of use of the earlier international word mark BUDWEISER (R 238 203) was insufficient.

15 The Opposition Division therefore chose to limit its examination to a comparison between the mark applied for and the earlier international figurative mark No 614 536, in relation to which it agreed to take account of the documents produced by Budvar in support of its opposition.

16 In that regard, the Opposition Division considered, essentially, that there was a likelihood of confusion in Germany, Austria, Benelux, France and Italy between the mark applied for and the earlier international figurative mark No 614 536.

17 On 13 February 2006, Anheuser-Busch filed an appeal with OHIM, pursuant to Articles 57 to 62 of Regulation No 40/94, against the second decision of the Opposition Division.

18 By decision of 20 March 2007 (Case R 299/2006-2) ('the contested decision'), notified to Anheuser-Busch on 22 March 2007, the Second Board of Appeal of OHIM dismissed the appeal.

19 While not contesting the Opposition Division's assessment of the likelihood of confusion between the mark applied for and the international figurative mark No 614 536, the Board of Appeal considered, contrary to the Opposition Division, that the earlier international word mark BUDWEISER (R 238 203) could be taken into account. In that context, the Board of Appeal concluded, on the basis of the documents produced by Budvar, that proof of genuine use of the international word mark BUDWEISER (R 238 203) had been furnished.

20 Next, finding that the mark applied for was identical to the earlier international word mark BUDWEISER (R 238 203) and that the goods concerned, 'beer, ale, porter, malted alcoholic ... beverages', covered by the Community trade mark application at issue were identical to the goods 'beer of any kind' covered by the earlier mark, the Board of Appeal considered that the opposition could be upheld for those goods on the basis of Article 8(1)(a) of Regulation No 40/94. As regards the remaining products ('non-alcoholic beverages'), in view of the identity of the marks and the obvious similarities of the goods, the Board of Appeal considered that the opposition could be upheld for those goods on the basis of Article 8(1)(b) of Regulation No 40/94.

#### **Forms of order sought**

21 Anheuser-Busch claims that the Court of First Instance should:

- annul the contested decision;
- in the alternative, annul the contested decision in so far as it upholds the opposition in respect of 'non-alcoholic beverages';
- order OHIM and Budvar to pay the costs.

22 OHIM and Budvar contend that the Court of First Instance should:

- dismiss the action;
- order Anheuser-Busch to pay the costs.

#### **Law**

##### **1. Principal form of order sought**

23 In support of its principal form of order sought, Anheuser-Busch relies on three pleas in law alleging, first, infringement of the right to be heard, second, infringement of Article 74(2) of Regulation No 40/94 and, third, infringement of Article 43(2) and (3) of Regulation No 40/94.

##### **The first plea, alleging infringement of the right to be heard**

#### **Arguments of the parties**

24 Anheuser-Busch claims that the dispute between the parties did not concern the registration and validity of the earlier international word mark BUDWEISER (R 238 203), matters upon which the Board of Appeal concentrated.

25 In the proceedings before the Board of Appeal, Budvar stated that, on 21 January 2004, it furnished the Opposition Division with evidence of renewal of the earlier international word mark BUDWEISER (R 238 203). Anheuser-Busch concedes that it did not express a view on that point before the Board of Appeal. However, Anheuser-Busch states that it had no reason to think that the Board of Appeal would accept that evidence, submitted almost two years after the expiry of the initial time-limit of 26 February 2002. Anheuser-Busch refers, in that regard, to two OHIM decisions which excluded documents submitted outside the time-limit. That decision-making practice is consistent with OHIM Opposition Guidelines, in particular Paragraph 1.5.1.

26 Anheuser-Busch concedes that that settled decision-making practice and guidelines predate the judgment in Case C-29/05 P OHIM v Kaul [2007] ECR I-2213. However, Anheuser-Busch claims that, at the date of filing its reply with the Board of Appeal, on 10 October 2006, the former legal framework should have applied. Anheuser-Busch asserts, moreover, that the judgments in Case T-308/01 Henkel v OHIM – LHS (UK) (KLEENCARE) [2003] ECR II-3253; Case T-164/02 Kaul v OHIM – Bayer (ARCOL) [2004] ECR II-3807; Case T-275/03 Focus Magazin Verlag v OHIM – ECI Telecom (Hi-FOCuS) [2005] ECR II-4725; Case T-323/03 La Baronia de Turis v OHIM – Baron Philippe de Rothschild (LA BARONNIE) [2006] ECR II-2085; and Case T-252/04 Caviar Anzali v OHIM – Novomarket (Asetra) [2006] ECR II-2115, concerned other facts and legal issues.

27 In those circumstances, Anheuser-Busch claims that, if the Board of Appeal had wished to take into consideration the earlier international word mark BUDWEISER (R 238 203), it ought to have informed Anheuser-Busch thereof and afforded it the opportunity of expressing a view in that regard. In omitting to do so, the Board of Appeal failed to fulfil its obligations pursuant to Article 73 of Regulation No 40/94.

28 Anheuser-Busch adds that the contested decision was adopted only seven days after judgment was delivered in OHIM v Kaul, paragraph 26 above. In its view, the Board of Appeal ought to have afforded it an opportunity to comment on the potential consequences of that judgment for the present case, namely, the taking into account of the evidence of renewal of the earlier international word mark BUDWEISER (R 238 203) and the other evidence which should have been received on 26 February 2002.

29 Lastly, Anheuser-Busch claims that, with regard to the likelihood of confusion in trade mark law, any infringement of the rules of procedure has potential consequences for the OHIM decision which must, accordingly, be annulled on that ground.



30 OHIM contends that Anheuser-Busch was in a position to submit its observations on the earlier international word mark BUDWEISER (R 238 203). As regards OHIM v Kaul, paragraph 26 above, that judgment merely interpreted a rule of law.

31 Budvar contends that OHIM was required to take account of the earlier international word mark BUDWEISER (R 238 203) and that Anheuser-Busch did not dispute the validity of that earlier right before the Board of Appeal. As regards OHIM v Kaul, paragraph 26 above, Article 73 of Regulation No 40/94 cannot be interpreted as requiring OHIM to inform the parties about decisions which might influence its findings.

#### **Findings of the Court**

32 First, by its plea alleging breach of the principle of the right to be heard, the applicant is in fact actually alleging infringement of the second sentence of Article 73 of Regulation No 40/94, which provides that OHIM decisions are to be based only on reasons or evidence on which the parties concerned have had an opportunity to present their comments.

33 In accordance with that provision, a Board of Appeal of OHIM may base its decision only on matters of fact or of law on which the parties have been able to set out their views (Case C-447/02 P KWS Saat v OHIM [2004] ECR I-10107, paragraph 42, and Case T-242/02 Sunrider v OHIM (TOP) [2005] ECR II-2793, paragraph 59).

34 That provision lays down, in the Community trade mark law context, the general principle of the protection of rights of defence (Case T-320/03 Citicorp v OHIM (LIVE RICHLI) [2005] ECR II-3411, paragraph 21, and Case T-317/05 Kustom Musical Amplification v OHIM (Shape of a guitar) [2007] ECR II-427, paragraph 26). According to that general principle of Community law, a person whose interests are appreciably affected by a decision taken by a public authority must be given the opportunity to make his point of view known (Case 17/74 Transocean Marine Paint Association v Commission [1974] ECR 1063, paragraph 15; Case T-34/00 Eurocool Logistik v OHIM (EUROCOOL) [2002] ECR II-683, paragraph 21; and LIVE RICHLI, paragraph 22).

35 In addition, according to case-law, the right to be heard covers all the matters of fact and law which form the basis for the decision-making act but not the final position which the administration intends to adopt (Case T-16/02 Audi v OHIM (TDI) [2003] ECR II-5167, paragraph 75, and Shape of a guitar, paragraph 34 above, paragraph 27). Accordingly, the Board of Appeal is not obliged to hear an applicant with regard to a factual assessment which forms part of its final decision (Case T-458/05 Tegometall International v OHIM – Wuppermann (TEK) [2007] ECR II-4721, paragraph 45).

36 In the present case, there is no need, in the context of the first plea, for the Court to rule on whether evidence of the renewal of the earlier international word mark BUDWEISER (R 238 203) was filed in good time; it is to be noted, first, that by notice of opposition of 28 September 1999, Budvar relied on the

earlier mark before OHIM. According to the extract from the World Intellectual Property Organisation (WIPO) Register, which Budvar submitted to OHIM, the mark was valid at the time when the notice of opposition was filed.

37 Second, it must be pointed out that Budvar expressly states in the grounds of its opposition that the mark applied for and the earlier international word mark BUDWEISER (R 238 203) are identical.

38 Third, by letter sent to the Opposition Division on 19 May 2003, Anheuser-Busch inter alia contested the validity of the earlier international word mark BUDWEISER (R 238 203) on the ground that the evidence of renewal of the mark had not been produced before the deadline of 26 February 2002. That evidence of renewal was submitted by Budvar on 21 January 2004.

39 Fourth, in the appeal brought by Anheuser-Busch against the first decision of the Opposition Division (see paragraph 9 above), in its response of 24 January 2005, Budvar also relied, in support of its opposition, on the earlier international word mark BUDWEISER (R 238 203).

40 Fifth, in the appeal brought by Anheuser-Busch against the second decision of the Opposition Division (see paragraph 13 above), Budvar, in its response of 28 July 2006, stated that the earlier international word mark BUDWEISER (R 238 203) had to be taken into account and that, inasmuch as the goods concerned were identical, the mark justified the upholding of the opposition.

41 Sixth, it should be pointed out that, in the context of the reply of 10 October 2006 before the Board of Appeal, Anheuser-Busch had the opportunity to respond to the arguments put forward by Budvar concerning the earlier international word mark BUDWEISER (R 238 203), which it did not do, as it conceded in its written submissions before the Court of First Instance.

42 It follows that, in view of Budvar's observations before the Opposition Division and the Board of Appeal and the opportunities to respond offered to Anheuser-Busch, the latter was in a position to put forward its observations on the validity of the earlier international word mark BUDWEISER (R 238 203), which, moreover, it did before the Opposition Division.

43 In addition, it follows from Article 62(1) of Regulation No 40/94 that, following the examination of the allowability of the appeal, the Board of Appeal is to decide on the appeal and that, in doing so, it may, inter alia, 'exercise any power within the competence of the department which was responsible for the decision appealed', that is, in the present case itself to rule on the opposition, rejecting or upholding the opposition, and in so doing to uphold or annul the decision of the OHIM department which ruled at first instance. It thus follows from Article 62(1) of Regulation No 40/94 that the effect of the appeal brought before it is that the Board of Appeal is called upon to carry out a new, full examination of the merits of the opposition, in terms of

both law and fact (OHIM v Kaul, paragraph 26 above, paragraphs 56 and 57).

44 It follows from all the above that the Board of Appeal did not fail to fulfil its obligations pursuant to the second sentence of Article 73 of Regulation No 40/94 in not expressly inviting Anheuser-Busch to present its comments on the earlier international word mark BUDWEISER (R 238 203).

45 The other arguments put forward by Anheuser-Busch are not such as to call that finding into question.

46 First, if those arguments were to be understood as meaning that Anheuser-Busch relies on the principle of the protection of legitimate expectations in support of the first plea, it must be recalled that the principle extends to any individual in a situation where it is apparent that the Community authorities, by giving him precise assurances, have caused him to entertain justified hopes (Case T-203/96 Embassy Limousines & Services v Parliament [1998] ECR II-4239, paragraph 74; Case T-273/01 Innova Privat-Akademie v Commission [2003] ECR II-1093, paragraph 26, and judgment of 5 April 2006 in Case T-388/04 Kachakil Amar v OHIM (Longitudinal line ending with a triangle), not published in the ECR, paragraph 26). Precise, unconditional and consistent information coming from authorised and reliable sources amount to such assurances (Innova Privat-Akademie v Commission, paragraph 26, and Longitudinal line ending with a triangle, paragraph 27).

47 It should be stated at the outset that Anheuser-Busch did not receive precise assurances that the earlier international word mark BUDWEISER (R 238 203) would not be taken into account in the examination of the opposition. The fact that, in the second decision, the Opposition Division did not take into account the earlier mark cannot constitute such an assurance since, as has already been pointed out in paragraph 43 above, the Board of Appeal is required to carry out a new, full examination of the merits of the opposition, in terms of both law and fact.

48 With regard to Paragraph 1.5.1 of the OHIM Opposition Guidelines, it should also be pointed out that the extract submitted by Anheuser-Busch is dated March 2004, that is, a date after the notice of opposition was filed by Budvar and the expiry of the time-limits for justifying the opposition set by OHIM. In addition, there is no basis for the proposition that the OHIM Opposition Guidelines take precedence over the Community rules applicable. In that regard, Anheuser-Busch does not rely, in its first plea, on any legislative provision in force at the time of the facts intended to show that Budvar was required to furnish, automatically, a certificate of renewal of the earlier international word mark BUDWEISER (R 238 203). Moreover, OHIM did not expressly request Budvar to furnish such a certificate of renewal. Furthermore, the fact that the Board of Appeal may have applied, wrongly, a provision of Community legislation cannot constitute, as such, a breach of the principle of protection of legitimate expectations.

49 With regard to practice in previous decisions, according to settled case-law, decisions concerning registration of a sign as a Community trade mark which the Boards of Appeal are called on to take under Regulation No 40/94 are adopted in the exercise of circumscribed powers and are not a matter of discretion. The legality of decisions of the Boards of Appeal must therefore be assessed purely by reference to that regulation, as interpreted by the Community Courts, and not to the practice of the Boards in earlier cases (Case C-37/03 P BioID v OHIM [2005] ECR I-7975, paragraph 47; Case T-36/01 Glaverbel v OHIM (Surface of a plate of glass) [2002] ECR II-3887, paragraph 35; and Case T-207/06 Europig v OHIM (EUROPIG) [2007] ECR II-1961, paragraph 40). Moreover, a mere practice, no matter how current, does not amount to precise, unconditional and consistent information within the meaning of the case-law recalled at paragraph 46 above (see, to that effect, Case T-135/05 Campoli v Commission [2006] ECR-SC I-A-2-297 and II-A-2-1527, paragraph 70). Furthermore, Anheuser-Busch cites, in support of its claims, only two decisions of the Boards of Appeal of OHIM.

50 Accordingly, the arguments put forward by Anheuser-Busch in that regard cannot be successful.

51 Second, concerning the argument that the Board of Appeal failed to invite Anheuser-Busch to make comments on the possible consequences of OHIM v Kaul, paragraph 26 above, with regard to the taking into account of the evidence of a certificate of renewal of the international word mark BUDWEISER (R 238 203) and of the documents produced by Budvar in support of its opposition and filed as a whole at OHIM on 27 February 2002, it cannot be successful either.

52 With regard to the evidence of renewal of the earlier international word mark BUDWEISER (R 238 203), suffice it to state, as Anheuser-Busch itself has done in the context of the second plea (see paragraph 59 below), that that judgment was not referred to in the contested decision in connection with the taking into account of the certificate of renewal. It is apparent from the contested decision, and in particular from paragraphs 24 and 25 thereof, that OHIM v Kaul, paragraph 26 above, was referred to in the context of the taking into account of the documents produced by Budvar and filed as a whole at OHIM on 27 February 2002. It follows that the arguments put forward by Anheuser-Busch in that regard are unfounded in fact.

53 With regard to the documents produced by Budvar in support of its opposition and filed as a whole at OHIM on 27 February 2002, it must be pointed out, first, that Anheuser-Busch challenged before the Board of Appeal the taking into account of those documents by OHIM. Next, although OHIM v Kaul, paragraph 26 above, interprets Article 74(2) of Regulation No 40/94, it cannot alter its content. Lastly, even if it were possible to find an infringement of Anheuser-Busch's right to be heard in relation to the taking into account by the Board of Appeal of the judgment in OHIM v Kaul, paragraph 26 above, such an irregularity could lead to the annulment of the contested decision only if the out-

come of the procedure might have been different (see, to that effect, Case C-142/87 Belgium v Commission [1990] ECR I-959, paragraph 48, and KWS Saat v OHIM, paragraph 33 above, paragraphs 47 to 50). For the reasons set out in paragraphs 81 to 91 below, in the context of examination of the second plea raised by Anheuser-Busch, the Board of Appeal did not err in applying Article 74(2) of Regulation No 40/94, as interpreted by the Court. Therefore, even if Anheuser-Busch had been able to submit its comments in that regard, the outcome would not have been different.

54 In the light of all those factors, the first plea raised by Anheuser-Busch must be rejected as unfounded.

### **The second plea, alleging infringement of Article 74(2) of Regulation No 40/94**

#### **Arguments of the parties**

55 Anheuser-Busch claims that, even taking account of OHIM v Kaul, paragraph 26 above, the documents submitted late by Budvar for the purpose of establishing the registration of the earlier international word mark BUDWEISER (R 238 203) should have been excluded and the opposition, accordingly, rejected.

56 Anheuser-Busch points out, in that regard, that the time-limit for Budvar to present evidence in support of its opposition was 26 February 2002. However, it is not contested that the documents transmitted by fax to that end were filed as a whole at OHIM on 27 February 2002 at 00:48 hours (in other words, 48 minutes late and not 44 minutes late as the Board of Appeal stated). Moreover, even if, as Budvar contends, the fax transmission of the documents started on 26 February 2002 at 21:46 hours, it would be difficult to decide which of those documents were filed at OHIM before expiry of the time-limit and which were filed after its expiry. Under the rules on the burden of proof, that lack of clarity should go against the party on whom the burden of proof rests, namely Budvar. It is therefore appropriate to take 27 February 2002 as the date of filing as a whole of the documents transmitted by Budvar.

57 In any event, Anheuser-Busch claims that the documents submitted by Budvar in support of its opposition and filed as a whole at OHIM on 27 February 2002 did not cover the renewal of the earlier international word mark BUDWEISER (R 238 203). According to Anheuser-Busch, Budvar was, however, obliged to furnish evidence of the renewal of the earlier mark when submitting documents in support of its opposition. Budvar produced evidence of such renewal only on 21 January 2004, nearly two years after the expiry of the time-limit set by OHIM (namely 26 February 2002), in accordance with Rule 20(2) of Commission Regulation (EC) No 2868/95 of 13 December 1995 implementing Regulation No 40/94 (OJ 1995 L 303, p. 1), now Rule 19(4) of the same regulation, as amended. Budvar has provided no reasons justifying that delay.

58 Anheuser-Busch acknowledges that, under Article 74(2) of Regulation No 40/94, as interpreted by the Court, OHIM enjoys a discretion as to whether to ac-

cept documents filed late. However, it was wrong to exercise that discretion in the present case.

59 With regard to the certificate of renewal of the earlier international word mark BUDWEISER (R 238 203), Anheuser-Busch refers to a decision of the Fourth Board of Appeal of OHIM which excluded evidence of the renewal of a mark that was filed late in another case. According to Anheuser-Busch, the same solution must apply to the present case. It is unacceptable for Boards of Appeal to apply different solutions to comparable cases. That constitutes a 'misuse of discretion'. Moreover, the reasons given in the contested decision to justify taking into account the certificate of renewal do not support the solution arrived at. The mere fact that that certificate was produced in the course of the proceedings does not, of itself, justify its acceptance pursuant to Article 74(2) of Regulation No 40/94. Anheuser-Busch points out in that respect that the Board of Appeal did not reach its decision on the basis of that article. Therefore, the question arises whether the Board of Appeal recognised that it had to exercise its discretion in that regard. Anheuser-Busch states, on that point, that the Board of Appeal's considerations regarding OHIM v Kaul, paragraph 26 above, did not concern the certificate of renewal of the earlier international word mark BUDWEISER (R 238 203), but only the documents filed as a whole at OHIM on 27 February 2002.

60 With regard to the documents produced by Budvar in support of its opposition and filed as a whole at OHIM on 27 February 2002, Anheuser-Busch claims that the Board of Appeal deemed the lateness of the transmission, by '44 minutes', to be insignificant on four grounds. In that regard, Anheuser-Busch claims, first, that the length of the procedure before OHIM should not be used as a reference for determining whether lateness may be considered to be insignificant. Second, it states that the fact that the fax transmission commenced before the expiry of the time-limit has not been proved and cannot be relied on by OHIM. It is only the time when documents are received that should be taken into consideration. Moreover, it was grossly negligent to begin to transmit 336 pages of documents shortly before midnight on the last day of the time-limit. It is, furthermore, still open to Budvar to file an application for a declaration that the trade mark concerned is invalid. Third, Anheuser-Busch is of the view that the relevance of the documents concerned for the adoption of the contested decision cannot alone justify taking them into account.

61 OHIM and Budvar contend that the Board of Appeal was not required to exclude the documents to which Anheuser-Busch refers. In particular, OHIM states that the evidence of renewal of the earlier international word mark BUDWEISER (R 238 203) was not produced outside the time-limit. As for the documents sent by Budvar and filed as a whole at OHIM on 27 February 2002, OHIM and Budvar state that the Board of Appeal was right to exercise its discretion.

#### **Findings of the Court**



62 For the purposes of examining the second plea, it is necessary to distinguish between the certificate of renewal of the earlier international word mark BUDWEISER (R 238 203), submitted on 21 January 2004, and the documents furnished by Budvar in support of its opposition and filed as a whole at OHIM on 27 February 2002.

– The certificate of renewal of the earlier international word mark BUDWEISER (R 238 203)

63 As is clear from the wording of Article 74(2) of Regulation No 40/94, OHIM may disregard facts or evidence which are not submitted in due time by the parties.

64 It follows that the application of Article 74(2) of Regulation No 40/94 to a particular case presupposes that one or more parties to the proceedings before OHIM have not submitted facts or evidence ‘in due time’.

65 However, in this case, with regard to the earlier international word mark BUDWEISER (R 238 203), it is not clear from the contested decision that the Board of Appeal considered that the certificate of renewal of the mark had not been submitted in due time.

66 In particular, the Board of Appeal, at paragraph 22 of the contested decision, found the following:

‘The opponent produced, in an annex to observations submitted to the Opposition Division on 21 January 2004, an extract issued by WIPO certifying that the registration had been renewed on 5 December 2000. The Opposition Division therefore had proof of the continued validity of [the earlier international word mark BUDWEISER (R 238 203)] at the time of the contested decision.’

67 In addition, it does not appear from the contested decision that the Board of Appeal applied Article 74(2) of Regulation No 40/94 for the purposes of taking into account the certificate of renewal of the earlier international word mark BUDWEISER (R 238 203), as it did in respect of the documents submitted by Budvar and filed as a whole at OHIM on 27 February 2002.

68 With regard to the latter documents, the Board of Appeal expressly referred, in paragraphs 24 and 25 of the contested decision, to Article 74(2) of Regulation No 40/94 as well as to OHIM v Kaul, paragraph 26 above.

69 Moreover, Anheuser-Busch itself states in its written submissions that the Board of Appeal did not base its decision on Article 74(2) of Regulation No 40/94 in connection with the certificate of renewal of the earlier international word mark BUDWEISER (R 238 203). Anheuser-Busch also states that the considerations relating to OHIM v Kaul, paragraph 26 above, did not concern the taking into account of that certificate.

70 All the same, on the grounds set out in paragraphs 78 and 79 below and in the light of the legislation applicable at the relevant time, the certificate of renewal of the earlier international word mark BUDWEISER (R 238 203) must be regarded as having been submitted in due time.

71 It follows that no infringement of Article 74(2) of Regulation No 40/94 can be found against the contested decision in connection with the taking into account of the certificate of renewal of the earlier international word mark BUDWEISER (R 238 203).

72 The arguments put forward by Anheuser-Busch in that regard are thus manifestly unfounded.

73 In any event, assuming that, in invoking Rule 20(2) of Regulation No 2868/95, in the version applicable before its amendment by Commission Regulation (EC) No 1041/2005 of 29 June 2005 (OJ 2005 L 172, p. 4), now Rule 19(4) of the same regulation, following amendment, Anheuser-Busch considers in fact that the Board of Appeal was required to exclude the certificate of renewal of the earlier international word mark BUDWEISER (R 238 203) without being able to apply Article 74(2) of Regulation No 40/94, it must be stated that that article confers a discretion upon OHIM as to whether or not to take account of evidence produced after the expiry of a time-limit (Case T-334/01 MFE Marienfelde v OHIM – Vétouquinol (HIPOVITON) [2004] ECR II-2787, paragraph 57, and Asetra, paragraph 26 above, paragraph 36). In addition, Regulation No 2868/95 having been adopted by the Commission, in accordance with Article 140(1) of Regulation No 40/94, those provisions must be interpreted in accordance with the provisions of the latter regulation (HIPOVITON, paragraph 57). Accordingly, the arguments of Anheuser-Busch, if they were to be understood in that sense, would amount to reliance on an interpretation of a rule of the implementing regulation which is contrary to the clear wording of the general regulation (see, to that effect, Asetra, paragraph 26 above, paragraph 36).

74 For the sake of completeness, it should be pointed out that Regulation No 1041/2005 entered into force on 25 July 2005, in other words, after the notice of opposition had been filed, after the time-limit fixed for completing the opposition had expired and after Budvar had submitted evidence of renewal of the earlier international word mark BUDWEISER (R 238 203).

75 It must be recalled that, as a general rule, the principle of legal certainty precludes a Community measure from taking effect from a point in time before its publication; it may, exceptionally, be otherwise where the purpose to be achieved so demands and where the legitimate expectations of those concerned are duly respected (Case 98/78 Racke [1979] ECR 69, paragraph 20, and Joined Cases 212/80 to 217/80 Meridionale Industria Salumi and Others [1981] ECR 2735, paragraph 10). That case-law also applies, as the Court has stated, where the retroactivity is not expressly laid down by the measure itself but is the result of its content (Case C-368/89 Crispolti [1991] ECR I-3695, paragraph 17; Joined Cases C-487/01 and C-7/02 Gemeente Leusden and Holin Groep [2004] ECR I-5337, paragraph 59).

76 In the present case, there is nothing in the wording or general structure of Regulation No 1041/2005 to

suggest that the provisions introduced by that regulation ought to have retroactive effect.

77 Accordingly, Rule 19(4) of Regulation No 2868/95, resulting from Regulation No 1041/2005, which lays down that '[OHIM] shall not take into account written submissions or documents, or parts thereof, that have not been submitted, or that have not been translated into the language of the proceedings, within the time-limit set by [OHIM]', cannot apply.

78 Rule 20(2) of Regulation No 2868/95, in the version applicable before its amendment by Regulation No 1041/2005, provided that '[w]here the notice of opposition does not contain particulars of the facts, evidence and arguments as referred to in Rule 16(1) and (2), [OHIM] shall call upon the opposing party to submit such particulars within a period specified by [OHIM]' and that '[a]ny submission by the opposing party shall be communicated to the applicant who shall be given an opportunity to reply within a period specified by [OHIM]'.

79 Although it results, *inter alia*, from a reading of Rule 16 in conjunction with Rule 20 of Regulation No 2868/95, in the version applicable before their amendment by Regulation No 1041/2005, that OHIM is entitled to require proof that an earlier mark has been renewed where that mark expires after the notice of opposition has been filed (see, to that effect, Case T-191/04 MIP Metro v OHIM – Tesco Stores (METRO) [2006] ECR II-2855, paragraph 41), that rule does not require the opposing party, on its own initiative, to submit such evidence. Nor does the rule specify that OHIM is required to exclude a document where it is brought late to its attention. In the present case, the Opposition Division did not expressly request Budvar to submit, within a time-limit, a certificate of renewal in respect of the earlier international word mark BUDWEISER (R 238 203). However, Budvar submitted the evidence of that renewal on its own initiative, after a comment made by Anheuser-Busch calling into question the registration of the earlier mark and its validity. In those circumstances, it cannot be concluded that the Board of Appeal was required to exclude the certificate of renewal of the earlier international word mark BUDWEISER (R 238 203) and that it was precluded from applying Article 74(2) of Regulation No 40/94.

80 In the light of all those factors, Anheuser-Busch's arguments must be rejected inasmuch as they relate to the certificate of renewal of the earlier international word mark BUDWEISER (R 238 203).

– The documents produced by Budvar in support of its opposition and filed as a whole at OHIM on 27 February 2002

81 It is not contested that the documents produced by Budvar in support of its opposition and filed as a whole at OHIM on 27 February 2002 were not submitted in due time, something which the Board of Appeal also found, substantively, in paragraphs 24 and 25 of the contested decision. On the other hand, the parties are in dispute as to whether OHIM could take the documents into consideration.

82 It should be pointed out in that regard that it results from the wording of Article 74(2) of Regulation No 40/94 that, as a general rule and unless otherwise specified, the submission of facts and evidence by the parties remains possible after the expiry of the time-limits to which such submission is subject under the provisions of Regulation No 40/94 and that OHIM is in no way prohibited from taking account of facts and evidence which are submitted or produced late. However, it is equally apparent from that wording that a party has no unconditional right to have facts and evidence which were submitted out of time taken into account by OHIM. In stating that the latter 'may', in such a case, decide to disregard facts and evidence, Article 74(2) of Regulation No 40/94 grants OHIM a wide discretion to decide, while giving reasons for its decision in that regard, whether or not to take such information into account. Where OHIM is called upon to give a decision in the context of opposition proceedings, taking such facts or evidence into account is particularly likely to be justified where OHIM considers, first, that the material which has been produced late is, on the face of it, likely to be relevant to the outcome of the opposition brought before it and, second, that the stage of the proceedings at which that late submission takes place and the circumstances surrounding it do not argue against such matters being taken into account (OHIM v Kaul, paragraph 26 above, paragraphs 42 to 44).

83 In the present case, it should be noted, first, that Anheuser-Busch does not rely on any other legislative provision which would be applicable to the facts concerned and which would lend support to the view that OHIM was required to exclude the documents concerned because they were submitted late.

84 Moreover, the purpose of the documents concerned was, *inter alia*, to prove use of appellations of origin including the word 'Budweiser', referred to in paragraph 7 above. By letter of 8 November 2002, in response to Anheuser-Busch's request that it prove genuine use of the earlier trade marks relied on in support of the opposition and at the invitation of OHIM in that regard, Budvar expressly referred to those documents, considering that they also applied to the earlier international word mark BUDWEISER (R 238 203). The reference by Budvar was not contested by Anheuser-Busch. That reference was justified, *inter alia*, by the fact that the Opposition Division gave Budvar a written assurance on 30 May 2002 that the documents concerned would be taken into account. Therefore, even if the Opposition Division was required to exclude those documents, and it had put Budvar on notice in that regard, Budvar, in its letter of 8 November 2002, could have submitted those documents anew to the Opposition Division.

85 Second, the contested decision contains, in its paragraphs 24 and 25, reasoning specifically aimed at justifying the decision to take into account the documents concerned.

86 Third, the factors put forward by the Board of Appeal in its reasoning are sufficient to justify its deci-



sion to take into account the documents concerned under Article 74(2) of Regulation No 40/94.

87 The Board of Appeal states, first, that the fax transmission commenced before the time-limit expired. The Board of Appeal's assessment of the facts is, in that regard, correct, the date and time at which that transmission started (26 February 2002 at 21:46 hours) having been recorded by the incoming fax machine at OHIM. Anheuser-Busch submitted no tangible evidence capable of calling that fact into question. In addition, that fact forms part of the circumstances surrounding the late submission of the documents. Accordingly, contrary to what Anheuser-Busch claims, the Board of Appeal's finding of fact is relevant inasmuch as it clarifies the circumstances surrounding the late submission of the documents concerned.

88 The Board of Appeal indicates, next, that the fax transmission of the documents concerned was completed 44 minutes after the expiry of the time-limit fixed by the Opposition Division. According to the Board of Appeal, that delay was insignificant. That finding must be upheld. Moreover, it is not strictly called into question by Anheuser-Busch, except with regard to the fact that the delay in question was 48 minutes instead of 44 minutes, which has no effect on the outcome of the proceedings. The Board of Appeal's finding must, furthermore, be seen in the light of the fact, pointed out by OHIM in its written submissions, that Anheuser-Busch would not have received the documents concerned any faster had they arrived at OHIM several minutes before the time-limit expired.

89 The Board of Appeal states, further, that the documents concerned were likely to be relevant. Anheuser-Busch does not seriously contest the Board of Appeal's finding, but takes the view that the relevance of the documents concerned cannot, in itself, and for no other reason, justify their being taken into account. Suffice it to state, in that regard, that the Board of Appeal did not base its decision solely on the relevance of the documents concerned, but also on other considerations.

90 Lastly, the Board of Appeal found that the documents concerned were received 35 months before the Opposition Division adopted its decision. The Opposition Division thus had ample opportunity to take them into consideration and the trade mark applicant to comment on their relevance. In that regard, contrary to what Anheuser-Busch claims, the Board of Appeal's finding is relevant inasmuch as it contributes to the assessment of the stage of the proceedings at which the late submission of the documents concerned took place.

91 Having regard to all of the foregoing, the arguments put forward by Anheuser-Busch do not affect the legality of the decision of the Board of Appeal to take account of documents produced by Budvar in support of its opposition and filed as a whole at OHIM on 27 February 2002.

92 In the light of all those factors, the second plea raised by Anheuser-Busch must be rejected as unfounded.

**The third plea, alleging infringement of Article 43(2) and (3) of Regulation No 40/94**

### **Arguments of the parties**

93 Anheuser-Busch claims that the evidence produced by Budvar was insufficient to prove genuine use of the earlier international word mark BUDWEISER (R 238 203).

94 Anheuser-Busch states, in that regard, that the only documents to be taken into account are those produced on 8 November 2002 consisting exclusively of copies of advertising published in Germany and Austria. No evidence of sales of the goods in question was produced. The documents submitted on 8 November 2002 thus do not, in themselves, satisfy the requirements of Article 43(2) and (3) of Regulation No 40/94 and Rule 22 of Regulation No 2868/95.

95 Anheuser-Busch adds that the Board of Appeal could not have found genuine use of the earlier word mark BUDWEISER (R 238 203) without taking account of the documents submitted outside the time-limit on 27 February 2002. The Board of Appeal found the invoices issued in Germany and Austria to be sufficient in that regard. However, for that finding, the Board of Appeal would have had to take into account other factors, such as the nature of use of the earlier mark in those countries. That nature cannot be discerned from the invoices at all and only to a limited extent from the advertising excerpts produced. In particular, no evidence of the nature of use was produced in relation to the containers or goods marked 'NRW'.

96 OHIM and Budvar contend that the genuine use of the earlier international word mark BUDWEISER (R 238 203) has been established. In particular, OHIM indicates that the nature of the use of the earlier mark, namely for beer, was readily apparent from the advertising submitted by Budvar.

### **Findings of the Court**

97 As is apparent from the ninth recital in the preamble to Regulation No 40/94, the legislature 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 provides 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 ('the relevant period').

98 Under Rule 22(2) (now Rule 22(3)) of Regulation No 2868/95, proof of use must relate to the place, time, extent and nature of use of the earlier mark.

99 In interpreting the concept of genuine use, account should be taken of the fact that the ratio legis of the requirement that the earlier mark must have been put to genuine use if it is to be capable of being used in opposition to a trade mark application is to restrict the number of conflicts between two marks, in so far as there is no sound economic reason resulting from an actual function of the mark on the market (Case T-174/01 *Goulbourn v OHIM – Redcats (Silk Cocoon)* [2003] ECR II-789, paragraph 38). However, the purpose of the provision is not to assess commercial

success or to review the economic strategy of an undertaking, nor is it intended to restrict trade-mark protection to the case where large-scale commercial use has been made of the marks (Case T-203/02 Sunrider v OHIM – Espadafor Caba (VITAFRUIT) [2004] ECR II-2811, paragraph 38, and judgment of 8 November 2007 in Case T-169/06 Charlott v OHIM – Charlott France Entre Luxe et Tradition), not published in the ECR, paragraph 33).

100 There is genuine use of a trade mark where the mark is used in accordance with its essential function, which is to guarantee the identity of the origin of the goods or services for which it is registered, in order to create or preserve an outlet for those goods or services; genuine use does not include token use for the sole purpose of preserving the rights conferred by the registration (Case C-234/06 P Il Ponte Finanziaria v OHIM [2007] ECR I-7333, paragraph 72; see also, by analogy, Case C-40/01 Ansul [2003] ECR I-2439, paragraph 43). In that regard, the condition of genuine use of the mark requires that the mark, as protected on the relevant territory, be used publicly and externally (Silk Cocoon, paragraph 99 above, paragraph 39; VITAFRUIT, paragraph 99 above, paragraph 39; Charlott France Entre Luxe et Tradition, paragraph 99 above, paragraph 34; see also, by analogy, Ansul, paragraph 37).

101 When assessing whether use of the trade mark is genuine, regard must be had to all the facts and circumstances relevant to establishing whether the commercial exploitation of the mark is real, particularly whether such use is viewed as warranted in the economic sector concerned to maintain or create a share in the market for the goods or services protected by the mark, the nature of those goods or services, the characteristics of the market and the scale and frequency of use of the mark (VITAFRUIT, paragraph 99 above, paragraph 40; Charlott France Entre Luxe et Tradition, paragraph 99, paragraph 35; see also, by analogy, Ansul, paragraph 100, paragraph 43).

102 As to the extent of the use to which the earlier trade mark has been put, account must be taken, in particular, of the commercial volume of the overall use, as well as of the length of the period during which the mark was used and the frequency of use (VITAFRUIT, paragraph 99 above, paragraph 41, and Charlott France Entre Luxe et Tradition, paragraph 99 above, paragraph 36).

103 The question whether use is sufficient to maintain or create market share for the goods or services protected by the mark thus depends on several factors and on a case-by-case assessment. The characteristics of those goods and services, the frequency or regularity of the use of the trade mark, whether the mark is used for the purpose of marketing all the identical goods or services of the proprietor or merely some of them, or evidence of use which the proprietor is able to provide, are among the factors which may be taken into account (Case C-416/04 P Sunrider v OHIM [2006] ECR I-4237, paragraph 71).

104 To examine whether an earlier trade mark has been put to genuine use, an overall assessment must be carried out, which takes into account all the relevant factors of the particular case (VITAFRUIT, paragraph 99 above, paragraph 42; Charlott France Entre Luxe et Tradition, paragraph 99 above, paragraph 37; see also, by analogy, Ansul, paragraph 100 above, paragraph 39).

105 Moreover, the Court of First Instance has held that genuine use of a trade mark could not be proved by means of probabilities or suppositions, but had to be demonstrated by solid and objective evidence of effective and sufficient use of the trade mark on the market concerned (Case T-39/01 Kabushiki Kaisha Fernandes v OHIM – Harrison (HIWATT) [2002] ECR II-5233, paragraph 47).

106 In the present case, the Board of Appeal found that the evidence which Budvar produced was clearly sufficient to prove genuine use of the earlier international word mark BUDWEISER (R 238 203). The Board of Appeal referred, in particular, to advertisements showing images of Budvar beer bearing the mark BUDWEISER, to invoices sent to customers in Germany and Austria and to the fact that those advertisements and invoices related to the relevant period. In addition, the Board of Appeal found that the invoices in question were relevant, especially in the light of the order in Case C-259/02 La Mer Technology [2004] ECR I-1159. The Board of Appeal notes that, in that case, the Court of Justice stated that even minimal use by a single importer in the Member State concerned may be sufficient if the use serves a real commercial purpose (paragraph 26 of the contested decision).

107 It is necessary, first, to point out that the Board of Appeal found, essentially, that the documents produced by Budvar during the administrative proceedings were sufficient to demonstrate the nature of the goods ('beer'), the place ('Germany' and 'Austria'), the duration ('the relevant period') and the extent (invoices submitted and reference made to the order in La Mer Technology, paragraph 106 above) of use of the earlier international word mark BUDWEISER (R 238 203).

108 Second, since the Community trade mark application was published on 28 June 1999, the relevant period ran from 28 June 1994 to 27 June 1999. It should be noted in that regard that, as is clear from Article 15(1) of Regulation No 40/94, only trade marks genuine use of which has been suspended during an uninterrupted period of five years are subject to the sanctions provided for by the regulation. Accordingly, it is sufficient that a trade mark should have been put to genuine use during a part of the relevant period for it not to be subject to the sanctions (VITAFRUIT, paragraph 99 above, paragraph 45, and Charlott France Entre Luxe et Tradition, paragraph 99 above, paragraph 41).

109 Third, by letter of 8 July 2002, Anheuser-Busch requested, pursuant to Article 43(2) of Regulation No 40/94, that Budvar adduce evidence that the marks referred to in support of its opposition had been put to genuine use. By letter of 10 September 2002, OHIM

requested Budvar to produce that evidence, in particular in respect of the earlier international word mark BUDWEISER (R 238 203) within a time-limit expiring on 11 November 2002. Budvar responded to that request on 8 November 2002 by submitting the following documents:

– an advertisement which appeared in an Austrian magazine in 1995, as evidenced by the date on the cover page of the magazine, in which the word ‘Budweiser’ appears a number of times in different forms in connection with beer;

– eight advertisements from German magazines which appeared between 1996 and 1998, as evidenced by the dates or certain indications appearing on the cover pages of the magazines, in which the word ‘Budweiser’ appears a number of times in different forms in connection with beer.

110 Anheuser-Busch does not dispute that those documents provide evidence as to the nature of the goods (beer), the place (Germany and Austria) and the time (1995 for Austria and between 1996 and 1998 for Germany) of the use of the word ‘Budweiser’. Nor does Anheuser-Busch dispute that the use of the word ‘Budweiser’, in the various forms used in the advertisements submitted by Budvar, may be linked to the earlier international word mark BUDWEISER (R 238 203).

111 Fourth, by fax, received as a whole on 27 February 2002 by OHIM, Budvar transmitted certain documents to OHIM in order to prove use of appellations of origin, including the word ‘Budweiser’, referred to in paragraph 7 above. In its letter of 8 November 2002, in response to Anheuser-Busch’s request that it furnish proof of genuine use of the earlier trade marks relied on in support of the opposition, Budvar expressly referred to those transmitted documents, considering that they applied, *inter alia*, to the earlier international word mark BUDWEISER (R 238 203). Those documents comprised, in relation to Austria, seven advertisements which appeared in newspapers and magazines between 1995 and 1997 and 23 invoices issued between 1993 and 2000. With regard to Germany, Budvar produced eight advertisements which appeared in newspapers and magazines between 1996 and 1998 and 14 invoices issued between 1993 and 1997.

112 Anheuser-Busch does not dispute in the proceedings before this Court the fact that the documents concerned relate to the use of the earlier international word mark BUDWEISER (R 238 203). Nor does Anheuser-Busch question the fact that those documents provide evidence of the place, time and extent of the use of the mark, factors which, moreover, are clearly apparent from those documents.

113 As to Anheuser-Busch’s argument that the Board of Appeal should not have taken those documents into account, it must be rejected for the reasons set out in the analysis of the second plea.

114 Moreover, as to Anheuser-Busch’s allegation that the Board of Appeal should have taken other factors into account, such as the nature of the use of the earlier

international word mark BUDWEISER (R 238 203) in Germany and Austria, suffice it to state in that regard that the Board of Appeal referred to advertisements showing pictures of Budvar’s beer bearing the earlier mark. Contrary to what Anheuser-Busch claims, the nature of the use of the mark is sufficiently clear from the advertisements submitted by Budvar. In particular, the great majority of the advertisements concerned make reference to the word ‘Bier’. In addition, in referring to the invoices sent to customers in Germany and Austria, the Board of Appeal necessarily, albeit implicitly, found that they concerned ‘beer’. Moreover, the words ‘pivo’, ‘Bier’ or ‘Beers’ also appear in the sales invoices relating to Germany and Austria.

115 In the light of all those factors, the third plea raised by Anheuser-Busch must be rejected as unfounded.

## **2. Form of order sought in the alternative Arguments of the parties**

116 In support of the form of order which it seeks in the alternative, Anheuser-Busch relies on a single plea, alleging infringement of the duty to state reasons pursuant to Article 73 of Regulation No 40/94.

117 Anheuser-Busch claims that, in its assessment of the likelihood of confusion pursuant to Article 8(1)(b) of Regulation No 40/94, the Board of Appeal found that the ‘beer’ covered by the earlier international word mark BUDWEISER (R 238 203) and the ‘non-alcoholic beverages’ covered by the Community trade mark application presented ‘obvious similarities’.

118 That assertion does not, in itself, constitute a statement of reasons under Article 73 of Regulation No 40/94.

119 It is not clear, moreover, that the non-alcoholic beverages and beer are similar. Anheuser-Busch refers in that regard to the judgment in Case T-296/02 *Lidl Stiftung v OHIM – REWE-Zentral (LINDENHOF)* [2005] ECR II-563, in which it was held that alcoholic drinks were, as such, clearly distinct from non-alcoholic drinks and that the average consumer, deemed to be reasonably well-informed and reasonably observant and circumspect, was used to and aware of that distinction between alcoholic and non-alcoholic drinks, which is, moreover, necessary, since some consumers do not wish to or cannot consume alcohol (paragraph 54 of the judgment).

120 OHIM accepts that the Board of Appeal did not give a detailed explanation of the criteria adopted when it found that the goods concerned were similar. However, referring to the judgment in *LA BARONNIE*, paragraph 26 above (paragraph 69 and the case-law cited), OHIM considers that an applicant has no legitimate interest in the annulment of a decision on the ground of a procedural defect, where annulment of the decision can only lead to the adoption of another decision identical in substance to the decision annulled. That would be the case here.

121 OHIM states, in particular, that Anheuser-Busch distorts the facts when it claims that the Community trade mark was applied for in respect of ‘non-alcoholic beverages’. In fact, that mark covers ‘malted alcoholic



and non-alcoholic beverages'. Anheuser-Busch thus applied for registration of a Community trade mark in respect of 'malted' non-alcoholic beverages.

122 On that basis, OHIM is of the view that the malted non-alcoholic beverages refer to non-alcoholic beers, even if they may cover other goods. It was not for the Board of Appeal to divide the category of malted non-alcoholic beverages into different sub-categories.

123 It is clear that beers and malted non-alcoholic beverages (which include non-alcoholic beers) are similar to a high degree in so far as they are of the same nature (beverages), have the same intended purpose (quenching thirst), the same distribution channels (supermarkets, bars and restaurants) and are to some extent in competition. It is, moreover, common on the beer market for the same operators to be engaged in the production of both alcoholic and non-alcoholic beers.

124 Budvar contends that, in the present case, a likelihood of confusion is inevitable.

#### **Findings of the Court**

125 According to the first sentence of Article 73 of Regulation No 40/94, decisions of OHIM are to state the reasons on which they are based. That duty has the same effect as that imposed by Article 253 EC (Joined Cases T-124/02 and T-156/02 *Sunrider v OHIM – Vitakraft-Werke Wührmann and Friesland Brands (VITATASTE and METABALANCE 44)* [2004] ECR II-1149, paragraph 72, and Case T-214/04 *Royal County of Berkshire Polo Club v OHIM – Polo/Lauren (ROYAL COUNTY OF BERKSHIRE POLO CLUB)* [2006] ECR II-239, paragraph 16).

126 It follows from settled case-law that the duty to give reasons for a decision has two purposes: to allow interested parties to know the justification for the measure so as to enable them to protect their rights and to enable the Community judicature to exercise its power to review the legality of the decision (see *VITATASTE and METABALANCE 44*, paragraph 125 above, paragraph 73, and the case-law cited). Whether a statement of reasons satisfies those requirements is a question to be assessed with reference not only to its wording but also to its context and the whole body of legal rules governing the matter in question (Case C-122/94 *Commission v Council* [1996] ECR I-881, paragraph 29; Case T-188/98 *Kuijter v Council* [2000] ECR II-1959, paragraph 36; and *ROYAL COUNTY OF BERKSHIRE POLO CLUB*, paragraph 125 above, paragraph 17).

127 In particular, when OHIM refuses registration of a sign as a Community trade mark, it must, in order to state the reasons for its decision, indicate the ground for refusal, absolute or relative, which precludes that registration and the provision from which that ground is drawn, and set out the facts which it found to be proved and which, in its view, justify application of the provision relied on (Case T-304/06 *Reber v OHIM – Chocoladefabriken Lindt & Sprüngli (Mozart)* [2008] ECR II-0000, paragraph 46).

128 However, the Boards of Appeal cannot be required to provide an account that follows exhaustively

and one by one all the lines of reasoning articulated by the parties before them. The reasoning may therefore be implicit, on condition that it enables the persons concerned to know the reasons for the Board of Appeal's decision and provides the competent Court with sufficient material for it to exercise its power of review (*Mozart*, paragraph 127 above, paragraph 55).

129 It is in the light of those considerations that the Court will examine whether this plea is well founded.

130 In the present case, the Board of Appeal stated, at paragraph 27 of the contested decision, as follows:

'The mark applied for is identical to the mark protected by IR 238 203 for "beer of any kind" in Class 32. The opposition must therefore succeed, under Article 8(1)(a) [of Regulation No 40/94], as regards "beer, ale, porter, malted alcoholic ... beverages", it being a question of identical marks and identical goods. As regards the remaining goods ("non-alcoholic beverages"), the opposition must succeed under Article 8(1)(b) [of Regulation No 40/94]. In view of the identity of the marks and the obvious similarities of the goods, there is a likelihood of confusion in the relevant territory; consumers in Austria and Germany would inevitably assume that non-alcoholic beverages sold under the trade mark BUDWEISER came from the same source as beer sold under the trade mark BUDWEISER.'

131 Anheuser-Busch specifically challenges the Board of Appeal's finding that there are 'obvious similarities' between the 'remaining goods' covered by trade mark application, that is, goods other than 'beer, ale, porter, malted alcoholic ... beverages'. The Board of Appeal indicated, in that regard, that the 'remaining goods' comprised 'non-alcoholic beverages'.

132 First, by the terms 'non-alcoholic beverages', the Board of Appeal is referring, in fact, to 'malted non-alcoholic beverages'. Registration of the Community trade mark concerned is requested for 'beer, ale, porter, malted alcoholic and non-alcoholic beverages'. It follows clearly from that description that the adjective 'non-alcoholic' applies to 'malted' beverages. That registration is, thus, requested, *inter alia*, for 'malted non-alcoholic beverages'. The parties do not, moreover, contest that point. Therefore, after the Board of Appeal had referred to 'beer, ale, porter, malted alcoholic ... beverages' in the second sentence of paragraph 27 cited above, the term 'remaining goods' used can cover only 'malted non-alcoholic beverages'.

133 It is not contested that 'beer of any kind' covered by the earlier mark, includes non-alcoholic beer, which is, by definition, a malted non-alcoholic beverage. It is necessary to point out in that regard that in the grounds supporting the notice of opposition of 28 September 1999, Budvar expressly indicated that 'malted non-alcoholic beverages' and 'beer of any kind' were similar, in particular because those goods in fact designated 'malted' beverages. Those factors were fully known by the applicant for the mark which is, moreover, a well-known professional in the sector concerned. Moreover, Anheuser-Busch did not submit observations in that regard before the Board of Appeal, even though the Opposition Division had also found, albeit in connec-

tion with another earlier mark but also for beers, that the goods were 'identical or similar to a high degree'. In those circumstances, Anheuser-Busch was in a position to understand the reasons which led the Board of Appeal to consider that the goods in question presented 'obvious similarities'.

134 Moreover, even if, in its written submissions before OHIM with regard specifically to the earlier international word mark BUDWEISER (R 238 203), Budvar referred to Article 8(1)(a) of Regulation No 40/94 in support of its opposition, on its opposition form, which covered all the earlier rights relied on, it referred not only to the identity of the marks and goods (Box 93 of the opposition form), but also to the existence of a likelihood of confusion (Box 94 of the opposition form). In addition, in the grounds for its opposition, Budvar expressly referred, in relation to the earlier international word mark BUDWEISER (R 238 203), to the similarity of the goods concerned. Moreover, Article 42(1)(a) of Regulation No 40/94 refers, inter alia, as a relative ground of opposition, to the case of Article 8(1) of that regulation, without making a distinction between Article 8(1)(a) and (b). Likewise, Rule 15 of Regulation No 2868/95, in the version applicable at the time of the facts, referred to the case of an opposition based on an earlier mark without distinguishing between Article 8(1)(a) and Article 8(1)(b) of Regulation No 40/94. Nor did that provision lay down that, where the opposition was based on more than one earlier mark, the exact description of the grounds on which the opposition was based applied to each mark. In those circumstances, the Board of Appeal was able legitimately to base its decision in respect of the earlier international word mark BUDWEISER (R 238 203) on Article 8(1)(b) of Regulation No 40/94, which Anheuser-Busch, moreover, does not challenge in the proceedings before this Court.

135 In the light of those factors, taking account of the context of the contested decision and the circumstances of the case, it must be found that the reasons stated by the Board of Appeal satisfy the requirements of the first sentence of Article 73 of Regulation No 40/94.

136 It is therefore necessary to reject as unfounded the single plea relied on by Anheuser-Busch in support of the form of order which it seeks in the alternative.

137 Accordingly, the action must be dismissed in its entirety.

#### **Costs**

138 Under Article 87(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings.

139 Since Anheuser-Busch has been unsuccessful, it must be ordered to pay the costs, as applied for by OHIM and Budvar.

#### **On those grounds,**

#### **THE COURT OF FIRST INSTANCE (First Chamber)**

hereby:

1. Dismisses the action;

2. Orders Anheuser-Busch, Inc. to bear, in addition to its own costs, the costs of OHIM and Budějovický Budvar, národní podnik.