

***GUIDELINES FOR EXAMINATION IN THE  
OFFICE FOR HARMONIZATION IN THE  
INTERNAL MARKET (TRADE MARKS AND  
DESIGNS) ON COMMUNITY TRADE MARKS***

***PART C***

***OPPOSITION***

***SECTION 2***

***DOUBLE IDENTITY AND  
LIKELIHOOD OF CONFUSION***

***CHAPTER 6***

***RELEVANT PUBLIC AND  
DEGREE OF ATTENTION***

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## 1 Introduction

Whether a likelihood of confusion exists depends on an overall assessment of several interdependent factors, including: (i) the similarity of the goods and services, (ii) the similarity of the signs, (iii) the distinctive and dominant elements of the conflicting signs, (iv) the distinctiveness of the earlier mark, and (v) the relevant public, and in particular its degree of attention and sophistication.

The first step in assessing if a likelihood of confusion exists is to establish these five factors. The second step is to determine their relevance and how they interact with each other.

With regard to the relevant public, the Court of Justice has held that a likelihood of confusion (including a likelihood of association) exists if there is a risk that the public might believe that the goods or services in question come from the same undertaking or, as the case may be, from economically-linked undertakings (judgment of 29/09/1998, C-39/97 ‘Canon’, para. 29). The Court has also held that it is the **perception of marks in the mind of the relevant public of the goods or services in question** which plays a decisive role in the global assessment of the likelihood of confusion (judgment of 11/11/1997, C-251/95, ‘Sabèl’, para. 23 and judgment of 22/06/1999, C-342/97, ‘Lloyd Schufabrik Meyer’, para. 25).

Accordingly, the first task is to define the consumer circles that are relevant for the purposes of the case. The method for identifying the relevant public is discussed in paragraph 2. Thereafter, the relevant public’s degree of attention and sophistication must be established. The impact of the relevant public’s attention and sophistication on the assessment of the likelihood of confusion is discussed in paragraph 3.

In addition, the relevant public plays an important role in establishing a number of other factors that are relevant for the assessment of the likelihood of confusion:

- *Comparison of the goods and services*

The actual and potential customers of the goods and services in dispute constitute one of the factors to be dealt with in the analysis of their similarity. While a coincidence in the relevant public is not necessarily an indication of similarity of the goods or services, largely diverging publics weigh heavily against similarity.<sup>1</sup>

### Example

*Leather, animal skins and hides* are raw materials that go to industry for further processing whereas *goods made of leather* are final products targeted at the general public. The relevant public is different which is a fundamental factor in deeming these goods dissimilar. Similar reasoning applies to *precious metals* and *jewellery*.

- *Comparison of the signs*

The question of the relevant public also plays a role in the comparison of the signs. The same word may be pronounced differently depending on the relevant public.

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<sup>1</sup> See The Guidelines Concerning Opposition. Part 2: Double Identity and Likelihood of Confusion. Chapter 2: Comparison of Goods and Services.

Conceptually, the public in a part of the European Union may understand the meaning of the sign, while consumers in other parts may not understand it.<sup>2</sup>

### Example

The Court has already confirmed that the general public in the Scandinavian countries, the Netherlands and Finland has a basic understanding of English (judgment of 26/11/2008, T-435/07 'NEW LOOK', para. 23).

- *Distinctive elements of the signs / distinctiveness of the earlier mark*

The inherent distinctiveness of a sign or one of its elements also depends on the relevant public for the goods and services. For example, depending on the relevant public's knowledge, background and language, an element contained in a trade mark may be non-distinctive or have a low degree of distinctiveness, or it may be distinctive because inter alia it is perceived as a fanciful term without any meaning.<sup>3</sup>

### Example

The French word 'Cuisine' will not be understood as a descriptive indication for goods in Classes 29 and 30 in some Member States (decision of 23/06/2010, R 1201/2009-1 'GREEN CUISINE', paras 29-33).

### Example

Professionals in the IT field and scientific field are in general more familiar with the use of technical and basic English words than the general public: In Gateway vs. Activy Media Gateway, the Court held that the common word "gateway" directly evokes, in the mind of the relevant consumer, the concept of a gateway, which is commonly used in the computing sector (judgment of 27/11/2007, T-434/05, 'ACTIVY Media Gateway', paras 38, 48, confirmed by appeal C-57/08P).

## **2 Defining the Relevant Public**

In accordance with Article 8(1)(b) CTMR, it must be determined whether a likelihood of confusion exists 'on the part of the public in the territory where the earlier mark is protected'.

According to the Court, this wording shows that the perception of the marks in the mind of the **average consumer** of the type of goods or services in question plays a decisive role in the overall appreciation of the likelihood of confusion (judgment of 11/11/1997, C-251/95, 'Sabèl', para. 23 and judgment of 22/06/1999, C-342/97, 'Lloyd Schufabrik Meyer', para. 25).

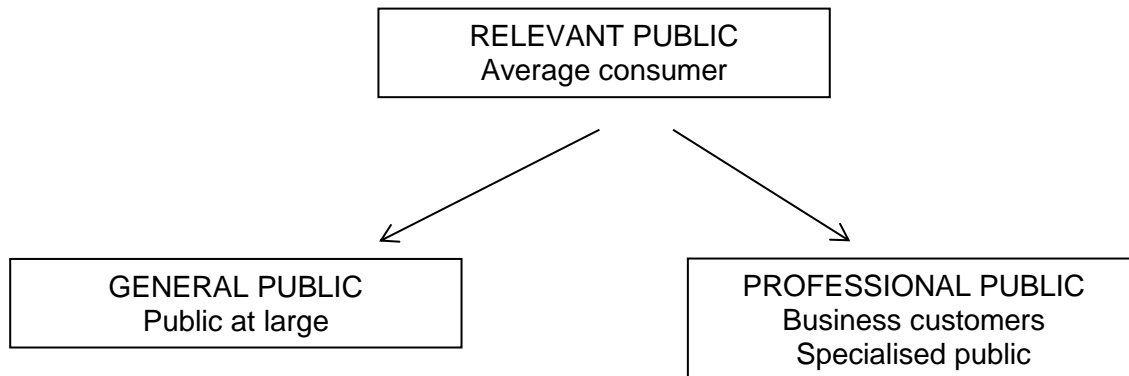
The term '**average consumer**' is a legal concept that is used in the sense of the 'relevant consumer' or '**relevant public**'. It should not be confused with the 'general public' or 'public at large', albeit the Courts sometimes use it in this sense. However, in

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<sup>2</sup> See The Guidelines Concerning Opposition. Part 2: Double Identity and Likelihood of Confusion. Chapter 3: Comparison of Signs.

<sup>3</sup> See The Guidelines Concerning Opposition. Part 2: Double Identity and Likelihood of Confusion. Chapter 4: Distinctiveness.

the context of relative grounds, the term 'average consumer' shall not be used as a synonym of 'general public' as it can refer to both, **professional** and **general public**. In this respect, in cases concerning the likelihood of confusion, the Court normally distinguishes between the *general public (or public at large)*, and a *professional or specialised public (or business customers)* based on the goods and services in question.



In order to properly define the relevant public in the context of relative grounds, two factors have to be taken into account:

- **the territory defined by the earlier mark:** the relevant public is always the public in the territory(ies) where the earlier right(s) is/are protected. Consequently, in the case of an earlier national right, the relevant public concerned is the one of that particular EU Member State (or Member States in the case of Benelux trade marks). For an earlier Community trade mark, the public in the whole Community has to be taken into account. For an international registration, it is the public in each of the Member States where the mark is protected.
- **the goods and services which have been found identical or similar:** likelihood of confusion is always assessed against the perception of the consumers of the goods and services which have been found identical or similar. Depending on the goods or services the relevant public is the general public or a professional public.

The relevant public always includes both the **actual** and the **potential** consumers, that is, the consumers who are currently purchasing the goods / services or who may do so in the future.

If a **significant part of the relevant public** for the goods or services at issue may be confused as to the origin of the goods, this is sufficient to establish a likelihood of confusion. It is not necessary to establish that all actual or potential consumers of the relevant goods or services are likely to be confused.

As stated by the Court, the relevant public for the assessment of the likelihood of confusion is composed of **users likely to use both the goods and services covered by the earlier mark and the product covered by the mark applied for which were found to be identical or similar** (judgment of 01/07/2008, T-328/05, 'QUARTZ', para. 23, C-416/08 P appeal dismissed).

When defining the part of the public **against which a likelihood of confusion is assessed** the following applies:

- If the goods or services of both marks are targeted at the general public the relevant public against which a likelihood of confusion is assessed is the general public.

Example

In a case in which both the earlier and the contested mark concerned articles of clothing, the Court held: 'clothing for men and women are everyday consumer items and the trade mark on which the opposition is based is registered as a Community trade mark. It follows that the relevant public by reference to which the likelihood of confusion must be assessed is composed of the general public in the European Union' (judgment of 06/10/2004, T-117/03 to T-119/03 and T-171/03, 'New Look', para. 25).

- If the goods and services of both marks are directed at the same or a similar professional public, the likelihood of confusion will be assessed from the perspective of those specialists.

Example

The relevant goods of both the earlier and the contested mark were raw plastic materials, chemical products, resins and the like. These are goods for industrial use. The targeted consumers are, therefore, engineers, chemists, i.e. highly skilled professionals who will process these products and use them in manufacturing activities. The relevant public was considered to be professionals (decision of 15/02/2012, R 2077/2010-1, 'PEBAFLEX' para. 18. See also decision of 16/09/2010, R 1370/2009-1, 'CALCIMATT', para. 20, confirmed by T-547/10).

- If the goods or services of both marks are targeted at both the general public and at specialists, the likelihood of confusion will be assessed against the perception of the part of the public displaying the lower degree of attentiveness as it will be more prone to be confused. If this part of the public is not likely to be confused, it is even more unlikely that the part of the public with a higher degree of attention will be.

Example

In a case in which both the earlier and the contested mark concerned goods in Classes 3 and 5 which are targeted at both the general public and professionals (e.g. doctors in relation to pharmaceuticals in Class 5), the Court assessed the likelihood of confusion in relation to the general public only, because it is the one displaying the lower degree of attention (see, to this effect, judgment of 15/07/2011, T-220/09, 'ERGO', para. 21).

- If the goods and services of the earlier mark are targeted at the general and professional public and the contested goods and services are targeted exclusively at a professional public (or vice versa), the relevant public for assessing likelihood of confusion is the professional public only.

### Example

The goods of the earlier mark are *polish for metals*, while the goods of the application are *preparations for cleaning waste pipes for the metal-working industry*. As stated in the relevant GC judgment: 'Although "polish for metals" can consist equally well of everyday consumer goods as of goods intended for a professional or specialised public, it is not disputed that the goods to which the trade mark application relates must be regarded as directed solely at persons operating in the metal-working industry. Therefore, the only public likely to confuse the trade marks in question is formed of such operators' (judgment of 14/07/2005, T-126/03, 'ALADIN', para. 81).

### Example

*Paints in general* are sold both to professional painters (i.e. for business purposes) and to the public at large for 'do-it-yourself purposes'. By contrast, *paints for industry* are not targeted at the general public. Therefore, when the specifications of the two marks cover paints and paints for industry respectively, only professionals constitute the relevant public since they are likely to be the only consumers who encounter both marks.

### Example

The services of the earlier mark are *telecommunications*. The contested services are *telecommunication services, namely collocation, telehousing and interconnection services* addressed at professionals only. The definition of the relevant public must be adjusted to the more specific list, and likelihood of confusion should be assessed for professionals only (judgment of 24/05/2011, T-408/09, 'ancotel.', paras 38-50).

- If the relevant goods are pharmaceuticals the following applies:

The average consumer of **non-prescription** pharmaceuticals (sold over-the-counter) is the general public, and the likelihood of confusion will be assessed in relation to that public.

According to the case-law, the general public cannot be excluded from the relevant public also in the case of pharmaceuticals which require a **doctor's prescription** prior to their sale to end-users in pharmacies. Thus, the relevant public comprises both general public and health professionals, such as doctors and pharmacists. Consequently, even though the choice of those products is influenced or determined by intermediaries, a likelihood of confusion can also exist for the general public since they are likely to be faced with those products, even if that takes place during separate purchasing transactions for each of those individual products at various times (judgment of 09/02/2011, T-222/09, 'ALPHAREN', paras 42-45 and judgment of 26/04/2007, C-412/05 P, 'TRAVATAN', paras 56-63). In practice, this means that the likelihood of confusion will be assessed against the perception of the general public which is more prone to confusion.

In the case of pharmaceutical goods **targeted only at specialists** for professional use (e.g. *sterile solutions for ophthalmic surgery*), the likelihood of confusion must be assessed from the point of view of that specialist public only (see judgment of 26/04/2007, C-412/05 P 'TRAVATAN', para. 66).

In cases where the pharmaceutical goods of the CTM application are **sold over the counter** while the pharmaceutical goods covered by the earlier registration would **only be available on prescription, or vice versa**, the Office must assume that the relevant public consists of both qualified professionals and also of the general public without any specific medical and pharmaceutical knowledge the likelihood of confusion will be assessed in relation to the general public which is more prone to confusion.

#### Example

Judgment of 23/09/2009, in joined cases T-493/07, T-26/08 and T-27/08, 'FAMOXIN', paras 50-54 (C-461/09 P appeal dismissed).

In the above case, the goods covered by the earlier mark were pharmaceutical preparations with *digoxin for human use for cardiovascular illnesses*, while the contested goods were *pharmaceutical preparations for the treatment of metabolic disorders adapted for administration only by intravenous, intra-muscular or subcutaneous injection*.

Although both the goods of the earlier mark and the goods of the contested mark are prescribed by and administered under the supervision of healthcare professionals, the GC held that the relevant public comprises both healthcare professionals and the general public.

### 3 Defining the Degree of Attention

The Court has indicated that for the purposes of the global assessment, the average consumer of the products concerned is deemed to be **reasonably well informed and reasonably observant and circumspect** and that the relevant public's degree of attention is likely to vary according to the category of goods or services in question (C-342/97, 'Lloyd Schufabrik Meyer', para. 26).

Whether its degree of attention will be **higher or lower will depend, among others, on the nature of the relevant goods and services and the knowledge, experience and purchase involvement of the relevant public**.

The fact that the relevant public consists of the *general public* does not necessarily mean that the degree of attention cannot be high (for instance when expensive, potentially hazardous or technically sophisticated goods are purchased). Likewise, the fact that the goods at issue are targeted at *specialists* does not necessarily mean that the degree of attention is high. In some cases the professional public may have a high degree of attention when purchasing a specific product. This is when these professional consumers are considered to have special background knowledge or experience in relation to the specific goods and services. Moreover, purchases made by professional consumers are often more systematic than the purchases made by the general public. However, this is not always the case. For example, if the relevant goods or services are used by a given professional on a daily basis, the level of attention paid may be average or even low (see, by analogy, judgment of 15/09/2005, T-320/03 'LIVE RICHLI', para. 74: 'that awareness can be relatively low when it comes to purely promotional indications, which well-informed consumers do not see as decisive').

**Properly defining the degree of attention of the relevant public is important as this factor can weigh for or against a finding of a likelihood of confusion.** Whilst



the relevant public only rarely has the chance to make a direct comparison between the different signs and must rely on an *imperfect recollection* of them, a high level of attention of the relevant public may lead to conclude that it will not confuse the marks, despite the lack of direct comparison between the trade marks (see judgment of 22/03/2011, 'CA' para. 95).

However, **a high degree of attention does not automatically lead to a finding of no likelihood of confusion**. All other factors have to be taken into account (*interdependence principle*)<sup>4</sup>. For example, in view of the specialised nature of the relevant goods and / or services and the high degree of attention of the relevant public, likelihood of confusion may be ruled out (judgment of 26/06/2008 'POLAR', para. 50-51). However, a likelihood of confusion can exist despite a high degree of attention. For example, when there is a strong likelihood of confusion created by other factors, such as identity or close overall similarity of the marks and the identity of the goods, the attention of the relevant public alone cannot be relied upon to prevent confusion (judgment of 21/11/2013, T-443/12 'ANCOTEL' (fig.) para. 53-56, decision of 06/09/2010, R 1419/2009-4, 'Hasi').

### 3.1 Higher degree of attention

A higher degree of attention is usually connected with the following types of purchases: expensive purchases, purchase of potentially hazardous or technically sophisticated goods. The average consumer often seeks professional assistance or advice when choosing or buying certain types of goods and services (e.g. cars, pharmaceutical products).

A higher degree of attention can also apply to goods when brand loyalty is important for the consumer.

#### 3.1.1 Expensive purchases

When purchasing expensive goods, the consumer will generally exercise a higher degree of care and will buy the goods only after careful consideration. Non-specialised or non-professional consumers often seek professional assistance or advice when choosing or buying certain types of goods and services. The attention may be enhanced in cases of luxury goods and where the specific product is regarded as reflecting the social status of its owner.

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<sup>4</sup> See The Guidelines Concerning Opposition. Part 2: Double Identity and Likelihood of Confusion. Chapter 8: Global Assessment.

### Examples

- Cars: Taking into consideration their price, consumers are likely to pay a higher degree of attention than for less expensive purchases. It is to be expected that these consumers will not buy a car, either new or second-hand, in the same way as they would buy articles purchased on a daily basis. The consumer will be an informed one, taking all relevant factors into consideration, for example, price, consumption, insurance costs, personal needs or even prestige. See in this respect the GC judgment of 22/03/2011, T-486/07, 'CA', paras 27-38 and GC judgment of 21/03/2012, T-63/09 'SWIFT GTi', paras 39-42.
- Diamonds, precious and semi-precious stones: In its decision of 09/12/2010, R 900/2010-1, 'Leo Marco', para. 22, the Board held that consumers generally put a certain amount of thought into the selection of these goods. In many cases the goods will be luxury items or will be intended as gifts. A relatively high degree of attention on the part of the consumer may be assumed.
- Financial services: These services are targeted at the general public, which is reasonably well-informed and reasonably observant and circumspect. However, since such services are specialised services which may have important financial consequences for their users, the consumers' level of attention would be rather high when choosing them (decision of 03/02/2011, R 719/2010-1, 'f@ir Credit', para. 15) (Appeal before GC, T-220/11, dismissed. Appealed C-524/12 P dismissed).

In the overall impression combined by the signs at issue, the visual and conceptual differences between the signs are sufficient to outweigh their limited phonetic similarity, particularly since the relevant public is highly attentive and well informed (judgment of 22/06/2010, T-563/08, 'CARBON CAPITAL MARKETS', paras 33, 61).

- Real-estate services: The purchase and sale of property are business transactions that involve both risk and the transfer of large sums of money. For these reasons, the relevant consumer is deemed to possess a higher-than-average degree of attention, since the consequences of making a poor choice through lack of attentiveness might be highly damaging (decision of 17/02/2011, R 817/2010-2 'FIRST THE REAL ESTATE', para. 21).

### 3.1.2 Potentially hazardous purchases

The impact on safety of goods covered by a trade mark (for example, firelights, saws, electric accumulators, electric circuit breakers, electric relays, etc.) may result in an increase in the relevant consumer's degree of attention (see judgment of 22/03/2011, T-486/07 'CA', para. 41).

### 3.1.3 Brand loyalty

Furthermore, a higher degree of attention can be the consequence of brand loyalty.

### Example

Although tobacco products are relatively cheap mass consumption articles, smokers are considered particularly careful and selective as to the brand of cigarettes they smoke, so a higher degree of brand loyalty and attention is assumed when tobacco products are involved. Therefore, in the case of tobacco products a higher degree of similarity of signs may be required for confusion to occur. This has been confirmed by several Board decisions: decision of 26/02/2010, R 1562/2008-2, 'victory slims', where it was stated that the consumers of Class 34 goods are generally very attentive and brand loyal, and decision of 25/04/2006, R 61/2005-2, 'Granducato'.

#### 3.1.4 Pharmaceuticals

It is apparent from the case-law that, so far as pharmaceutical preparations are concerned, the relevant public's degree of attention is relatively high, whether or not issued on prescription (judgment of 15/12/2010, T-331/09 'Tolposan', para. 26 and judgment of 15/03/2012, T-288/08 'Zydus' para. 36 and quoted case-law).

In particular, *medical professionals* have a high degree of attentiveness when prescribing medicines. With regard to *non-professionals*, they also show a higher degree of attention, regardless whether the pharmaceuticals are sold without prescription, as these goods affect their state of health.

### **3.2 Lower degree of attention**

A *lower degree of attention* can be associated, in particular, with habitual buying behaviour. Purchase decisions in this area relate to, for example, inexpensive goods purchased on a daily basis (see by analogy judgment of 15/06/2010, T-547/08 'Orange colouring of the toe of a sock' para. 43).