

***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

***IDENTITY AND
LIKELIHOOD OF CONFUSION***

CHAPTER 6

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

Table of Contents

1	Introduction.....	3
1.1	The relevant public.....	3
1.2	The level of attention of the public.....	4
2	Defining the Relevant Public: General Remarks.....	5
2.1	Definition of the part of the public against which a likelihood of confusion is assessed	5
2.2	Relevant public in the case of pharmaceuticals.....	7
3	Degree of Attention	8
3.1	Purchase involvement	8
3.1.1	High degree of attention	9
3.1.1.1	Expensive and infrequent purchases	9
3.1.1.2	Potentially hazardous purchases.....	10
3.1.1.3	Brand loyalty.....	10
3.1.1.4	Enhanced degree of attention in relation to particular goods within a broad category	11
3.1.2	Low degree of attention	11
3.1.3	Level of attention in the case of pharmaceuticals	11

1 Introduction

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.

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.

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.

This chapter deals with the relevant public, which is one of the key factors in assessing likelihood of confusion. It will also deal with the level of attention paid by the relevant public in relation to the goods or services at issue.

1.1 The relevant public

The **relevant public** plays an important role when assessing other elements of a likelihood of confusion.

- *Comparison of the goods and services*

The actual and potential customers of the goods and services in dispute, constitutes one of the factors to be dealt with in the analysis of their similarity.¹

Example

Leather, animal skins and hides are raw materials intended for use in industry whereas *goods made of leather* are targeted at end consumers. The relevant public is different and the goods are dissimilar. Likewise *precious metals* (Class 14) and *jewellery* (Class 14) are dissimilar.

- *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. 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.²

¹ See The Guidelines Concerning Opposition. Part 2: Identity and Likelihood of Confusion. Chapter 2: Comparison of Goods and Services.

² See The Guidelines Concerning Opposition. Part 2: Identity and Likelihood of Confusion. Chapter 3: Comparison of Signs.

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.³

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 average consumer: 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).

1.2 The level of attention of the public

Another of the factors which can weigh for or against a finding of a likelihood of confusion is the **level of attention of the public**. In principle, the relevant public and the level of attention are independent of each other. The fact that the relevant public consists of the general public does not necessarily mean that the level of attention is average. Likewise, the fact that the goods at issue are targeted at specialists does not necessarily mean that the level of attention is high.

A heightened level of attention does not automatically lead to a finding of no likelihood of confusion. All other factors have to be taken into account. Consequently, a likelihood of confusion can exist despite a high degree of attention. 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 cannot be relied upon to prevent confusion (decision of 06/09/2010, R 1419/2009-4, 'Hasi'; decision of 26/02/2010, R 1562/2008-2, 'victory slims', para. 51).

³ See The Guidelines Concerning Opposition. Part 2: Identity and Likelihood of Confusion. Chapter 4: Distinctiveness.

2 Defining the Relevant Public: General Remarks

In the context of an opposition, 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.

In accordance with Article 8(1)(b) CTMR, it must be determined whether likelihood of confusion exists 'on the part of the public'. According to the ECJ, 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).

In cases concerning the likelihood of confusion, the ECJ and the GC normally distinguish between the **general public** (i.e. consumers who purchase goods and services to satisfy their personal needs) and a **professional or specialised public** based on the goods and services in question.

The term 'consumers' always refers to 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.

2.1 Definition of the part of the public against which a likelihood of confusion is assessed

The relevant public are the consumers of the goods and services which have been found identical or similar.

As stated by the General Court (GC), 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 (judgment of 01/07/2008, T-328/05, 'QUARTZ', para. 23, appeal before the CJ, C-416/08 P, order issued dismissing the appeal).

- If the goods or services of both marks are targeted at the general public, the relevant consumers are the general public.

Example

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 specialised public, the likelihood of confusion will be assessed from the perspective of those specialists.

Example

The relevant goods 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.

Example

Taking into account the nature of the goods at issue in Classes 3 and 5 (class headings) which are targeted at both the general public and professionals (e.g. doctors) the relevant public consists of the general public because it is the one displaying the lower degree of attentiveness (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 consumers for 'do-it-yourself purposes'. By contrast, *paints for industry* are not targeted at general consumers. 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).

2.2 Relevant public in the case of pharmaceuticals

The GC stated that in the case of pharmaceuticals which require a doctor's prescription prior to their sale to end-users in pharmacies, the relevant public comprises both end-users 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 consumers 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 52-66).

This means that even in the case of pharmaceuticals available only on prescription, the relevant public is composed of both a professional public and consumers without specific medical or pharmaceutical knowledge.

Furthermore, this is the case because pharmaceuticals which require a prescription in certain European countries may, in practice, be sold by pharmacists to consumers without a prescription in other European countries. Moreover, pharmaceuticals currently available only on prescription may in the future become available as over-the-counter medicines.

Consequently, when the pharmaceuticals covered by one of the rights in dispute are available on prescription, the Office must assume that the relevant public consists of both qualified professionals and the general public (in this case, patients).

Where the pharmaceutical goods are not prescribed or sold by qualified professionals but are freely sold on the market, the average consumer is the patient him/herself in most cases.

Therefore, where the pharmaceutical goods of the CTM application are sold over the counter and the pharmaceutical goods covered by the national 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 patients or consumers without any specific medical and pharmaceutical knowledge. The Office may not limit such protection by hypothetical considerations concerning the preparations which might be sold under the mark.

Example

Judgment of 23/09/2009, in joined cases T-493/07 (appeal case before CJ, C-461/09 P, order issued dismissing the appeal), T-26/08 and T-27/08, 'FAMOXIN'.

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.

The GC adopted the finding of the Board with regard to the relevant public. It stated that both healthcare professionals and end consumers must be taken into account despite the earlier pharmaceuticals being issued on prescription.

3 Degree of Attention

The ECJ has stated that:

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.

(See judgment of 22/06/1999, C-342/97, 'Lloyd Schuhfabrik Meyer', para. 26)

In principle, the degree of attention does not depend on the relevant public. It is an independent factor. The fact that the goods or services are directed at a professional public *may* mean that the professional public has a high level of attention when purchasing a specific product. The reason for this is that 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').

3.1 Purchase involvement

It is the level of the so-called 'purchase involvement' which has a significant impact on consumer choices of goods and services. The level of involvement relates to the importance of a decision to the consumer. Therefore, it corresponds to his/her degree of attention.

3.1.1 High degree of attention

A high degree of attention is usually connected with the following types of purchases: expensive, infrequent and potentially hazardous purchases. The average consumer often seeks professional assistance or advice when choosing or buying certain types of goods and services. Examples are cars (expensive and infrequent), or potentially hazardous purchases.

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

3.1.1.1 Expensive and infrequent 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. Purchases of expensive goods will also normally be infrequent purchases.

The same reasoning applies to services.

Cars

Taking into consideration their price, the average consumer is likely to pay a higher level of attention than for less expensive purchases. It is to be expected that the average consumer 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 average 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 (Appeal before CJ, C-260/12 P).

In relation to the vehicles or apparatus for locomotion by land, the Court stated that the relevant consumer will exercise great care when purchasing them. Since the price of those goods is generally high, the consumer will pay particular attention to them.

In its judgment of 12/01/2006, C-361/04 P, 'Picaro', para. 39, the ECJ stated that the average consumer displays a particularly high level of attention at the time of purchase of motor vehicles, in view of the nature and in particular their price and their highly technological character.

Diamonds, precious and semi-precious stones and jewellery

In its decision of 09/12/2010, R 900/2010-1, 'Leo Marco', para. 22, the Board held that people 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 level of attention on the part of the consumer may be assumed.

Financial services

These services are targeted at the public at large, 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 to the CJ, C-524/12 P).

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 level 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).

3.1.1.2 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 level of attention (see judgment of 22/03/2011, T-486/07 'CA', para. 41).

3.1.1.3 Brand loyalty

Furthermore, a high 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'.

Another example of high degree of attention as a consequence of brand loyalty could be the purchase of newspapers or magazines.

3.1.1.4 Enhanced degree of attention in relation to particular goods within a broad category

If the goods or services consist of a broad category, and the relevant public has an enhanced degree of attention in relation to some particular goods, it cannot be excluded that for part of the goods the attention may be average.

Example

In the judgment of 16/09/2009, T-221/06, 'Bebimil', it was held that parents of babies or young children pay a higher degree of attention when purchasing products for them because of the importance they attach to nutrition and health for babies and young children. However, in view of the extensive range of 'food for babies' goods, it must be held that while the group of average consumers for that category of goods will also include careful parents, it will not consist exclusively of such consumers.

In this case, the Office should consider that the goods in question are aimed at the general public, which is deemed to consist of consumers who are reasonably well-informed and reasonably observant and circumspect.

3.1.2 Low degree of attention

A *low 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 judgement of 15/06/2010, T-547/08 'Orange colouring of the toe of a sock' para. 43). An example of low degree of attention could be basic foodstuffs.

3.1.3 Level of attention in the case of pharmaceuticals

It is apparent from the case-law that, so far as pharmaceutical preparations are concerned, the relevant public's level of attention is relatively high.

In particular, *medical professionals* have a high degree of attentiveness when prescribing medicines.

With regard to *end consumers*:

- In cases where pharmaceutical products are sold **without prescription**, it must be assumed that those goods will be of concern to consumers, who are deemed to be reasonably well informed and reasonably observant and circumspect where those goods affect their state of health, and that these consumers are less likely to confuse different versions of such goods.
- Even assuming that a medical **prescription** is mandatory, consumers are likely to have a high degree of attentiveness upon prescription of the goods at issue, in the light of the fact that those goods are pharmaceutical products.

Thus medicines, whether or not issued on prescription (including medicines for mild disorders and minor afflictions), can be regarded as receiving a heightened degree of attentiveness by consumers who are reasonably well informed and reasonably

observant and circumspect (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).