Bilag 1

inhalator

Bokmål

Begge

Nynorsk

- Avansert søk

Ny nettadresse: http://ordbok.uib.no

Bokmålsordboka

Oppslagsord	Ordbokartikkel
inhalator	**inhalator** m1 (*i fl også utt -to´r-*) apparat til å innånde legemiddel med, for eksempel mot astma

Resultat pr. side 5

Bokmålsordboka er under oppgradering. Feil kan forekomme i opprettingsperioden.

Universitetet i Bergen overtar ordbøkene

Universitetet i Bergen har fra 04.09.2016 overtatt Universitetet i Oslos rolle som samarbeidspartner med Språkrådet. Ordboktjenesten vil fortsette som en gratis tjeneste til nytte for alle. Universitetet i Bergen vil sammen med Språkrådet videreutvikle tjenesten med blant annet en ordbokapp.

Den nye nettadressen er

http://ordbok.uib.no

Den gamle ordbokstjenesten vil eksistere inntil videre, men her vil ordbøkene ikke bli oppdatert. Det er lurt å bytte til den nye adressen med en gang.

E-post: ordbokene@iln.uio.no

Bilag 2

OFFICE FOR HARMONIZATION IN THE INTERNAL MARKET
(TRADE MARKS AND DESIGNS)

The Boards of Appeal

DECISION
of the Fifth Board of Appeal
of 21 January 2016

In Case R 3109/2014-5

LABORATOIRE DE LA MER
Avenue du Général Patton - ZAC de la Madeleine
FR-35400 Saint-Malo
France — Applicant / Appellant

represented by Cabinet Vidon Marques & Juridique PI, 16B, rue Jouanet - B P. 90333 Technopôle Atalante, FR-35703 Rennes Cedex 7, France

v

Boehringer Ingelheim Pharma GmbH & Co. KG
Intellectual Property Rights & Unfair Competition
DE-55216 Ingelheim
Germany — Opponent / Respondent

APPEAL relating to Opposition Proceedings No B 2 117 763 (Community trade mark application No 11 228 004)

THE FIFTH BOARD OF APPEAL

composed of G. Humphreys (Chairperson), A. Pohlmann (Rapporteur) and A Szanyi Felkl (Member)

Registrar H. Dijkema

gives the following

Language of the case English

Decision

Summary of the facts

1 By an application filed on 1 October 2012, LABORATOIRE DE LA MER ('the applicant') sought to register the word mark

RESPIMER

for the following list of goods

Class 3 – Creams for external application, in particular for irritations of the external walls of the nostrils and around the mouth and bronchial tubes (cosmetics, not for medical purposes),

Class 5 – Pharmaceutical preparations. Drugs. Pharmaceutical preparations based on marine products. essential oils. plant extracts. and goods of natural or chemical origin. Medicines based on marine products. essential oils. plant extracts. and goods of natural or chemical origin. Pharmaceutical preparations, namely solutions for the hygiene. cleaning and moistening of the nasal passages and sinuses and the prevention of diseases of the nose and sinuses. Pharmaceutical preparations, namely for the moistening and clearance of the bronchial tubes. Pharmaceutical preparations. namely for the regeneration. repair and healing of the respiratory mucosa. Pharmaceutical preparations, namely solutions for the treatment and soothing of symptoms. the soothing of pain. and the drainage, decongestion and disinfection of the upper and lower respiratory tracts. namely the nasal passages. the sinuses. the pharynx. the throat and the bronchial tubes. Medicines. namely solutions for the treatment and soothing of symptoms. the soothing of pain. and the drainage. decongestion and disinfection of the upper and lower respiratory tracts. namely the nasal passages. the sinuses. the pharynx. the throat and the bronchial tubes. Pharmaceutical preparations for the treatment of the nasal passages. the sinuses. the pharynx. the throat and the bronchial tubes. Solutions for calming symptoms in the nasal passages. the sinuses. the pharynx. the throat and the bronchial tubes. Painkiller solutions for the nasal passages. the sinuses. the pharynx. the throat and the bronchial tubes. Drainage solutions for the nasal passages. the sinuses. the pharynx. the throat and the bronchial tubes. Decongestants for the nasal passages. the sinuses. the pharynx. the throat and the bronchial tubes. Bacterial and/or viral disinfectants for the nasal passages. the sinuses. the pharynx. the throat and the bronchial tubes. Solutions. emulsions. creams. gels. ointments and micro-gel solutions for the nasal passages. the sinuses. the pharynx. the throat and the bronchial tubes. for hygiene. cleaning. moistening. rehydration. protection. regeneration. repair. healing and prevention of ENT diseases. in particular diseases of the upper and lower respiratory tracts. and in the context of diseases including colds. influenza. rhinitis. in particular allergic rhinitis. hay fever. nasal dryness. sinusitis. rhinosinusitis. rhinopharyngitis. pharyngitis. laryngitis. bronchitis and bronchiolitis. and post-operative care. Solutions. emulsions. creams. gels. ointments and micro-gel solutions for the nasal passages. the sinuses. the pharynx. the throat and the bronchial tubes. for the treatment and soothing of symptoms in the respiratory system. for the soothing of pain in the respiratory system. for drainage. decongestion. disinfection and regeneration. repair and healing in the context of diseases including colds. influenza. rhinitis. in particular allergic rhinitis. hay fever. nasal dryness. sinusitis. rhinosinusitis. rhinopharyngitis. pharyngitis. laryngitis. bronchitis and bronchiolitis. and post-operative care. Drops. sprays. Jets. misting solutions and aerosol therapy solutions for the nasal passages. the sinuses. the pharynx. the throat and the bronchial tubes. for hygiene. cleamng. moistening. rehydration. protection. regeneration. repair. healing and prevention of ENT diseases. in particular diseases of the upper and lower respiratory tracts. and in the context of diseases including colds. influenza. rhinitis. in particular allergic rhinitis. hay fever. nasal dryness. sinusitis. rhinosinusitis. rhinopharyngitis. pharyngitis. laryngitis. bronchitis and bronchiolitis. and post-operative care. Drops. sprays. Jets. misting solutions and aerosol therapy solutions for the nasal passages. the sinuses. the pharynx.

the throat and the bronchial tubes, for the treatment and soothing of symptoms in the respiratory system, for the soothing of pain in the respiratory system, for drainage, decongestion, disinfection and regeneration, repair and healing in the context of diseases including colds, influenza, rhinitis, in particular allergic rhinitis, hay fever, nasal dryness, sinusitis, rhinosinusitis, rhinopharyngitis, pharyngitis, laryngitis, bronchitis and bronchiolitis, and post-operative care, Powders for dilution, effervescent tablets for the nasal passages, the sinuses, the pharynx, the throat and the bronchial tubes, for hygiene, cleaning, moistening, rehydration, protection, regeneration, repair, healing and prevention of ENT diseases, in particular diseases of the upper and lower respiratory tracts, and in the context of diseases including colds, influenza, rhinitis, in particular allergic rhinitis, hay fever, nasal dryness, sinusitis, rhinosinusitis, rhinopharyngitis, pharyngitis, laryngitis, bronchitis and bronchiolitis, and post-operative care, Powders for dilution, effervescent tablets for the nasal passages, the sinuses, the pharynx, the throat and the bronchial tubes, for the treatment and soothing of symptoms in the respiratory system, for the soothing of pain in the respiratory system, for drainage, decongestion, disinfection and regeneration, repair and healing in the context of diseases including colds, influenza, rhinitis, in particular allergic rhinitis, hay fever, nasal dryness, sinusitis, rhinosinusitis, rhinopharyngitis, pharyngitis, laryngitis, bronchitis and bronchiolitis, and post-operative care, Isotonic and hypertonic marine serums,

Class 10 – Medical apparatus and instruments for the moistening, clearance, regeneration, repair and healing of the respiratory mucosa, for the treatment and soothing of symptoms in the respiratory system, for the soothing of pain in the respiratory system, and for drainage, decongestion and disinfection of the upper and lower respiratory tracts, namely the nasal passages, the sinuses, the pharynx, the throat and the bronchial tubes, Medical devices for the moistening, clearance, regeneration, repair and healing of the respiratory mucosa, for the treatment and soothing of symptoms in the respiratory system, for the soothing of pain in the respiratory system, and for drainage, decongestion and disinfection of the upper and lower respiratory tracts, namely the nasal passages, the sinuses, the pharynx, the throat and the bronchial tubes

2 The applicant claimed a priority based on French trade mark registration No 123 911 714

3 The application was published in the Community Trade Marks Bulletin No 222/2012 of 21 November 2012

4 On 8 January 2013, Boehringer Ingelheim Pharma GmbH & Co KG ('the opponent') filed a notice of opposition based on earlier CTM registration No 746 115 for the word mark

RESPIMAT

filed on 11 February 1998, registered on 8 March 1999 and duly renewed until 11 February 2018 in respect of the following goods

Class 5 – Pharmaceutical preparations,

Class 10 – Instruments and apparatus for inhaling of pharmaceutical preparations

5 As the grounds of the opposition, the opponent invoked Article 8(1)(b) CTMR The opposition was based on the goods listed in paragraph 4 above and directed against the goods listed in paragraph 1 above

6 On 3 December 2013, after having been invited to do so, the opponent submitted evidence to demonstrate genuine use of its earlier mark The evidence consisted of, in particular, the following documents:

- Thirty-four invoices covering the period from February 2008 until February 2012, containing references to 'Spiriva Respimat' and 'Berodual Respimat', showing sales in Germany, the Netherlands, France, Denmark, Ireland and the UK, amounting to a total of approximately EUR 300 000 and GBP 24 000,
- Five copies and three original packagings referring to 'Berodual® Respimat®' or 'Spiriva® Respimat®' in German, Dutch, French, Danish and English;
- Brochures and magazines articles
    - A copy of German brochure *'COPD schrankt ein. Sie können was bewegen'* of September 2012;
    - Printouts from German *'Therapie-Magazine'* and *'Blickpunkt Medizin'* of December 2008 and June 2012, respectively,
    - A French brochure *'Dès maintenant*, pour' demain**'* of February 2012, mentioning the 'Spiriva® Respimat®' product;
    - A printout from the French *'Revue des Maladies Respiratoires'* of October 2010 showing an article 'Respimat®, first Soft Mist™ inhaler: New perspective in the management of COPD';
- A document in German of June 2011 concerning product information of 'Berodual® Respimat®' created for the catalogue of drugs in Germany ('Rote Liste Service GmbH');
- A printout in English from www medicines org uk of 27 November 2013 giving information about 'Spiriva Respimat 2 5 micrograms solution for inhalation'. The text states, among others, that the product 'is indicated as a maintenance bronchodilator treatment to relieve symptoms of patients with COPD' and that 'the cartridge can only be inserted and used in the Respimat inhaler';
- A copy of a Spiriva® Respimat®' package leaflet of 16 November 2012 in English. The product is said to help people suffering from COPD,
- Undated extracts in German from databases of pharmaceutical preparations referring to 'SPIRIVA® Respimat®' and 'BERODUAL® Respimat®' for a 'solution for inhalation'

7 On 6 October 2014, after an exchange of observations between the parties, the Opposition Division rendered its decision ('the contested decision'), by which it upheld the opposition and rejected the CTM application in its entirety. The Opposition Division's arguments can be summarised as follows:

- The opponent was required to prove that the earlier mark was put to genuine use in the EU from 21 November 2007 to 20 November 2012 Although the evidence is not particularly exhaustive, it does reach the minimum level necessary to establish genuine use during the relevant period in the relevant territory,

- As regards the applicant's argument that not all of the evidence is in the language of proceedings, the opponent is not under any obligation to translate the proof of use, unless it is specifically requested to do so by the Office. Considering the self-explanatory character of the untranslated documents, there is no need to request a translation;

- As regards the period of use, this is sufficiently indicated in one of the published advertisements, in the press articles and the invoices. Most of the evidence refers to the relevant period, and it can be seen from the other evidence, such as the brochures, press articles and product fact sheets, what types of goods the trade mark covers;

- As regards the nature of use, by adding the '®' symbol after 'Spiriva', 'Berodual' and 'Respimat' signs, the opponent made clear that they are registered trade marks not altering the distinctive character of the mark 'Respimat' from the form in which it was registered;

- However, the evidence proves genuine use of the earlier mark only for 'pharmaceutical preparations to relieve symptoms of patients with chronic obstructive pulmonary disease' being an objective subcategory of 'pharmaceutical preparations for respiratory illnesses' in Class 5 and further for 'instruments and apparatus for inhaling of pharmaceutical preparations' in Class 10. Thus, only 'pharmaceutical preparations for respiratory illnesses' in Class 5 and 'instruments and apparatus for inhaling of pharmaceutical preparations' in Class 10 are considered in the further examination of the opposition;

- The contested goods in Class 3 are substances and preparations including those used in the treatment of irritations in various respiratory organs. Thus, they have the same purpose of use as the opponent's 'pharmaceutical preparations for respiratory illnesses' and target the same public. Moreover, they can be manufactured, marketed and provided by the same undertaking, or by economically-linked undertakings and usually use the same distribution and sales channels. Therefore, they are considered similar;

- The contested 'pharmaceutical preparations' in Class 5 include, as a broader category, the opponent's 'pharmaceutical preparations for respiratory illnesses' and are, thus, identical;

- The contested 'bacterial and/or viral disinfectants for the nasal passages, the sinuses, the pharynx, the throat and the bronchial tubes' in Class 5 are similar to a high degree to the opponent's 'pharmaceutical preparations for respiratory illnesses'. Although these goods have very different methods of use, they still share the same nature and purpose of use because they are both specific chemical products for healing/preventing disease, targeting the same end-user, and are sold in the same places and come from the pharmaceutical industry;

- The rest of the contested goods in Class 5 and the contested goods in Class 10 are identical to the opponent's goods, either because they are identically listed, form a broader category or overlap with each other;

- The relevant territory is the EU and the goods found to be identical and similar to various degrees target the public at large and health professionals, namely doctors and pharmacists, whose level of attention will be above average due to the healing nature of the goods;

- The goods concerned are partly identical and partly similar to various degrees;

- The signs 'RESPIMAT' and 'RESPIMER' show important visual, aural and, for some of the public, conceptual similarities. The six common letters (out of eight) are in the same order and are positioned at the beginnings of the signs, to which consumers generally pay greater attention;

- The distinctiveness of the earlier mark must be seen as normal, despite the presence of a weak element;

- The element 'RESPI' common to both signs is weak for a part of the relevant public in relation to the goods concerned as it might be allusive to 'respire' (to breath) and the relevant goods include medication, medical apparatus and instruments for the respiratory (breathing) system. However, this does not automatically exclude a likelihood of confusion. Moreover, for another part of the public apart from health professionals, the term does not have any meaning and it has a normal degree of distinctiveness;

- The differences between the signs are clearly insufficient to counterbalance the overall similarity between them Therefore, the part, at least, of the relevant public that does not attribute any particular meaning to the coinciding element 'RESPI*' may believe that the identical or similar goods come from the same undertaking or at least economically-linked undertakings. Moreover, the relevant public's higher level of attention is not enough to avoid a likelihood of confusion, taking into account the fact that the signs have significant overall similarities and that these similar signs cover identical and similar goods.

8 On 5 December 2014, the applicant filed a notice of appeal On 6 February 2015, the corresponding statement of grounds was submitted

9 The decision was forwarded to the Opposition Division for consideration pursuant to Article 62 CTMR and was remitted to the Board on 11 February 2015

10 On 17 April 2015, the opponent submitted observations in reply.

Submissions and arguments of the parties

11 The applicant requests that the Board annul the contested decision, allow the CTM application for all the goods applied for and order the opponent to bear the costs. Its arguments may be summarized as follows:

- The opposition based on the same earlier right against the French trade mark, on which the priority of the current CTM application is based, was rejected by INPI (decision by INPI attached as Annex 1). The opponent filed no appeal against that decision;

- The Opposition Division should have considered relevant consumers in the whole EU, not only German consumers;

- Some of the evidence submitted by the opponent is not dated or translated into the language of the proceedings (Rule 19(4) CTMIR) and, thus, those should have been rejected,

- Furthermore, the term 'RESPIMAT' is always used in a descriptive nature along with the mark 'SPIRIVA' or 'STRIVERDI' and never alone (excerpt from the opponent's website proving that 'RESPIMAT' cannot be bought alone, attached as Annex 4). Thus, the evidence does not prove use of the mark 'RESPIMAT' on its own,

- It follows that the opposition should have been rejected based on the lack of genuine use of the earlier mark. However, even if examined, there is no likelihood of confusion,

- The opponent's marks 'SPIRIVA RESPIMAT' and 'STRIVERDI RESPIMAT' are used strictly for the 'treatment of chronic obstructive pulmonary disease' which is a severe, life threatening chest disease (Wikipedia excerpt attached as Annex 5) and not for all the subcategory of 'pharmaceutical preparations for respiratory illnesses' as considered by the Opposition Division Respiratory illnesses relate to a number of illnesses and conditions that totally differ,

- The contested goods in Class 3 are dissimilar to the opponent's 'pharmaceutical preparations for chronic obstructive pulmonary disease' as the former are cosmetic skin creams for external application available without prescription whereas the latter are prescribed pharmaceutical drugs to treat chronic obstructive pulmonary disease Thus they have a different nature and purpose and the fact that they both can be found in pharmacies does not render them similar (reference to 25/11/2014, R 572/2014-4, FLEBOSTIM (FIG MARK) / PHLEBOSUP *et al.*);

- The contested goods in Classes 5 and 10 are also dissimilar to the opponent's goods as the former are non-medicated nasal cleansing products intended for improving nasal symptoms such as nasal congestion or a runny nose whereas the latter heal the lungs via a mouth inhaler delivering a metered dose of drugs. Thus, the goods differ in nature, purpose, use and its means and they heal different parts of the human body Furthermore, they are not substitutable,

- The element 'RESPI' common to both signs is for the major part of the relevant public totally descriptive in relation to the goods concerned as it will be immediately associated with 'RESPIRATION' clearly referring to the goods' characteristics (reference to 28/04/2011, B 1 670 424). Thus, consumers will focus their attention on the rest of the elements following this prefix, namely 'MER' and 'MAT' sharing solely one letter and, thus, being perceived visually as totally dissimilar;

- Aurally, the endings render the signs sufficiently dissimilar in order to exclude any risk of confusion,

- Conceptually, 'RESPI' is a descriptive element, 'MAT' alludes to the 'material' and 'MER' to the 'sea' (linguistic analysis attached as Annex 6), neither of the last two being descriptive in relation to the goods concerned Thus, 'RESPIMAT' alludes to material (technical device) for the respiration system whereas 'RESPIMER' to products for the respiration system from the sea (of marine origin) Therefore, the signs are different in their concepts,

- Moreover, the applicant carries the word 'MER' in its company name and develops and sells healthcare products containing seawater, many of which are branded with the suffix 'MER', such as 'PHYSIOMER';

- Several pharmaceutical products exist on the market bearing the name composed of the element 'RESPI' (a list of these products attached as Annex 7)

12 The opponent requests that the Board uphold the contested decision, dismiss the appeal and order the applicant to bear the costs. Its reasons can be summarized as follows

- The Opposition Division is not bound by its own prior decisions;

- The Rule cited by the applicant with regard to the untranslated evidence is irrelevant as Rule 22(6) CTMIR applies to this issue,

- The fact that the earlier mark 'RESPIMAT' appears on several pieces of evidence together with a second mark 'SPIRIVA' or 'BERODUAL' is caused by the nature of the product being a combination of an inhalation device and the contained substance The opponent is not obliged to prove use of its earlier mark on its own, independently of any other mark (08/12/2005, T-29/04, Cristal Castellblanch, EU T 2005:438),

- The use of the earlier mark is wider than the one claimed by the applicant In combination with the mark 'BERODUAL', it is used to treat a variety of pulmonary diseases and disorders such as certain forms of asthma as it widens the bronchia (as is evident from the extract from Wikipedia, article attached as Annex 1 and from item No 1 e i of the submitted proof of use Information sheet on 'Berodual® Respimat®' of June 2011),

- The signs are identical in the element 'RESPIM' and only differ in letters 'AT' and 'ER', respectively,

- The contested goods in Class 5 are identical to the opponent's goods as the 'pharmaceutical preparations' are included in both of the lists and the rest of the contested goods in Class 5 form a subgroup thereof,

- The contested goods in Class 3 are complementary and thus similar to opponent's 'pharmaceutical preparations' and 'instruments and apparatus for

inhaling of pharmaceutical preparations' serving the same purpose when both treat respiratory diseases and disorders,

- The contested goods in Class 10 are highly similar to the opponent's 'instruments and apparatus for inhaling of pharmaceutical preparations' as they are all designed to treat respiratory diseases and disorders and thus their purpose, nature and method of use can be identical making them complementary,

- The analysis from linguistic experts and the IMS-Database excerpt submitted by the applicant are irrelevant as linguistic experts are not part of the relevant public and the latter is not related subject-matter

Reasons

13 The appeal complies with Articles 58, 59 and 60 CTMR and Rule 48 CTMIR It is, therefore, admissible

14 For the reasons below the appeal is, however, not well founded

On the use of the earlier mark

15 According to Rule 22(3) CTMIR, the indications and evidence for furnishing of proof of use shall consist of indications concerning the place, time, extent and nature of use of the opposing trade mark for the goods and services in respect of which it is registered and on which the opposition is based This enumeration is cumulative In the absence of conclusive evidence with regard to one of these aspects the evidence furnished must be considered insufficient to demonstrate genuine use

16 It is relevant that genuine use implies real use of the mark on the market concerned for the purpose of identifying goods or services Genuine use is therefore to be regarded as excluding minimal or insufficient use for the purpose of determining that a mark is being put to real, effective use on a given market In that regard, even if it is the owner's intention to make real use of his/her trade mark, if the trade mark is not objectively present on the market in a manner that is effective, consistent over time and stable in terms of the configuration of the sign, so that it cannot be perceived by consumers as an indication of the origin of the goods or services in question, there is no genuine use of the trade mark (23/02/2006, T-194/03, Bainbridge, EU T 2006 65, § 32)

17 A sign is genuinely used if it has been used publicly and outwardly, and for a commercial purpose (08/07/2004, T-203/02, Vitafruit, EU T 2004 225, § 39) Genuine use does not include token use for the sole purpose of preserving the rights conferred by the mark (30/11/2009, T-353/07, Coloris, EU T 2009 475, § 21) Furthermore, genuine use of a trade mark cannot be proved by means of probabilities or suppositions, but must be demonstrated by solid and objective evidence (06/10/2004, T-356/02, Vitakraft, EU T 2004 292, § 28, 30/11/2009, T-353/07, Coloris, EU T 2009 475, § 24)

18 To examine whether an earlier trade mark has been put to genuine use, a global assessment must be carried out, which takes into account all the relevant factors of the particular case (25/03/2009, T-191/07, Budweiser, EU:T:2009:83, § 104).

19 Article 42(2) and (3) CTMR 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 trade mark application against which an opposition has been filed Failure to demonstrate such use of the goods on which the opposition is based will lead to the rejection of the opposition.

20 The applicant's request for proof of use under Article 42(2) and (3) CTMR was admissible since the earlier mark was registered on 8 March 1999 and, thus, for more than five years before the application of the contested mark was published, namely on 21 November 2012.

21 Therefore, the opponent was bound to prove genuine use of its earlier mark 'RESPIMAT' in the European Union during the period from 21 November 2007 to 20 November 2012 inclusive, in relation to the goods for which it was registered

The missing translations of some of the documents

22 Some of the evidence presented by the opponent (see para 6 above) was not translated into the language of the proceedings

23 As regards the opponent's pieces of evidence not submitted in the language of the proceedings, the Opposition Division rejected the applicant's statement that they could not be considered as they were not written in English, the language of proceedings. In accordance with Rule 22(6) CTMIR, the Office 'may' require the opponent to translate the evidence In view of the nature of the evidence submitted in the present case, the Opposition Division concluded that a translation was not necessary for self-explanatory elements in the documents.

24 The Board shares the Opposition Division's view that there was no need to translate those documents which had not been submitted in the language of proceedings. The content of the invoices and packaging is self-explanatory. The articles submitted in German and French contain pictures of the products which indicate the nature of use without the need to translate the text The French article *'Respimat, premier inhalateur 'Soft Mist''* contains an English summary (see p 1142 of the article).

25 In the following assessment, the Board will only consider those documents which are in English or are self-explanatory without any translation

Place of use

26 Considering the invoices, articles, packaging and product information leaflets, it is evident that use of the earlier mark has covered the territories of Germany, the

Netherlands, France, Denmark, Ireland and the UK. The earlier Community trade mark was used in the European Union.

Time of use

27 The invoices submitted before the Opposition Division cover the period from February 2008 to February 2012, i.e. almost the whole relevant five-year period (21 November 2007 until 20 November 2012) The evidence shows consistent use of the earlier mark during the relevant time period.

Nature of use

28 The applicant argues that the earlier mark has always been used in connection with other signs and never alone Thus, according to the applicant, the evidence does not prove use of the mark 'RESPIMAT' on its own.

29 The documents submitted by the opponent reveal that the product sold under the mark(s) 'Spiriva Respimat' is a combined product consisting of an inhaler called 'Respimat' and the pharmaceutical preparation 'Spiriva Respimat'. The sign 'Respimat' alone is used only for the inhaler but not for the pharmaceutical preparation.

Nature of use: Use of 'Respimat' for Inhalers

30 The product packaging (in English – item 5.b i.) states that the product contains '1 Respimat® Inhaler and 1 cartridge' Pages 19-22 of item 1.c.i show a number of pictures of the inhaler under the title 'Der Respimat® Soft Inhaler'. The pictures indicate how the inhaler should be used. The English summary of the French article *'Respimat, premier inhalateur 'Soft Mist''* states: 'Respimat®, the first 'soft Mist inhaler' (SMI), releases the drug solution as a low and sustained soft mist [..] studies assessing inhaler preferences in COPD showed that patients preferred Respimat® to usual inhalers'.

31 Consequently, there is sufficient evidence confirming that the sign 'Respimat' has been used alone for apparatus for inhaling pharmaceuticals in Class 10.

Nature of use: No use of 'Respimat' alone for pharmaceutical preparations

32 On the other hand, the documents indicate that the sign 'Respimat' has never been used alone for pharmaceutical preparations in Class 5. The official name of the pharmaceutical preparation is 'Spiriva Respimat' (or 'Berodual Respimat' in some countries). This is shown by official documents and databases submitted by the opponent (see, for example, the excerpt from the *'Rote Liste Fachinformation'* described on page 2 of the opponent's brief of 29 November 2013 (item 1 e.i.) or the database excerpt *'electronic Medicines Compendium (eMC)'*, item 5.c.i.). Thus, the product characteristics of the product (item 5.c.i.) state that 'the name of the medicinal product is 'Spiriva Respimat 2.5 microgram, solution for inhalation'. On the packaging, the product is also called Spiriva Respimat. Moreover, as Annex 4 (press release published by the opponent on its website on

3 September 2012) submitted by the applicant together with the statement of grounds indicates, the pharmaceutical product marketed under the product name 'Spiriva Respimat' is 'SPIRIVA®'. On page 2 of Annex 4, it is pointed out that 'SPIRIVA®' is delivered [..] by SPIRIVA® Respimat® SoftMist Inhaler propellant-free, new generation inhaler that combines innovative technology with the proven efficacy of SPIRIVA®'. Finally, the opponent itself stated, in its brief of 2 July 2014 and in the statement of grounds of 17 April 2015, that 'the fact that the earlier trademark RESPIMAT appears on several pieces of evidence together with a second trademark SPIRIVA is caused by the nature of the product being a combination of an inhalation device and the contained substance' (pages 1-2).

33 Under Article 15(1)(a) CTMR, use of the Community mark is considered to include use in a form differing in elements which do not alter the distinctive character of the mark in the form in which it was registered.

34 It is true that there is nothing at all in the wording of Article 15(1)(a) CTMR to suggest that the different form in which a trade mark is used cannot itself be registered as a trade mark (25/10/2012, C-553/11, Proti et al., EU:C 2012 3861, § 20) In other words, the fact that 'SPIRIVA RESPIMAT' itself may be a registered trade mark would not prevent the opponent from claiming that the use of that combined term also falls under the registered form of the trade mark 'RESPIMAT' Nevertheless, the condition laid down in Article 15(1)(a) CTMR still remains. The form in which the trade mark is used (here 'SPIRIVA RESPIMAT') must differ from the form in which that trade mark was registered (here 'RESPIMAT') *only in elements which do not alter the distinctive character of the registered mark* This condition has not been met in the present case

35 The trade marks mentioned on the product packaging refer to two products, an inhaler called 'RESPIMAT' and a pharmaceutical preparation called 'SPIRIVA RESPIMAT' It is irrelevant that each element of the word combination appears on the packaging with the symbol '®', i e as 'Spiriva® Respimat®' The packaging itself explicitly mentions that 'RESPIMAT' is the brand used for the inhaler (see para 30 above). The evidence submitted by the opponent confirms that the relevant public will always perceive the combined term 'SPIRIVA RESPIMAT' as the name of the pharmaceutical product, not the word 'RESPIMAT' alone. In other words, the opponent provided documentary evidence of use of the overall sign 'SPIRIVA RESPIMAT' for a pharmaceutical product but he failed to show that the relevant public would understand 'RESPIMAT' alone as a sign to distinguish the pharmaceutical preparation at issue According to the evidence, the words 'SPIRIVA RESPIMAT' are always used together as one combined and intrinsically connected term for the pharmaceutical product. The use of the word sequence 'SPIRIVA RESPIMAT' therefore alters the distinctive character of the registered mark 'RESPIMAT' within the meaning of Article 15(1)(a) CTMR.

36 To sum up, the opposing mark 'RESPIMAT' has been used alone only for 'apparatus for inhaling of pharmaceutical preparations' in Class 10 but not for pharmaceutical preparations in Class 5 As far as the latter goods are concerned, the use of the combined sign 'SPIRIVA RESPIMAT' alters the distinctive character of the registered sign and is, therefore, to be disregarded

Extent of use

37 As to the extent of use, it is not necessary to prove commercial success, but account must be taken 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 (18/01/2011, T-382/08, Vogue, EU T 2011 9, § 29 - 31)

38 As mentioned above, the opponent sold a combined product consisting of an inhaler called 'Respimat' and a pharmaceutical preparation called 'Spiriva Respimat' The combination of the two products was sold under the name 'Spiriva® Respimat®' with the explicit indication on the lower part of the packaging that 'Respimat®' is the trade mark for the inhaler Consequently, the invoices attesting to sales of the product combination sold under the name 'Spiriva Respimat' also prove sales of the inhalers included in the product

39 The invoices submitted show the actual sale of 'Respimat' products in six Member States of the European Union A total of 31 invoices have been presented, covering the whole five-year period between 2008 and 2012 The amounts sold range between a couple of hundred euros to DKK 1 7 million (around EUR 220 000 – see invoice No 19 892 of 30 November 2010 to a company in Denmark) The total sales presented and the consistency of use over the relevant period of time demonstrated by the evidence as a whole prove a sufficient extent of the earlier mark's use

Conclusion

40 The evidence submitted by the opponent shows genuine use of the sign 'RESPIMAT' for apparatus for inhaling of pharmaceutical preparations in Class 10 Contrary to the Opposition Division's findings, the documents do not prove genuine use of the registered trade mark for pharmaceuticals in Class 5

Article 8(1)(b) CTMR

41 Under Article 8(1)(b) CTMR, upon opposition by the proprietor of an earlier trade mark, the trade mark applied for shall not be registered if because of its identity with or similarity to the earlier trade mark and the identity or similarity of the goods 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 A likelihood of confusion includes the likelihood of association with the earlier trade mark

42 A likelihood of confusion lies in the risk that the public might believe that the goods in question come from the same undertaking or, as the case may be, from economically-linked undertakings (29/09/1998, C-39/97, Canon, EU C 1998 442, § 29, and 22/06/1999, C-342/97, Lloyd Schuhfabrik, EU C 1999 323, § 17)

43 A likelihood of confusion on the part of the public must be assessed globally, taking into account all factors relevant to the circumstances of the case (11/11/1997, C-251/95, Sabèl, EU C 1997 528, § 22, 29/09/1998, C-39/97,

Canon, EU C 1998 442, § 16, and 22/06/1999, C-342/97, Lloyd Schuhfabrik, EU C 1999 323, § 18)

Relevant public territory

44 The perception of the marks in the minds of the relevant public for the goods in question plays a decisive role in the global assessment of the likelihood of confusion

45 As the earlier mark is a Community trade mark, the relevant territory in relation to this mark is the European Union

46 The relevant public for the assessment of the likelihood of confusion is composed of users likely to use both the goods covered by the earlier mark and by the mark applied for (01/07/2008, T-328/05, Quartz, EU T 2008 238, § 23, 10/07/2009, C-416/08 P, Quartz, EU C 2009 450 dismissed on appeal) Furthermore, the consumer's level of attention is likely to vary according to the category of goods concerned (13/02/2007, T-256/04, Respicur, EU T 2007 46, § 42)

47 In the case at hand, the goods of the earlier mark (for which use has been shown, see paras 28-36 above) are 'apparatus for inhaling pharmaceutical preparations' The contested goods, on the other hand, are essentially non-medical creams and pharmaceutical preparations, both used for the treatment of the upper and lower respiratory tracts and, further, medical apparatus instruments and devices used in connection therewith The targeted public of these goods is composed of the general public in case of the contested non-medical creams used for the treatment of the upper and lower respiratory tracts and of doctors, pharmacists as well as the general public as the final consumers, for the rest of the goods concerned

48 Medical professionals have a high degree of attentiveness when prescribing or providing medicines in Class 5 As regards the general end-consumers, their level of attention will also be higher than average in respect of medicines, whether or not they are issued on prescription, since they affect a consumer's state of health (07/06/2012, T-492/09 & T-147/10, Allernil, EU T 2012 281, § 29, 15/12/2009, T-412/08, Trubion, EU T 2009 507, § 28) Given the nature of the products concerned and their possible impact on a consumer's health, the relevant public, consisting of medical professionals (not in case of the contested non-medical creams) and end consumers, will display a higher than average level of attention

Comparison of the goods

49 In assessing the similarity of the goods, all the relevant factors relating to those goods should be taken into account, including, *inter alia*, their nature, their intended purpose and their method of use and whether they are in competition with each other or are complementary (29/09/1998, C-39/97, Canon, EU C 1998 442, § 23) Other factors may also be taken into account, such as the distribution channels of the goods concerned (11/07/2007, T-443/05, Pirañam, EU T 2007 219, § 37), the usual origin and the relevant public of the goods

50 The reference point is whether the relevant public would perceive the relevant goods as having a common commercial origin (04/11/2003, T-85/02, Castillo, EU T 2003 288, § 38)

51 The contested mark covers all kinds of pharmaceutical preparations including pharmaceuticals for respiratory diseases in Class 5 Those goods are similar to apparatus for inhaling of pharmaceutical preparations All those goods may have the same purpose, namely the treatment of the upper and lower respiratory tracts The goods are also complementary to each other The proper use of apparatus for inhaling pharmaceutical preparations requires pharmaceutical preparations Moreover, the goods may be produced and offered by the same companies and may be directed to the same public, i e patients with respiratory diseases The goods are similar to a medium degree

52 The contested goods 'medical apparatus and instruments for the moistening, clearance, regeneration, repair and healing of the respiratory mucosa, for the treatment and soothing of symptoms in the respiratory system, for the soothing of pain in the respiratory system, and for drainage, decongestion and disinfection of the upper and lower respiratory tracts, namely the nasal passages, the sinuses, the pharynx, the throat and the bronchial tubes, Medical devices for the moistening, clearance, regeneration, repair and healing of the respiratory mucosa, for the treatment and soothing of symptoms in the respiratory system, for the soothing of pain in the respiratory system, and for drainage, decongestion and disinfection of the upper and lower respiratory tracts, namely the nasal passages, the sinuses, the pharynx, the throat and the bronchial tubes' in Class 10 are similar to the opponent's goods 'apparatus for inhaling of pharmaceutical preparations' in the same class The goods have the same nature and purpose, namely medical devices and apparatus for the treatment of the respiratory tract Moreover, the goods may be offered by the same companies and are directed to the same public, e g patients suffering from problems related to the respiratory tract The method of use and the distribution channels also overlap The goods are similar to a high degree

53 Finally, the goods 'creams for external application, in particular for irritations of the external walls of the nostrils and around the mouth and bronchial tubes (cosmetics, not for medical purposes)' in Class 3 are similar to a low degree to the opponent's goods apparatus for inhaling of pharmaceutical preparations in Class 10 It is true that, according to the wording of the list of goods in Class 3, the creams in that class are not for medical purposes On the other hand, it is difficult to draw a line between medical creams and cosmetic creams Medical creams may also serve cosmetic purposes (hygiene, cleaning, moistening, rehydration, protection of the skin) The fact is that the list of medical products included in Class 5 of the contested mark includes solutions, emulsions and creams which have the aforementioned cosmetic purposes (see para 1) above Likewise, cosmetic creams may also serve medical purposes (repair, healing, prevention, regeneration of the skin) The question of whether a product serves a 'medical purpose' must not be interpreted restrictively and does not only depend on the classification of that product in the Nice Classification (23/01/2014, T-221/12, Sun fresh, EU T 2014 25, § 35, confirmed by the CJEU 03/06/2015, C-142/14 P,

SUN FRESH / SUNNY FRESH, EU:C 2015 371; 29/10/2015, T-21/14, SANDTER 1953 / >Sander< *et al.*, EU:T.2015:815, § 44 and 45).

54 Consequently, although the nature of the conflicting goods is different, there is a certain similarity as regards the purpose, namely the treatment of the respiratory system (nostrils/mouth area and bronchial tubes). Moreover, it cannot be excluded that patients using medical apparatus for inhaling pharmaceutical preparations may also need creams treating irritations of the external walls of the nostrils and around the mouth and bronchial tubes Therefore, the goods may be complementary to each other. Finally, companies producing inhalers and similar apparatus for inhaling pharmaceutical preparations may also offer specific creams treating irritations of the nostrils/mouth area or the bronchial tubes even if those creams are not, strictly speaking, medical products. To sum up, the goods are similar to a low degree.

Comparison of the signs

55 The conflicting marks have to be compared visually, phonetically and conceptually Such a comparison must be based on the overall impression given by the marks, bearing in mind, in particular, their distinctive and dominant components. The perception of marks by the average consumer of the goods in question plays a decisive role in the global appreciation of that likelihood of confusion In that regard, the average consumer normally perceives a mark as a whole and does not proceed to analyse its various details (22/06/1999, C-342/97, Lloyd Schuhfabrik, EU.C 1999:323, § 25, 11/11/1997, C-251/95, Sabèl, EU C·1997 528, § 23)

56 Two marks are similar where, from the point of view of the relevant public, they are at least partially identical as regards one or more relevant aspects, namely the visual, phonetic and conceptual aspects (17/02/2011, T-385/09, Ann Taylor Loft, EU.T:2011:49, § 26).

57 The signs to be compared are the following.

Contested CTM application	*Earlier CTM registration*
RESPIMER	**RESPIMAT**

58 Both the contested sign as well as the earlier sign are word marks consisting of the words 'RESPIMER' and 'RESPIMAT', respectively

59 The signs are visually similar for the relevant public as they comprise a single word, are of the same lengths and share the first six out of eight letters 'RESPIM'. The different endings 'ER' and 'AT' are not sufficient to eliminate the visual similarity (compare to 13/02/2007, T-256/04, Respicur, EU:T·2007 46, § 55) In that regard, it should be borne in mind that consumers normally attach more importance to the beginnings of words (see, to that effect, 30/11/2011, T-477/10,

SE© Sports Equipment, EU:T 2011 707, § 54; 17/03/2004, T-183/02 & T-184/02, Mundicor, EU:T:2004 79, § 81). The component common to both signs, namely 'RESPIM', makes a significant contribution to the overall impression produced by the conflicting signs as it is placed at the beginning of the two signs, takes up two of their three syllables and is longer than the respective second components (13/02/2007, T-256/04, Respicur, EU:T.2007:46, § 60) Consequently, the signs are visually similar to a high degree

60 As to the phonetic comparison, the beginnings 'RESPIM' [res-pi:m] are pronounced identically in the relevant languages of the European Union. Only the last two letters 'ER' and 'AT' are pronounced differently. Again, one has to bear in mind that the consumer tends to focus on the beginning of a sign when being confronted with it Although the different endings must not be neglected it is likely that the public will pay less attention to them Thus, there is a high degree of phonetic similarity between the conflicting signs

61 Conceptually, neither of the signs as a whole has any clear meaning The marks would evoke similar associations from the perspective of those consumers who perceive the common term 'RESPI' as an abbreviation for 'respiratory' (compare to 13/02/2007, T-256/04, Respicur, EU T:2007:46, § 59). Other customers may associate the ending 'MER' with the French word *'la mer'* (the sea, the ocean). The ending 'mat' could be perceived as an abbreviation for 'material' or as a play on words with the term 'automat' Finally, some consumers will see both terms as purely fanciful words without any meaning. Even if a part of the public were to perceive a certain conceptual difference between the two marks, this difference would not be, however, sufficient to counteract the high visual and phonetic similarities which have been established (see 13/02/2007, T-256/04, Respicur, EU T:2007:46, § 62)

Distinctiveness of the earlier mark

62 Since the opponent did not claim the earlier mark's enhanced distinctiveness through use, the assessment must rest on its distinctiveness *per se*

63 It is true that the component 'RESPI' will be perceived by a part of the relevant public as a reference to 'respiratory' which in relation to the goods concerned, being intended to treat the respiratory system, is highly allusive On the other hand, the sign 'RESPIMAT' as a whole does not have a clear meaning A part of the public will perceive the opposing mark as a fanciful word without any meaning At least for this part of the relevant public, the earlier mark has a normal degree of distinctiveness

Global assessment of likelihood of confusion

64 A likelihood of confusion on the part of the public must be assessed globally, taking into account all factors relevant to the circumstances of the case. That global appreciation of the visual, aural or conceptual similarity of the marks in question must be based on the overall impression given by the marks. The global assessment implies some interdependence between the factors taken into account

and in particular similarity between the trade marks and between the goods covered Accordingly, a lesser degree of similarity between these goods may be offset by a greater degree of similarity between the marks, and vice versa (29/09/1998, C-39/97, Canon, EU:C.1998 442, § 17; 22/06/1999, C-342/97, Lloyd Schuhfabrik, EU:C:1999:323, § 19)

65 The conflicting goods in Classes 3, 5 and 10 were found similar. The conflicting marks were found highly similar from a visual and phonetic point of view. Although the element 'respi' of the earlier mark may be perceived as a reference to 'respiratory' by a part of the public in the European Union, the mark as a whole does not convey a clear meaning in relation to the goods concerned. In any event, even a weakened distinctive character of the earlier mark cannot preclude a likelihood of confusion due to the striking similarities between the signs from a visual and phonetic perspective Although the distinctive character of the earlier mark must be taken into account for the purpose of assessing the likelihood of confusion, it is only one factor among others involved 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 concerned (16/09/2009, T-400/06, zerorh+, EU T:2009:331, § 74 and the case-law cited).

66 To give priority to the weak distinctive character of a trade mark in the assessment of the likelihood of confusion would point to the conclusion that, where a mark has only weak distinctive character, there is a likelihood of confusion only where it is reproduced fully by the trade mark for which registration is sought, whatever the degree of similarity between the marks at issue Such a result would not be consistent with the very nature of the global appreciation which the competent authorities are required to undertake by virtue of Article 8(1)(b) CTMR (14/09/2011, T-485/07, O-live, EU.T:2011.467, § 106 and the case-law cited therein) Furthermore, the weak distinctive character of an element of a complex mark does not necessarily mean that that element cannot constitute a dominant element where, owing, in particular, to its position in the sign or its size, it may make an impression on consumers and be remembered by them (22/05/2012, T-273/10, O•live, EU·T:2012.246, § 56; 14/09/2011, T-485/07, O-live, EU.T:2011·467, § 84 and the case-law cited).

67 Finally, account must be taken of the fact that the average consumer only rarely has the chance to make a direct comparison between the different marks but must rely on his or her imperfect recollection of them (see 12/06/2007, C-334/05 P, Limoncello, EU:C·2007:333 , § 35 and the case-law cited; 09/07/2003, T-162/01, Giorgio Beverly Hills, EU:T:2003·199, § 33 and the case-law cited) When being confronted with the contested sign 'RESPIMER' for creams, pharmaceutical and medical products and medical apparatus in Classes 3, 5 and 10, it cannot be excluded that at least a part of the relevant public in the European Union may confuse that sign with the medical apparatus marketed by the opponent under the earlier mark 'RESPIMAT'.

68 The applicant argues that the opposition based on the same earlier right against the French trade mark, on which the priority of the current CTM application is based, was rejected by French Trademark Office (INPI). In that regard, the Board recalls

that OHIM is not bound by decisions of the national offices. The Community trade mark regime is an autonomous system with its own set of objectives and rules peculiar to it and applies independently of any national system. Accordingly, the registrability of a sign as a Community trade mark is to be assessed on the basis of the Community Trade Mark Regulation alone (13/09/2010, T-292/08, Often, EU:T:2010:399, § 84; 25/10/2006, T-13/05, Oda, EU:T:2006:335, § 59). Decisions adopted in a Member State or in a state that is not a member of the European Union are not binding for the Office (24/03/2010, T-363/08 & T-364/08, Nollie, EU:T:2010:114, § 52). In any event, the decisions cannot be compared: Whereas the decision of INPI was limited to the French territory, the assessment of likelihood of confusion in the case at hand extends to the territory of the whole European Union.

69 As a result, the marks in conflict are confusingly similar within the meaning of Article 8(1)(b) CTMR in relation to all contested goods.

70 It follows that the contested decision is confirmed and the appeal is dismissed

Costs

71 Pursuant to Article 85(1) CTMR, the applicant, as the losing party, bears the costs incurred by the opponent in the appeal proceedings. The apportionment of costs foreseen in the contested decision remains unchanged.

Fixing of costs

72 On the basis of the first sentence of Article 85(6) CTMR, in the appeal decision, the Board of Appeal also fixes the costs to be reimbursed.

73 Since the opponent is represented by its own employee, no representation costs are subject to be reimbursed for the appeal proceedings (Article 93(1) CTMR and Rule 94(7)(d) CTMIR). The costs to be paid by the applicant to the opponent for the appeal proceedings amounts to EUR 0.

Order

On those grounds,

THE BOARD

hereby:

1. **Dismisses the appeal;**

2. **Orders the applicant to bear the costs of the appeal proceedings;**

3. **Fixes the total amount of costs to be paid by the applicant to the opponent for the appeal proceedings at EUR 0.**

Signed	Signed	Signed
G. Humphreys	A. Pohlmann	A. Szanyi Felkl

Registrar:

Signed

H.Dijkema

Bilag 3

OFFICE FOR HARMONIZATION IN THE INTERNAL MARKET
(TRADE MARKS AND DESIGNS)

Opposition Division

OPPOSITION No B 2 117 763

Boehringer Ingelheim Pharma GmbH & Co. KG, 55218 Ingelheim, Germany (opponent)

against

Laboratoire De La Mer, Avenue du Général Patton - Zac de la Madeleine, 35400 Saint-Malo, France (applicant), represented by **Cabinet Vidon Marques & Juridique PI**, 16B, Rue Jouanet - B.P. 90333, Technopôle Atalante, 35703 Rennes Cedex 7, France (professional representative).

On 06/10/2014, the Opposition Division takes the following

DECISION:

1. Opposition No B 2 117 763 is upheld for all the contested goods.

2. Community trade mark application No 11 228 004 is rejected in its entirety.

3. The applicant bears the costs, fixed at EUR 350.

REASONS:

The opponent filed an opposition against all the goods of Community trade mark application No 11 228 004. The opposition is based on Community trade mark registration No 746 115. The opponent invoked Article 8(1)(b) CTMR.

PROOF OF USE

According to Article 42(2) and (3) CTMR, if the applicant so requests, the opponent shall furnish proof that, during the period of five years preceding the date of publication of the contested trade mark, the earlier trade mark has been put to genuine use in the territories in which it is protected in connection with the goods or services in respect of which it is registered and which he cites as justification for his opposition, or that there are proper reasons for non-use.

According to the same provision, in the absence of such proof the opposition must be rejected.

The applicant requested that the opponent submit proof of use of the trade mark on which the opposition is based.

The request was filed in due time and it is admissible given that the earlier trade mark was registered more than five years prior to the publication of the contested application.

On 24/09/2014 the opponent was given two months to submit the requested proof of use.

The contested application was published on 21/11/2012. The opponent was therefore required to prove that the trade mark on which the opposition is based was put to genuine use in the European Union from 21/11/2007 to 20/11/2012 inclusive. Furthermore, the evidence must show use of the trade mark for the goods on which the opposition is based, namely the following:

Class 5: *Pharmaceutical preparations.*

Class 10: *Instruments and apparatus for inhaling of pharmaceutical preparations.*

According to Rule 22(3) CTMIR, the evidence of use shall consist of indications concerning the place, time, extent and nature of use of the opposing trade mark for the goods and services in respect of which it is registered and on which the opposition is based.

On 03/12/2013 the opponent submitted, in particular, the following evidence:

- Attachment 1: Invoices.

  - 22 invoices covering the period from 04/02/2008 to 02/02/2012, containing references to 'Spiriva Respimat' and 'Berodual Respimat' and accounting for sales to Denmark, Germany, Ireland, France, the Netherlands and the United Kingdom, amounting to a total of approximately EUR 300 000 and GBP 23 000.

- Attachment 2: Advertisement material (two brochures).

  1. An undated brochure, 'COPD schränkt ein. Sie können was bewegen'. The evidence consists of a brochure to inform patients about Chronic Obstructive Pulmonary Disease (COPD) and the benefits and function of RESPIMAT in this context on page 19.
  2. A brochure, 'Dès maintenant*, pour demain**,' to inform patients and doctors about the advantages of the product. The brochure is dated 02/2012.

- Attachment 3: Publications.

  1. Press clips from the International Journal of COPD, 2010:5 367—373; Revue des Maladies Respiratoires, (2010)27, 1141—1149; Rassegna di Patologia dell'Apparato Respiratorio, 2011; 26: 263—264, referring to Tiotropium Respimat®, and to Respimat® being an inhalator.
  2. A printout from a special publication concerning pneumology dated June 2012 featuring COPD and the benefits of the RESPIMAT product therein.
  3. A printout of an article published in 'Therapie-Magazin' of December 2008 featuring the benefits of the Respimat® product in the treatment of COPD.

- Attachment 4: Samples of products.

  - Seven copies of packaging referring to 'Berodual® Respimat®' and 'Spiriva® Respimat®' in Danish, Dutch, English, French and German.

- Attachment 5: Other.

- Product fact sheets and extracts from databases of pharmaceutical preparations referring to 'Spiriva® Respimat®' and 'Berodual® Respimat®' as a 'solution for inhalation' which is only used together with a specific 'Respimat Apparatus' and 'Respimat Cartridge'

The applicant argues that the opponent did not submit translations of some of the evidence of use and that, therefore, this evidence should not be taken into consideration However, the opponent is not under any obligation to translate the proof of use, unless it is specifically requested to do so by the Office (Rule 22(6) CTMIR) Taking into account the nature of the documents that have not been translated and are considered relevant for the present proceedings, namely invoices, packaging, articles, and their self—explanatory character, the Opposition Division considers that there is no need to request a translation.

The applicant argues that not all the items of evidence indicate genuine use in terms of time, place, extent, nature and use of the goods for which the earlier mark is registered. The applicant's argument is based on an individual assessment of each item of evidence regarding all the relevant factors. However, when assessing genuine use, the Opposition Division must consider the evidence in its entirety. Even if some relevant factors are lacking in some items of evidence, the combination of all the relevant factors in all the items of evidence may still indicate genuine use

The Opposition Division finds that the abovementioned evidence proves that the earlier trade mark has been genuinely used in the course of trade

Some of the documents are not dated, such as some of the advertising brochures and copies of packaging However, the information contained in one of the published advertisements, in the press articles and in the invoices sufficiently indicates the period of use. In addition, although three of the invoices are dated outside the reference period and do not indicate the nature of the goods, most of the evidence refers to the relevant period, and it can be seen from the other evidence, such as the brochures, press articles and product fact sheets, what types of goods the trade mark covers

As regards the nature of use of the earlier mark, the opponent has made known that both 'Spiriva' and 'Respimat' are registered trade marks, by adding the '®' symbol after each of these words The same applies to the use of the earlier mark in combination with the mark 'Berodual'. For this reason, the use of the trade mark 'Respimat' in combination with the trade marks 'Spiriva' and 'Berodual' qualifies as use of the mark 'Respimat' for *pharmaceutical preparations to relieve symptoms of patients with chronic obstructive pulmonary disease* and *instruments and apparatus for inhaling of pharmaceutical preparations*, because it does not alter the distinctive character of the mark 'Respimat' from the form in which it was registered

The evidence as a whole provides sufficient indications to conclude that the earlier trade mark was genuinely used in the European Union during the relevant period for *pharmaceutical preparations to relieve symptoms of patients with chronic obstructive pulmonary disease* and *instruments and apparatus for inhaling of pharmaceutical preparations*.

Taking into account the evidence in its entirety, the Opposition Division finds that although the evidence submitted by the opponent is not particularly exhaustive, it does reach the minimum level necessary to establish genuine use during the relevant period in the relevant territory

However, the evidence filed by the opponent does not show genuine use of the trade mark for all the opponent's goods.

According to Article 42(2) CTMR, if the earlier trade mark has been used in relation to part only of the goods or services for which it is registered it shall, for the purposes of the examination of the opposition, be deemed to be registered in respect only of that part of the goods or services

According to case-law, when applying the abovementioned provision the following should be considered

> ...if a trade mark has been registered for a category of goods or services which is sufficiently broad for it to be possible to identify within it a number of sub-categories capable of being viewed independently, proof that the mark has been put to genuine use in relation to a part of those goods or services affords protection, in opposition proceedings, only for the sub-category or sub-categories to which the goods or services for which the trade mark has actually been used belong However, if a trade mark has been registered for goods or services defined so precisely and narrowly that it is not possible to make any significant sub-divisions within the category concerned, then the proof of genuine use of the mark for the goods or services necessarily covers the entire category for the purposes of the opposition.
>
> Although the principle of partial use operates to ensure that trade marks which have not been used for a given category of goods are not rendered unavailable, it must not, however, result in the proprietor of the earlier trade mark being stripped of all protection for goods which, although not strictly identical to those in respect of which he has succeeded in proving genuine use, are not in essence different from them and belong to a single group which cannot be divided other than in an arbitrary manner The Court observes in that regard that in practice it is impossible for the proprietor of a trade mark to prove that the mark has been used for all conceivable variations of the goods concerned by the registration. Consequently, the concept of 'part of the goods or services' cannot be taken to mean all the commercial variations of similar goods or services but merely goods or services which are sufficiently distinct to constitute coherent categories or sub-categories.

(Judgment of 14/07/2005, T-126/03 'ALADIN')

In the present case, the evidence proves use only for *pharmaceutical preparations to relieve symptoms of patients with chronic obstructive pulmonary disease* and *instruments and apparatus for inhaling of pharmaceutical preparations.*

Pharmaceutical preparations to relieve symptoms of patients with chronic obstructive pulmonary disease can be considered to form an objective subcategory of *pharmaceutical preparations*, namely *pharmaceutical preparations for respiratory illnesses* Therefore, the evidence shows genuine use of the trade mark only for the following goods:

Class 5 *Pharmaceutical preparations for respiratory illnesses.*

Class 10. *Instruments and apparatus for inhaling of pharmaceutical preparations*

Therefore, the Opposition Division will only consider the abovementioned goods in its further examination of the opposition

LIKELIHOOD OF CONFUSION – ARTICLE 8(1)(b) CTMR

A likelihood of confusion exists if there is a risk that the public might believe that the goods or services in question, under the assumption that they bear the marks in question, come from the same undertaking or, as the case may be, from economically-linked undertakings Whether a likelihood of confusion exists depends on the appreciation in a global assessment of several factors, which are interdependent These factors include the similarity of the signs, the similarity of the goods and services, the distinctiveness of the earlier mark, the distinctive and dominant elements of the conflicting signs and the relevant public

a) The goods

The goods on which the opposition is based are the following

Class 5 *Pharmaceutical preparations for respiratory illnesses*

Class 10 *Instruments and apparatus for inhaling of pharmaceutical preparations*

The contested goods are the following

Class 3 *Creams for external application, in particular for irritations of the external walls of the nostrils and around the mouth and bronchial tubes (cosmetics, not for medical purposes)*

Class 5 *Pharmaceutical preparations, drugs, pharmaceutical preparations based on marine products, essential oils, plant extracts, and goods of natural or chemical origin, medicines based on marine products, essential oils, plant extracts, and goods of natural or chemical origin, pharmaceutical preparations, namely solutions for the hygiene, cleaning and moistening of the nasal passages and sinuses and the prevention of diseases of the nose and sinuses, pharmaceutical preparations, namely for the moistening and clearance of the bronchial tubes, pharmaceutical preparations, namely for the regeneration, repair and healing of the respiratory mucosa, pharmaceutical preparations, namely solutions for the treatment and soothing of symptoms, the soothing of pain, and the drainage, decongestion and disinfection of the upper and lower respiratory tracts, namely the nasal passages, the sinuses, the pharynx, the throat and the bronchial tubes, medicines, namely solutions for the treatment and soothing of symptoms, the soothing of pain, and the drainage, decongestion and disinfection of the upper and lower respiratory tracts, namely the nasal passages, the sinuses, the pharynx, the throat and the bronchial tubes, pharmaceutical preparations for the treatment of the nasal passages, the sinuses, the pharynx, the throat and the bronchial tubes, solutions for calming symptoms in the nasal passages, the sinuses, the pharynx, the throat and the bronchial tubes, painkiller solutions for the nasal passages, the sinuses, the pharynx, the throat and the bronchial tubes, drainage solutions for the nasal passages, the sinuses, the pharynx, the throat and the bronchial tubes, decongestants for the nasal passages, the sinuses, the pharynx, the throat and the bronchial tubes, bacterial and/or viral*

disinfectants for the nasal passages, the sinuses, the pharynx, the throat and the bronchial tubes; solutions, emulsions, creams, gels, ointments and micro-gel solutions for the nasal passages, the sinuses, the pharynx, the throat and the bronchial tubes, for hygiene, cleaning, moistening, rehydration, protection, regeneration, repair, healing and prevention of ent diseases, in particular diseases of the upper and lower respiratory tracts, and in the context of diseases including colds, influenza, rhinitis, in particular allergic rhinitis, hay fever, nasal dryness, sinusitis, rhinosinusitis, rhinopharyngitis, pharyngitis, laryngitis, bronchitis and bronchiolitis, and post-operative care; solutions, emulsions, creams, gels, ointments and micro-gel solutions for the nasal passages, the sinuses, the pharynx, the throat and the bronchial tubes, for the treatment and soothing of symptoms in the respiratory system, for the soothing of pain in the respiratory system, for drainage, decongestion, disinfection and regeneration, repair and healing in the context of diseases including colds, influenza, rhinitis, in particular allergic rhinitis, hay fever, nasal dryness, sinusitis, rhinosinusitis, rhinopharyngitis, pharyngitis, laryngitis, bronchitis and bronchiolitis, and post-operative care; drops; sprays; jets, misting solutions and aerosol therapy solutions for the nasal passages, the sinuses, the pharynx, the throat and the bronchial tubes, for hygiene, cleaning, moistening, rehydration, protection, regeneration, repair, healing and prevention of ent diseases, in particular diseases of the upper and lower respiratory tracts, and in the context of diseases including colds, influenza, rhinitis, in particular allergic rhinitis, hay fever, nasal dryness, sinusitis, rhinosinusitis, rhinopharyngitis, pharyngitis, laryngitis, bronchitis and bronchiolitis, and post-operative care; drops; sprays; jets, misting solutions and aerosol therapy solutions for the nasal passages, the sinuses, the pharynx, the throat and the bronchial tubes, for the treatment and soothing of symptoms in the respiratory system, for the soothing of pain in the respiratory system, for drainage, decongestion, disinfection and regeneration, repair and healing in the context of diseases including colds, influenza, rhinitis, in particular allergic rhinitis, hay fever, nasal dryness, sinusitis, rhinosinusitis, rhinopharyngitis, pharyngitis, laryngitis, bronchitis and bronchiolitis, and post-operative care; powders for dilution, effervescent tablets for the nasal passages, the sinuses, the pharynx, the throat and the bronchial tubes, for hygiene, cleaning, moistening, rehydration, protection, regeneration, repair, healing and prevention of ent diseases, in particular diseases of the upper and lower respiratory tracts, and in the context of diseases including colds, influenza, rhinitis, in particular allergic rhinitis, hay fever, nasal dryness, sinusitis, rhinosinusitis, rhinopharyngitis, pharyngitis, laryngitis, bronchitis and bronchiolitis, and post-operative care; powders for dilution, effervescent tablets for the nasal passages, the sinuses, the pharynx, the throat and the bronchial tubes, for the treatment and soothing of symptoms in the respiratory system, for the soothing of pain in the respiratory system, for drainage, decongestion, disinfection and regeneration, repair and healing in the context of diseases including colds, influenza, rhinitis, in particular allergic rhinitis, hay fever, nasal dryness, sinusitis, rhinosinusitis, rhinopharyngitis, pharyngitis, laryngitis, bronchitis and bronchiolitis, and post-operative care; isotonic and hypertonic marine serums.

Class 10: *Medical apparatus and instruments for the moistening, clearance, regeneration, repair and healing of the respiratory mucosa, for the treatment and soothing of symptoms in the respiratory system, for the soothing of pain in the respiratory system, and for drainage, decongestion and disinfection of the upper and lower respiratory tracts, namely the nasal*

passages, the sinuses, the pharynx, the throat and the bronchial tubes; medical devices for the moistening, clearance, regeneration, repair and healing of the respiratory mucosa, for the treatment and soothing of symptoms in the respiratory system, for the soothing of pain in the respiratory system, and for drainage, decongestion and disinfection of the upper and lower respiratory tracts, namely the nasal passages, the sinuses, the pharynx, the throat and the bronchial tubes.

The term 'in particular' and 'including', used in the applicant's list of goods, indicates that the specific goods are only examples of items included in the category and that protection is not restricted to them. In other words, it introduces a non-exhaustive list of examples (on the use of 'in particular' see a reference in judgment of 09/04/2003, T-224/01, 'Nu-Tride').

However, the term 'namely', used in the applicant's list of goods to show the relationship of individual goods with a broader category, is exclusive and restricts the scope of protection only to the specifically listed goods.

The relevant factors relating to the comparison of the goods include, inter alia, the nature and purpose of the goods, the distribution channels, the sales outlets, the producers, the method of use and whether they are in competition with each other or complementary to each other.

Contested goods in Class 3

The contested *creams for external application, in particular for irritations of the external walls of the nostrils and around the mouth and bronchial tubes (cosmetics, not for medical purposes)* are substances and preparations including those used in the treatment of irritations on various respiratory organs. These goods have the same purpose of use as the opponent's *pharmaceutical preparations for respiratory illnesses,* and target the same public. Moreover, they can be manufactured, marketed and provided by the same undertaking, or by economically linked undertakings and usually use the same distribution and sales channels. Therefore, they are considered similar.

Contested goods in Class 5

The contested *pharmaceutical preparations* include, as a broader category, the opponent's *pharmaceutical preparations for respiratory illnesses.* It is impossible for the Opposition Division to filter these goods from the abovementioned category. Since the Opposition Division cannot dissect *ex officio* the broad category of the applicant's goods, they are considered identical.

The contested *drugs; pharmaceutical preparations based on marine products, essential oils, plant extracts, and goods of natural or chemical origin; medicines based on marine products, essential oils, plant extracts, and goods of natural or chemical origin; pharmaceutical preparations, namely solutions for the hygiene, cleaning and moistening of the nasal passages and sinuses and the prevention of diseases of the nose and sinuses; pharmaceutical preparations, namely for the moistening and clearance of the bronchial tubes; pharmaceutical preparations, namely for the regeneration, repair and healing of the respiratory mucosa; pharmaceutical preparations, namely solutions for the treatment and soothing of symptoms, the soothing of pain, and the drainage, decongestion and disinfection of the upper and lower respiratory tracts, namely the nasal passages, the sinuses, the pharynx, the throat and the bronchial tubes; medicines, namely solutions for the treatment and*

soothing of symptoms, the soothing of pain, and the drainage, decongestion and disinfection of the upper and lower respiratory tracts, namely the nasal passages, the sinuses, the pharynx, the throat and the bronchial tubes; pharmaceutical preparations for the treatment of the nasal passages, the sinuses, the pharynx, the throat and the bronchial tubes; solutions for calming symptoms in the nasal passages, the sinuses, the pharynx, the throat and the bronchial tubes; painkiller solutions for the nasal passages, the sinuses, the pharynx, the throat and the bronchial tubes; drainage solutions for the nasal passages, the sinuses, the pharynx, the throat and the bronchial tubes; decongestants for the nasal passages, the sinuses, the pharynx, the throat and the bronchial tubes; solutions, emulsions, creams, gels, ointments and micro-gel solutions for the nasal passages, the sinuses, the pharynx, the throat and the bronchial tubes, for hygiene, cleaning, moistening, rehydration, protection, regeneration, repair, healing and prevention of ent diseases, in particular diseases of the upper and lower respiratory tracts, and in the context of diseases including colds, influenza, rhinitis, in particular allergic rhinitis, hay fever, nasal dryness, sinusitis, rhinosinusitis, rhinopharyngitis, pharyngitis, laryngitis, bronchitis and bronchiolitis, and post-operative care; solutions, emulsions, creams, gels, ointments and micro-gel solutions for the nasal passages, the sinuses, the pharynx, the throat and the bronchial tubes, for the treatment and soothing of symptoms in the respiratory system, for the soothing of pain in the respiratory system, for drainage, decongestion, disinfection and regeneration, repair and healing in the context of diseases including colds, influenza, rhinitis, in particular allergic rhinitis, hay fever, nasal dryness, sinusitis, rhinosinusitis, rhinopharyngitis, pharyngitis, laryngitis, bronchitis and bronchiolitis, and post-operative care; drops; sprays; jets, misting solutions and aerosol therapy solutions for the nasal passages, the sinuses, the pharynx, the throat and the bronchial tubes, for hygiene, cleaning, moistening, rehydration, protection, regeneration, repair, healing and prevention of ent diseases, in particular diseases of the upper and lower respiratory tracts, and in the context of diseases including colds, influenza, rhinitis, in particular allergic rhinitis, hay fever, nasal dryness, sinusitis, rhinosinusitis, rhinopharyngitis, pharyngitis, laryngitis, bronchitis and bronchiolitis, and post-operative care; drops; sprays; jets, misting solutions and aerosol therapy solutions for the nasal passages, the sinuses, the pharynx, the throat and the bronchial tubes, for the treatment and soothing of symptoms in the respiratory system, for the soothing of pain in the respiratory system, for drainage, decongestion, disinfection and regeneration, repair and healing in the context of diseases including colds, influenza, rhinitis, in particular allergic rhinitis, hay fever, nasal dryness, sinusitis, rhinosinusitis, rhinopharyngitis, pharyngitis, laryngitis, bronchitis and bronchiolitis, and post-operative care; powders for dilution, effervescent tablets for the nasal passages, the sinuses, the pharynx, the throat and the bronchial tubes, for hygiene, cleaning, moistening, rehydration, protection, regeneration, repair, healing and prevention of ent diseases, in particular diseases of the upper and lower respiratory tracts, and in the context of diseases including colds, influenza, rhinitis, in particular allergic rhinitis, hay fever, nasal dryness, sinusitis, rhinosinusitis, rhinopharyngitis, pharyngitis, laryngitis, bronchitis and bronchiolitis, and post-operative care; powders for dilution, effervescent tablets for the nasal passages, the sinuses, the pharynx, the throat and the bronchial tubes, for the treatment and soothing of symptoms in the respiratory system, for the soothing of pain in the respiratory system, for drainage, decongestion, disinfection and regeneration, repair and healing in the context of diseases including colds, influenza, rhinitis, in particular allergic rhinitis, hay fever, nasal dryness, sinusitis, rhinosinusitis, rhinopharyngitis, pharyngitis, laryngitis, bronchitis and bronchiolitis, and post-operative care; isotonic and hypertonic marine serums are identical to the opponent's *pharmaceutical preparations for respiratory illnesses*, either because they are identically contained in both lists (including synonyms) or because the opponent's goods are included in or overlap with the contested goods or vice versa.

The contested *bacterial and/or viral disinfectants for the nasal passages, the sinuses, the pharynx, the throat and the bronchial tubes* are similar to a high degree to the opponent's *pharmaceutical preparations for respiratory illnesses*. Although these goods have very different methods of use, they still share the same nature and purpose of use because they are both specific chemical products for healing/preventing disease, targeting the same end-user, and are sold in the same places and come from the pharmaceutical industry. Therefore, these goods are considered similar to a high degree.

Contested goods in Class 10

The contested *medical apparatus and instruments for the moistening, clearance, regeneration, repair and healing of the respiratory mucosa, for the treatment and soothing of symptoms in the respiratory system, for the soothing of pain in the respiratory system, and for drainage, decongestion and disinfection of the upper and lower respiratory tracts, namely the nasal passages, the sinuses, the pharynx, the throat and the bronchial tubes; medical devices for the moistening, clearance, regeneration, repair and healing of the respiratory mucosa, for the treatment and soothing of symptoms in the respiratory system, for the soothing of pain in the respiratory system, and for drainage, decongestion and disinfection of the upper and lower respiratory tracts, namely the nasal passages, the sinuses, the pharynx, the throat and the bronchial tubes* are identical to the opponent's *instruments and apparatus for inhaling of pharmaceutical preparations,* either because they are identically contained in both lists (including synonyms) or because the opponent's goods are included in or overlap with the contested goods or vice versa.

b) The signs

RESPIMAT	RESPIMER
Earlier trade mark	Contested sign

The relevant territory is the European Union. For reasons of procedural economy, the Opposition Division will focus the comparison of the signs on the German-speaking part of the relevant public.

Visually, the signs are similar to the extent that they coincide in the sequence of letters 'RESPIM*'. On the other hand, they differ in the letters '*AT' in the earlier mark and '*ER' in the contested sign

Aurally, the pronunciation of the signs coincides in the sound of the letters 'RESPIM*' present identically in both signs, and to that extent the signs are aurally similar The pronunciation differs in the sound of the letters '*AT' of the earlier sign and '*ER' of the contested sign, which have no counterparts in each other.

Conceptually, neither the signs as a whole nor the common element 'RESPI' have any meaning for the public in the relevant territory. On the other hand, even if the German-speaking public uses the term 'atmen' ('to breath') instead of the element 'respi' which refers to the Latin-derived term 'respire' and used in many European languages; for a relevant part of the pertinent public, for example professionals in the

medical field and the Romance-speaking public, the element 'RESPI' included in both signs will be perceived as alluding to the Latin-derived term 'respire' and to that extent the signs are conceptually similar.

Taking into account the abovementioned visual, aural and, for some of the public, conceptual coincidences, it is considered that the signs under comparison are highly similar.

c) Distinctive and dominant elements of the signs

In determining the existence of likelihood of confusion, the comparison of the conflicting signs must be based on the overall impression given by the marks, bearing in mind, in particular, their distinctive and dominant components.

The element 'RESPI' contained in both marks will be allusive to 'respire' for some of the relevant public. Bearing in mind that the relevant goods include medication, medical apparatus and instruments for the respiratory system, this element is weak for that part of the public for these goods. The part of the relevant public that understands the meaning of that element will not pay as much attention to this weak element as to the other more distinctive elements of the mark. Consequently, the impact of this weak element is limited when assessing the likelihood of confusion between the marks at issue. For the part of the public that does not understand the meaning of this element, it has a normal degree of distinctiveness.

The marks under comparison have no elements which could be considered clearly more dominant (visually eye-catching) than other elements.

d) Distinctiveness of the earlier mark

The distinctiveness of the earlier mark is one of the factors to be taken into account in the global assessment of likelihood of confusion.

The opponent did not explicitly claim that its mark is particularly distinctive by virtue of intensive use or reputation.

Consequently, the assessment of the distinctiveness of the earlier mark will rest on its distinctiveness per se. In the present case, the earlier trade mark as a whole has no meaning in relation to any of the goods at hand from the perspective of the public in the relevant territory. Therefore, the distinctiveness of the earlier mark must be seen as normal, despite the presence of a weak element (from the perspective of some of the public) in the mark as stated above in section c) of this decision.

e) Relevant public – level of attention

The average consumer of the category of products concerned is deemed to be reasonably well informed and reasonably observant and circumspect. It should also be borne in mind that the average consumer's level of attention is likely to vary according to the category of goods or services in question.

The goods found to be identical and similar to various degrees target the public at large and health professionals, namely doctors and pharmacists. Considering the specific

healing nature of the goods, the level of attention of all consumers will be above average.

f) Global assessment, other arguments and conclusion

The contested goods have been found to be partly identical and partly similar to various degrees to the opponent's goods.

From the perspective of the relevant public, the verbal elements 'RESPIMAT' and 'RESPIMER' show important visual, aural and, for some of the public, conceptual similarities. The six common letters (out of eight) are in the same order and are positioned at the beginning of the signs, which is the part that consumers generally tend to focus on when encountering a trade mark. This is justified by the fact that the public reads from left to right, which makes the part placed at the left of the sign (the initial part) the one that first catches the attention of the reader. Consequently, the identical first elements of the marks at issue have to be taken into account when assessing the likelihood of confusion between the marks.

Although the element 'RESPI' is weak for a relevant part of the pertinent public in relation to the goods concerned, the Opposition Division points in particular to the fact that a coinciding element with a weak distinctive character does not automatically prevent a finding that there is a likelihood of confusion. Although the distinctive character of the earlier mark and the coinciding elements must be taken into account when assessing the likelihood of confusion, it is only one of the factors involved in that assessment. Therefore, even in a case involving an earlier mark or a coinciding element 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 (judgment of 13/12/2007, T-134/06, 'Pagesjaunes.com').

Moreover, and more importantly, in the present case, for another part of the public apart from health professionals, the term does not have any meaning and it has a normal degree of distinctiveness.

It is common knowledge that the average consumer normally perceives a mark as a whole and does not proceed to analyse its various details. In the case at issue, contrary to the applicant's arguments, the similarity of the marks is beyond doubt for the reasons mentioned above. Furthermore, average consumers rarely have the chance to make a direct comparison between different marks but must trust in their imperfect recollection of them (judgment of 22/06/1999, C-342/97, 'Lloyd Schuhfabrik Meyer', paragraph 26).

Therefore, the differences between the signs are clearly insufficient to counterbalance the overall similarity between them resulting from their visual, aural and, for some of the relevant public, conceptual similarities. Therefore, the part, at least, of the relevant public that does not attribute any particular meaning to the coinciding element RESPI* may believe that the identical or similar goods come from the same undertaking or at least economically-linked undertakings. Moreover, although the relevant public will pay special attention during the purchase of the goods involved, this fact will not be enough to avoid confusion regarding the origin of the goods under the present circumstances, taking into account the fact that the signs have significant overall similarities and that these similar signs cover identical and similar goods.

It is a result of the unitary character of the Community trade mark, laid down in Article 1(2) CTMR, that an earlier Community trade mark has identical protection in all

Member States. Earlier Community trade marks may therefore be relied upon to challenge any subsequent application for a trade mark which would prejudice their protection, even if this is only in relation to the perception of consumers in part of the European Community. It follows that the principle laid down in Article 7(2) CTMR, which provides that it is sufficient that an absolute ground for refusal exists in only part of the Community for a trade mark application to be refused, applies, by analogy, to a relative ground for refusal under Article 8(1)(b) CTMR. Consequently, the likelihood of confusion on the part of the German-speaking part of the relevant public examined above is sufficient.

In its observations, the applicant argues that the earlier trade mark has a low distinctive character given that there are many trade marks that include the verbal element 'RESPI'. In support of its argument the applicant refers to several international and Community trade mark registrations.

The Opposition Division notes that the existence of several trade mark registrations is not per se particularly conclusive, as it does not necessarily reflect the situation in the market. In other words, on the basis of data concerning a register only, it cannot be assumed that all such trade marks have been effectively used. It follows that the evidence filed does not demonstrate that consumers have been exposed to widespread use of, and have become accustomed to, trade marks that include the verbal element 'RESPI'. Under these circumstances, the applicant's claims must be set aside.

In addition the applicant refers to previous decisions of the Office to support its arguments. However, the Office is not bound by its previous decisions as each case has to be dealt with separately and with regard to its particularities.

This practice has been fully supported by the General Court which stated that it is settled case-law that the legality of decisions is to be assessed purely by reference to the CTMR, and not the Office's practice in earlier decisions (judgment of 30/06/2004, T-281/02, 'Mehr für Ihr Geld').

Even though previous decisions of the Office are not binding, their reasoning and outcome should still be duly considered when deciding upon a particular case.

Moreover, the previous cases referred to by the applicant are not relevant to the present proceedings. In the present case, the earlier mark, as a whole, is inherently distinctive. Moreover, taking into account the high degree of visual, aural and, for some of the public, conceptual similarities of the marks, consumers might believe that the conflicting goods come from the same or economically linked undertakings. In this regard, account must be taken of the fact that consumers can rarely compare both marks at the time of purchase but must trust in their imperfect recollection of them. The difference of two letters at the end of the signs is insufficient to make them distinguishable from one another.

Considering all the above, the Opposition Division finds that there is a likelihood of confusion on the part of the public.

Therefore, the opposition is well founded on the basis of the opponent's Community trade mark registration. It follows that the contested trade mark must be rejected for all the contested goods.

COSTS

According to Article 85(1) CTMR, the losing party in opposition proceedings must bear the fees and costs incurred by the other party.

Since the applicant is the losing party, it must bear the opposition fee as well as the costs incurred by the opponent in the course of these proceedings.

According to Rule 94(3), (6) and (7)(d)(i) CTMIR, the costs to be paid to the opponent are the opposition fee and the costs of representation which are to be fixed on the basis of the maximum rate set therein. In the present case the opponent did not appoint a professional representative within the meaning of Article 93 CTMR and therefore did not incur representation costs.

The Opposition Division

Daniel GÁJA Ersin MURAT Liliya YORDANOVA

According to Article 59 CTMR, any party adversely affected by this decision has a right to appeal against this decision. According to Article 60 CTMR, notice of appeal must be filed in writing at the Office within two months of the date of notification of this decision. Furthermore, a written statement of the grounds of appeal must be filed within four months of the same date. The notice of appeal will be deemed to be filed only when the appeal fee of EUR 800 has been paid.

The amount determined in the fixation of the costs may only be reviewed by a decision of the Opposition Division on request. According to Rule 94(4) CTMIR, such a request must be filed within one month from the date of notification of this fixation of costs and shall be deemed to be filed only when the review fee of EUR 100 (Article 2(30) CTMFR) has been paid.

Bilag 4

Rob Jacob

Subject: FW: GSK /Sandoz - Exhibit AG 30 [SH-WS.FID3040288]
Attachments: Anlage AG 30.pdf

From: Rusanov Aleksandar <Aleksandar.Rusanov@ema.europa.eu>
Date: 3 June 2014 15:14:55 BST
To: "Joanne.B.Green@gsk.com" <Joanne.B.Green@gsk.com>
Cc: Marino Stefano <Stefano.Marino@ema.europa.eu>
Subject: RE: Query re inhalers

Dear Joanne,

Thank you for taking the time to talk to me on the phone last week. As agreed, I have contacted our scientific colleagues and we have prepared a response to your question.

No legal requirements or a particular guidance exist at the EU/EEA level for the colour coding to be used in inhalers and the packaging for medicinal products for inhalation. This includes both powder forms and metered dose inhalers.

In absence of explicit requirements or guidance, if a risk of medication errors exists due to the colour coding used in inhalers and/or packaging (or for any other reason), such risk would be subject to discussion between the EMA and the applicant/marketing authorisation holder and may have to be addressed with appropriate risk minimisation measures on a case by case basis.

While some EU Member States may require the use of a particular colour coding for particular product types, we are not in a position to advise on any such guidance or requirements that may exist at a national level in EU Member States.

I remain at your disposal to provide any further information and to discuss at a convenient time for you.

Regards,

Aleksandar

Bilag 5

Felix Reimers (Grette)

Emne: VS: Spørsmål om farge på inhalator

From: Nina Malvik [mailto:nina.malvik@legemiddelverket.no]
Sent: 27. august 2015 14:42
To: Kari Struksnes
Cc: Inger Heggebø
Subject: SV: Spørsmål om farge på inhalator

Hei Kari,

Vi har i Norge ingen nasjonale veiledninger som stiller krav til farger på inhalatorer. Det er heller ikke noen krav til dette knyttet til felles europeiske veiledninger fra EMA eller den Europeiske kommisjonen.

Dette er altså et område hvor det kan være forskjellige nasjonale krav innad i EU/EØS. Nå er jeg ikke kjent med hvordan dette er regulert i alle europeiske land, men f.eks. UK har en nasjonal veiledning på dette området.

Vennlig hilsen
Nina Malvik
Forsker, Seksjon for produktinformasjon
Regulatorisk avdeling
Telefon: 22 16 84 11
www.legemiddelverket.no
Statens legemiddelverk
Norwegian Medicines Agency

Fra: Kari Struksnes [mailto:kari.x.struksnes@gsk.com]
Sendt: 26. august 2015 12:17
Til: Inger Heggebø
Emne: Spørsmål om farge på inhalator

Hei Inger

Jeg har et spørsmål jeg håper du kan hjelpe meg med

Er det noen regulatorske krav til farger på inhalatorer? Dvs at inhalatorer som brukes i vedlikeholdsbehandling skal ha én farge, anfallsmedisin skal ha en annen farge etc - og i så fall hvilke farger er det?

På forhånd takk for hjelpen!

Mvh
Kari

Dr Kari Struksnes
Nordic Cluster Head and Regulatory Head Norway
Europe

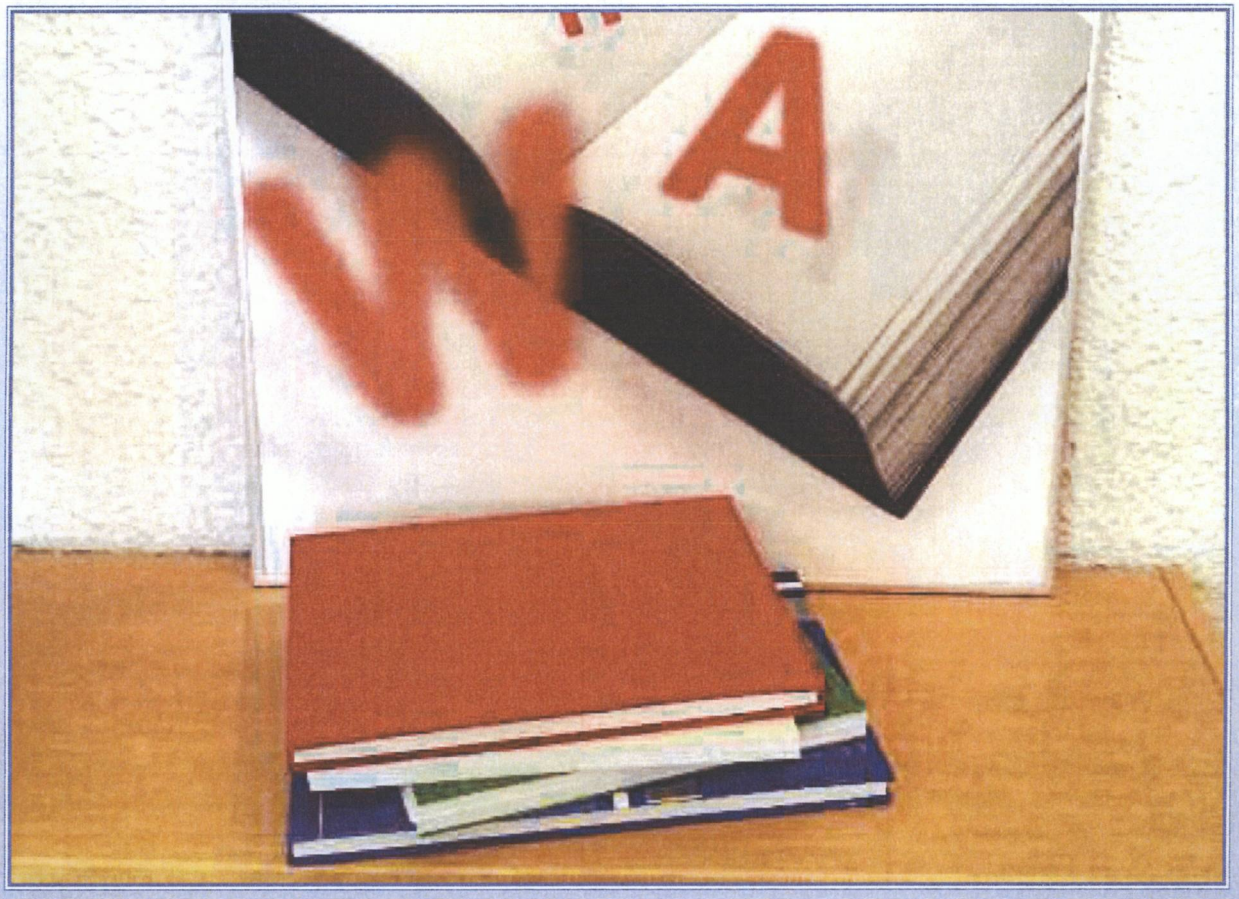
GSK
Klaus Torgårds vei 3, 0372 Oslo, Norway
Email kari.x.struksnes@gsk.com
Mobile +4791585151

gsk.com | Twitter | YouTube | Facebook | Flickr

Bilag 6

Fagblad
for lungesykepleiere

Nr. 2 – 2014



TEMA: Fagutvikling

AV INNHOLDET:

OPPDATERT TABELL MED OVERSIKT OVER INHALASJONSMEDISINER

HOVEDGRUPPE	VIRKNING	UNDERGRUPPE	VIRKESTOFF	MEDIKAMENT
Adrenerge beta-2-reseptoragonister	Bronkodilaterende effekt. Påvirker bronkialmuskulaturen ved å stimulere beta-2-reseptorer	Korttidsvirkende beta-2-agonister (SABA)	Salbutamol	Airomir Buventol Ventoline
			Terbutalin	Bricanyl
		Langtidsvirkende beta-2-agonister (LABA)	Salmeterol	Serevent
			Formoterol	Oxis
			Indakaterol	Onbrez
			Olodaterol	Striverdi
Antikolinergika (Muskarine antagonister)	Bronkodilaterende effekt. Påvirker bronkialmuskulaturen ved å blokkere acetylcholinets effekt på muskarine reseptorer	Korttidstidsvirkende muskarine antagonister (SAMA)	Ipratropiumbromid	Atrovent Ipraxa
		Langtidsvirkende muskarine antagonister (LAMA)	Tiotropiumbromid	Spiriva
			Glykopyrroniumbromid	Seebri
			Aklidiniumbromid	Eklira
Inhalasjonssteroider (ICS)	Antiinflammatorisk effekt	Glukokortikoider	Ciklesonid	Alvesco
			Flutikason	Flutide
			Beclometason	AeroBec Beclomet
			Budesonid	Giona Pulmicort
			Mometason	Astmanex
Kombinasjons-preparater LABA + ICS	Bronkodilaterende og antiinflammatorisk effekt	Inhalasjonssteroider og langtidsvirkende beta-2-agonist	Salmeterol-Flutikason	Airflusal Seretide
			Formoterol-Flutikason	Flutiform
			Formoterol-Beclometason	Inuxair
			Formoterol-Budesonid	DuoResp Symbicort
			Vilanterol-Flutikasonfuroat	Relvar
Kombinasjons-preparater LABA + LAMA	Bronkodilaterende effekt	Langtidsvirkende beta-2-agonist og langtidsvirkende muskarin antagonist	Vilanterol-Umeklidiniumbromid	Anoro
			Indakaterol-Glykopyrroniumbromid	Ultibro

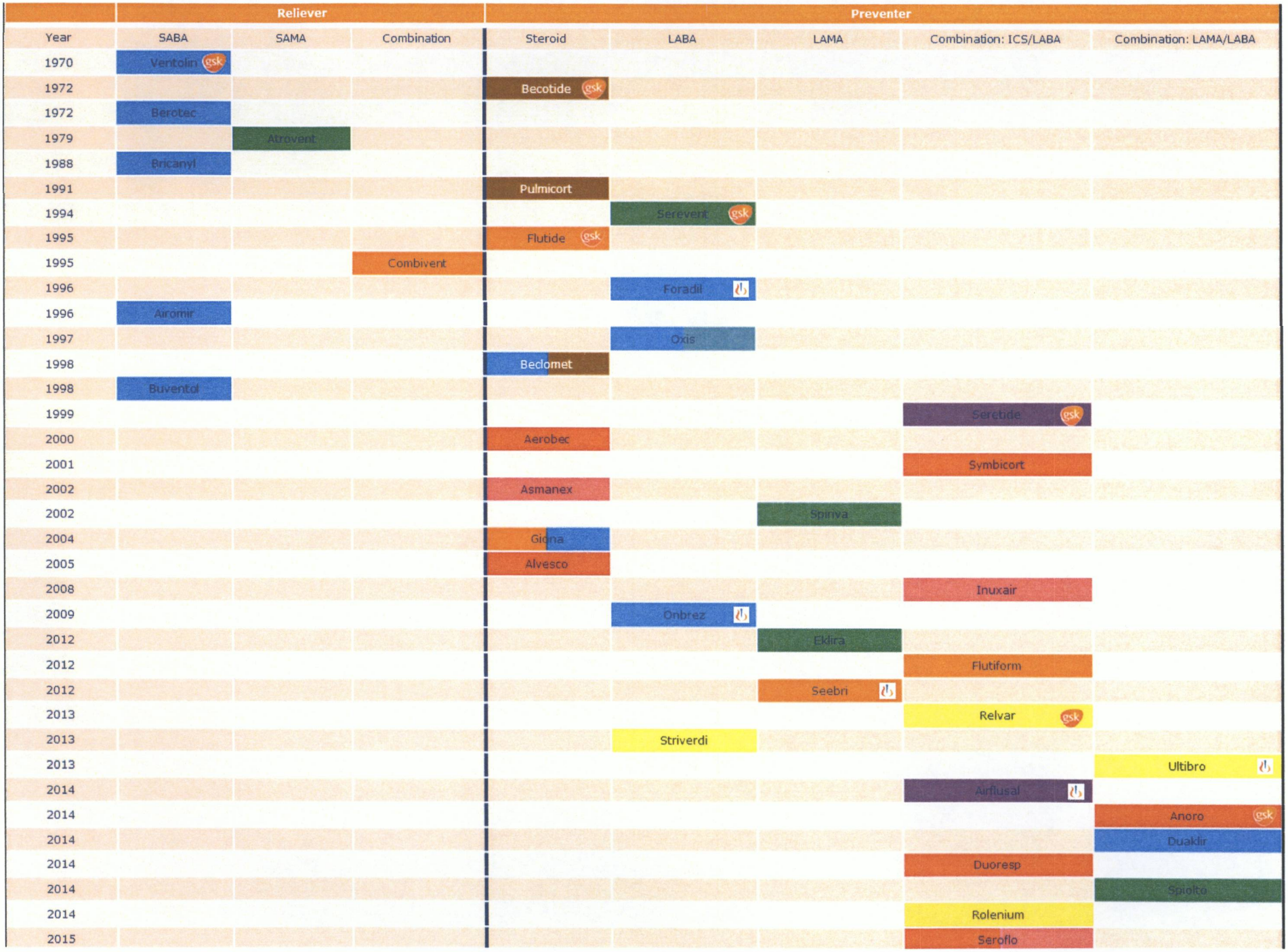
Tabell med oversikt over inhalasjonsmedisiner, oppdatert september 2014 *Trykket i Fagblad for lungesykepleiere september 2014. Utarbeidet av sykepleier Marit Leine*

Marit Leine

Våren 2013 utarbeidet vi en tabell med oversikt over de inhalasjonsmedisinene som var på det norske markedet mai 2013. Tabellen ble oppdatert kort tid etter. Det siste året har det kommet flere nye inhalasjonsmedisiner, det er derfor på tide å trykke en oppdatert tabell. Vi tilstreber å trykke oppdaterte tabeller med jevne mellomrom, men det må imidlertid tas forbehold om at vi ikke alltid rekker å oppdatere med én gang det kommer noe nytt. Dersom dere har innspill til tabellen eller oppdager feil/mangler så tar vi veldig gjerne imot tilbakemeldinger på NSFFLU@gmail.com

NB! Vi har valgt å ikke trykke tabellen i fargekodene som ble omtalt i forrige tabell fordi nyere inhalasjonsmedisiner ikke lenger benytter disse kodene.

Referanser: **www.felleskatalogen.no** og **www.legemiddelhandboka.no**


Reliever
Preventer
Year
SABA
SAMA
Combination
Steroid
LABA
LAMA
Combination: ICS/LABA
Combination: LAMA/LABA
1970
Ventolin
1972
Becotide
1972
Berotec
1979
Atrovent
1988
Bricanyl
1991
Pulmicort
1994
Serevent
1995
Flutide
1995
Combivent
1996
Foradil
1996
Airomir
1997
Oxis
1998
Beclomet
1998
Buventol
1999
Serctide
2000
Aerobec
2001
Symbicort
2002
Asmanex
2002
Spiriva
2004
Giona
2005
Alvesco
2008
Inuxair
2009
Onbrez
2012
Eklira
2012
Flutiform
2012
Seebri
2013
Relvar
2013
Striverdi
2013
Ultibro
2014
Airflusal
2014
Anoro
2014
Duaklir
2014
Duoresp
2014
Spiolto
2014
Rolenium
2015
Seroflo

Bilag 7