

THEME II. THE AVERAGE CONSUMER'S DEGREE OF ATTENTION IN TRADE MARK CASES

I. CASE T-363/04, *KOIKE CORPORATION/OHIM- ACEITES DEL SUR*, [2007] ECR II-03355 AND CASE C-498/07 P, *ACEITES DEL SUR-COOSUR/KOIKE-OHIM*, [2009] ECR I-7371

§1. *Facts*

The main issue in this case was the overall impression created in the mind of the relevant public by the two complex trade marks for olive oil.

The Opposition Division of OHIM¹, followed by the Board of Appeal, rejected Koike's opposition to the registration of Aceites del Sur's trade mark. It held that the signs at issue produced a different overall visual impression, that from a phonetic point of view they had no similar elements, and that the conceptual link relating to the agricultural nature and origin of the goods was weak, which excluded any likelihood of confusion between the marks at issue.

According to the decision of the Board of Appeal of OHIM, the figurative elements, consisting essentially of the image of a person seated in an olive grove, had only a weak distinctive character with respect to olive oil, the effect of which was to confer the utmost importance to the word elements "La Española" and "Carbonell", which are characterized by a complete absence of similarity.

§2. *Judgments*

A. Judgment of The Court of First Instance (First Chamber)

"101 The Court considers that the similarity of the figurative elements at issue, both as regards the colour schemes and the drawings is more significant than small differences which become apparent only after a detailed and thorough examination.

102 As regards the conceptual aspects, the Court finds that the Board of Appeal itself held in the contested decision (paragraphs 9 and 19) that there is a conceptual link between the marks at issue, which although weak, is linked to the nature and origin of the goods protected.

103 The Court considers that the elements common to the two marks at issue, seen as a whole, produce an overall visual impression of great similarity, since the La Española mark reproduces very precisely the essence of the message and the visual impression given by the Carbonell mark: the woman dressed in traditional clothes, seated in a certain manner, close to an olive branch with an olive grove in the

¹ The "Office of Harmonization for the Internal Market" registers the Community Trade Mark in the European Union.

background, the overall image consisting of an almost identical arrangement of spaces, colours, places for brand names and style of lettering.

104 The Court considers that that overall similar impression inescapably gives rise on the part of the consumer to a likelihood of confusion between the marks at issue.

105 That likelihood of confusion is not diminished by the existence of the different word element since, as it was held above, the word element of the mark applied for has a very weak distinctive character, since it refers to the geographical origin of the goods.

106 First, it must be recalled that the average consumer only rarely has the chance to make a direct comparison between different marks but must place his trust in the imperfect picture of them that he has kept in his mind (*Lloyd Schuhfabrik Meyer*, paragraph 26). That fact gives more weight to the elements which are particularly visible and easy to apprehend in the marks concerned such as, in this case, the figurative elements of the marks at issue (see, to that effect, *CONFORFLEX*, paragraph 45).

107 Second, it must be noted that the perception of marks in the mind of the average consumer of the goods or services in question plays a decisive role in the global appreciation of the likelihood of confusion (*SABEL*, paragraph 23, and *Lloyd Schuhfabrik Meyer*, paragraph 25). For the purposes of that global appreciation, the average consumer of the category of products concerned is deemed to be reasonably well-informed and reasonably observant and circumspect, but his level of attention is likely to vary according to the category of goods or services in question (*Lloyd Schuhfabrik Meyer*, paragraph 26).

108 Since olive oil is a consumer product which is very common in Spain, the level of attention of the average consumer with respect to its external appearance is low (see, to that effect, Case T-283/04 *Georgia-Pacific v OHIM (Motif gaufré)*, [2007] ECR I0000, paragraph 41).

109 Third, as the Board of Appeal acknowledges in the contested decision, account should be taken of the fact that olive oil is most commonly purchased in supermarkets or establishments where goods bearing different trade marks are arranged on shelves. In this type of point-of-sale, as the applicant submits, the consumer loses little time between his successive purchases, which are made in different parts of the shop, and does not ask orally for the various goods that he is looking for, but goes to the shelves where those products are located with the consequence that phonetic differences between the marks at issue are irrelevant for the purposes of distinguishing the goods. In those circumstances, the consumer is guided more by an impression than by a direct comparison of the various marks and often does not read all the information on each olive oil container. In most cases, he merely takes a bottle whose label provides him with the visual impact of the brand he is looking for. In those circumstances, it is the figurative element of the marks at issue which acquires greater importance, contrary what was held in the contested decision, which increases the likelihood of confusion between the two marks at issue.

110 It should be noted in support of this, that where the marks at issue are examined at the distance and the speed at which the consumer in a supermarket selects the goods he is looking for, the differences between the signs at issue are more difficult to

distinguish and the similarities are more apparent, since the average consumer perceives the mark as a whole and does not proceed to analyse its various details.

111 Finally, account should be taken of the fact that in light of the similarity of the signs at issue and the fact that the word element of the mark applied for has a weak distinctive character, the consumer may perceive the mark applied for as a sub-brand linked to the Carbonell mark designating an olive oil of a different quality from that which is the subject of that mark (see, to that effect, *CONFORTFLEX*, paragraph 61). As it is clear from the file, the Carbonell mark, which has been in Spain since 1904, is identified with olive oil on the Spanish market and the image that it uses automatically identifies that mark.

112 In light of the foregoing, it is clear that the Board of Appeal was wrong to conclude that any likelihood of confusion between the marks at issue was excluded (paragraph 24). On the contrary, it follows from all of the findings of the Court that there is a likelihood of confusion between the marks.”

B. Judgment of The European Court of Justice (First Chamber)

“74 Thus, as the Court of First Instance rightly noted at paragraph 107 of the judgment under appeal, the perception of marks in the mind of the average consumer of the goods or services in question plays a decisive role in the global appreciation of the likelihood of confusion (*SABEL*, paragraph 23, and *Lloyd Schuhfabrik Meyer*, paragraph 25) and, for the purposes of that global appreciation, the average consumer is deemed to be reasonably well-informed and reasonably observant and circumspect, but his level of attention is likely to vary according to the category of goods or services in question (*Lloyd Schuhfabrik Meyer*, paragraph 26).

75 In the light of those principles, the Court of First Instance held in particular, at paragraphs 108 and 109 of the judgment under that appeal, that olive oil is a consumer product which is very common in Spain, that it is most commonly purchased in supermarkets or establishments where goods are arranged on shelves and that the consumer is guided more by the visual impact of the mark he is looking for.

76 The Court of First Instance was therefore right to conclude from this, at paragraphs 109 and 110 of the judgment under appeal, that in those circumstances the figurative element of the marks at issue acquires greater importance, which increases the likelihood of confusion between them, and the differences between the signs at issue are more difficult to distinguish since, as the Court of Justice has moreover had occasion to observe (see, to that effect, *OHIM v Shaker*, paragraph 35, and *Nestlé v OHIM*, paragraph 34 and the case-law cited), the average consumer normally perceives a mark as a whole and does not proceed to analyse its various details.

77 Secondly, as regards the appellant's argument concerning the findings made by the Court of First Instance with regard to the average consumer's level of attention, it must be observed that it relates exclusively to factual elements.

78 In that regard, it is important to note that the Court of First Instance has exclusive jurisdiction to make findings of fact, save where a substantive inaccuracy in its findings is attributable to the documents submitted to it, and to appraise those facts.

The appraisal of the facts thus does not, save where the clear sense of the evidence before it has been distorted, constitute a point of law which is subject, as such, to review by the Court of Justice on appeal (see Joined Cases C456/01 P and C457/01 P *Henkel v OHIM* [2004] ECR I5089, paragraphs 41 and 56, and Case C-238/06 P *Develey v OHIM* [2007] ECR I9375, paragraph 97).

79 Since no distortion has been established or even alleged by the appellant in the present case, that argument must be considered manifestly inadmissible.”

II. CASE T-59/10, *GEEMARC TELECOM INTERNATIONAL/ OHIM*, [2011] ECR II-NOT YET REPORTED

§1. *Facts*

This case concerned the alleged descriptive character and lack of distinctive character of a trade mark.

Geemarc Telecom International Ltd is the owner of the mark AMPLIDECT, registered as a Community trade mark in 2005 for goods in Class 9 (‘Telecommunications apparatus and instruments; telephones and telephone answering machines’) and 16 (‘Printed matter; manuals, leaflets, booklets, magazines’).

In 2008, Audioline GmbH filed an application for a declaration of invalidity in respect of the goods in Class 9, based on the descriptive character of the disputed mark and on its lack of distinctive character. The Cancellation Division of OHIM dismissed this application but the Board of Appeal of OHIM upheld Audioline’s appeal and declared the disputed mark to be invalid in respect of all the goods in Class 9.

The Board of Appeal pointed out that the goods covered by the disputed registration include, in particular, cordless telephones equipped with an amplification system and which function with the aid of DECT technology and that such goods are primarily used by persons with a hearing disability. According to the Board of Appeal, those telephones are intended for end consumers who are reasonably well informed and reasonably observant and circumspect, and those consumers necessarily make a link between the acronym DECT (acronym for: ‘Digital Enhanced Cordless Telecommunications’) and telecommunications, in particular cordless telephony.

§2. *Judgment*

“54 As the Board of Appeal correctly pointed out in paragraph 27 of the contested decision, the term ‘amplidect’ immediately and unequivocally informs the relevant public of the essential characteristics of the goods marketed by the applicant and covered by the disputed registration, namely an amplificatory function incorporated

in a telephone and using DECT technology. A sufficiently direct and specific link therefore exists, from the point of view of the relevant public, between the disputed mark and the characteristics of that mark. Contrary to what the applicant suggests, it is not necessary, in those circumstances, to establish the existence of a direct and immediate link between the disputed mark and a telephone as such.

55 As OHIM correctly points out, the disputed mark is even more markedly descriptive from the point of view of consumers suffering from impaired hearing, who constitute a part of the applicant's clientele. The way in which the relevant public perceives a trade mark is influenced by its level of attention, which is likely to vary according to the category of goods or services in question (Case T286/08 *Fidelio v OHIM (Hallux)* [2010] ECR II-0000, paragraphs 41 to 52, concerning the descriptive character which a sign has by reason of the handicap to which it refers).

56 Although DECT technology is not used solely in goods designed to compensate for such hearing disabilities, the fact none the less remains that the telephones equipped with an amplification system, marketed by the applicant under the disputed mark, are aimed primarily at those consumers. In addition, a person suffering from such disabilities generally pays particular attention to the technical specificities of a telephone which he is thinking of purchasing, as those specificities relate to, *inter alia*, the sound amplification system of the device or to the presence of an illuminated incoming call button.

57 It follows that, from the point of view of consumers suffering from impaired hearing, whose degree of attention is high, the term 'amplidect' naturally evokes a sound amplification function attached to a telephone and, consequently, one of the essential functionalities of the goods concerned. The conjunction which the term 'amplidect' establishes between the concepts of amplification and telephony thus reinforces the descriptive character of the disputed mark from the point of view of those consumers."

III. COMMENTS

Andrée PUTTEMANS²

§1. *Introduction*

1. It was my pleasure and great honour to be asked to write a tribute to my dear colleague and friend Jules Stuyck, one of the most subtle, intelligent, humorous, educated and informed persons in Europe – and beyond!

I confess I was perplexed when I first thought about writing on the topic of this hopelessly featureless abstract being utilised as a benchmark in trade mark law: the average consumer, who is "reasonably well-informed and reasonably observant and circumspect". I was really worried: would the exercise of

² Dean of the Faculty of law and Criminology – Université libre de Bruxelles (ULB), Professor at ULB and Guest Professor at KUB-HUB.

describing how this fictitious pale figure is considered to perceive trade marks not be awfully boring for Jules? Was it not a paradox to dedicate to an exceptional person a paper on an (imaginary) individual characterized by the fact that he (she? it?) is average in all respects?

Well, reading the numerous and very interesting studies and discussions on this topic by authors of great quality quickly reassured me.³ And gradually, I realised that there was another paradox: while it is stated that trade mark law tends not only to protect the interests of holders but also those of the public⁴, and as the benchmark is the same in consumer law (i.e. the average consumer, reasonably well-informed and reasonably observant and circumspect), the trade mark case-law that has developed over the last fifteen years in Europe has the (indirect but real) effect of providing better protection to rushed and negligent consumers of everyday products than to vulnerable, sick or disabled consumers, who have special needs, or are willing to make a major and infrequent purchase...

2. I was solicited, as a starting point, to examine the contrasts in the case-law of the EU General Court related to this issue, especially between the judgments in the Koipe and Geemarc cases. Before considering these cases, I will point out the outline of European jurisprudence on those issues. At the end of my

³ See, *inter alia*: P. Maeyaert, “Verwarringsgevaar in het merkenrecht – Analyse van de rechtspraak in oppositieprocedures”, *RDC-TBH*, 2011, 961; M. Buydens, “La personne de référence dans l’appréciation des atteintes à la propriété intellectuelle: où êtes-vous, Mr. Average?” in X, *Liber Amicorum Ludovic De Gryse*, Brussels, De Boeck, 2010, 65; C. Vanleenhove, “De relevante consument in het merkenrecht – het mystieke wezen ontsluit”, IRDI 2010, 354; “The relevant public in the community trade mark system – unveiling the mystical animal”, ECTA, www.ecta.org/IMG/pdf/494_c-vanleenhove_revised.pdf; G.B. Dinwoodie, “What Linguistics Can Do For Trade mark Law”, in L. Bently, J. Davis and J.C. Ginsburg (eds.), *Trade Marks and Brands: an interdisciplinary critique. Cambridge Intellectual Property and Information Law* (2007). In USA: T. Lee, E. Derosia and G. Christensen, “Trade marks, consumer psychology, and the sophisticated consumer”, Vol. 57, *Emory Law Journal* (2008), p. 627. www.law2.byu.edu/news/file/Christensen_DeRosia_Lee.pdf; W.E. Gallagher and R.C. Goodstein, “Inference Versus Speculation in Trademark Infringement Litigation: Abandoning the Fiction of the Vulcan Mind Meld”, 94 *Trademark Rep.* 1229,1230 (2004).

⁴ Proposal for a recast of the directive on trade marks, 27.3.2013, COM (2013) 162 final, 2013/0089 (COD). recital 29: “[trade mark law pursues the] purpose of distinguishing goods or services and allowing consumers to make informed choices”; Memorandum of the Benelux Convention on trade marks and the Uniform Benelux Law on trade marks: “this regulation aims to protect the public”. See also in US law: “When Congress enacted the Lanham Act in 1946, 15 U.S.C. §1051 et seq. (“Trade mark Act”), it explained that the statute served dual purposes: ‘One is to protect the public so it may be confident that, in purchasing a product bearing a particular trade-mark which it favorably knows, it will get the product which it asks for and wants to get. Secondly, where the owner of a trade-mark has spent energy, time, and money in presenting to the public the product, he is protected in his investment from its misappropriation by pirates and cheats’ (Senate Rep. No. 79–1333 at 3, 5 (1946))” (United States Patent and Trade mark Office (USPTO), *Report to Congress – Trade mark Litigation Tactics and Federal Government Services to Protect Trade marks and Prevent Counterfeiting*, April 2011, www.uspto.gov/ip/TMLitigationReport_final_2011April27.pdf, 5).

contribution, I will discuss the particular case of medicine trade marks and try to draw some conclusions.

§2. *The standard of the average consumer('s degree of attention) in EU trade mark cases*

3. The concept of "relevant public" is central in trade mark law, especially (but not only⁵) when it comes to assessing the likelihood of confusion between two signs (as in the Koipe case) or the distinctiveness of a trade mark (as in the Geemarc case).

Following Advocate General F. Jacobs, the CJEU stated at the end of the 20th century that the standard concerning the likelihood of confusion and the criteria for judging it are a matter of Community law. The CJEU set those general criteria in the preliminary rulings Sabel (1997) and Lloyd (1999).

In SABEL⁶, the Court stated that:

- "the wording of the Directive ("[...] there exists a likelihood of confusion on the part of the public [...]") shows that the perception of marks in the mind of *the average consumer of the type of goods or services in question* plays a decisive role in the global appreciation of the likelihood of confusion";
- "the average consumer normally perceives a mark as a whole and does not proceed to analyse its various details";
- "the more distinctive the earlier mark, the greater will be the likelihood of confusion" (paragraph 22–24).

In LLOYD⁷, the Court added that:

- For the purposes of that global appreciation, "*the average consumer of the category of products concerned is deemed to be reasonably well informed and reasonably observant and circumspect*". The court refers in this respect to case GUT⁸, which concerns consumer law.⁹ According to AG Jacobs, the same

⁵ See, for instance, Intel (C-252/07) on the assessment of: 1) injury consisting of detriment to the distinctive character or the repute of the earlier mark by reference to average consumers of the goods and services for which that mark is registered, and 2) injury consisting of unfair advantage taken of the distinctive character or the repute of the earlier mark by reference to average consumers of the goods or services for which the later mark is registered.

⁶ Case C-251/95, *Sabel/Puma*, [1997] ECR I-6191.

⁷ Case C-342/97, *Lloyd/Klijnsen*, [1999] ECR I-3819.

⁸ Case C-210/96, *Gut Springenheide and Tuskys*, [1998] ECR I-4657, par. 31.

⁹ See about Case Gut: M. Buydens, "La personne de référence dans l'appréciation des atteintes à la propriété intellectuelle: où êtes-vous, Mr. Average?" in X, *Liber Amicorum Ludovic De Gryse*, Brussels, De Boeck, 2010, 65.

criteria have to be taken into account as those that are considered in the context of the protection of consumers from misleading practices. Otherwise, “an unduly high level of protection would impede the integration of national markets by imposing unjustified restrictions on the free flow of goods and services between Member States and indeed would defeat the very objective of the Directive”¹⁰;

- However, the Court pointed out that account should be taken of the fact that the average consumer only rarely has the chance to make a direct comparison between the different marks and must therefore place his trust in the imperfect picture of them that he has kept in his mind: “*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*” (par. 26).

4. Subsequently the Court applied, *mutatis mutandis*, the same reasoning to the assessment of the distinctive character of a mark and nuanced nuancing this reasoning about certain categories of marks (color¹¹, shape¹²).

In LIBERTEL¹³, the Court stated that:

- “The relevant public is made up of average consumers, reasonably well-informed and reasonably observant and circumspect” (par. 63);
- “Account should 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 place his trust in the imperfect picture of them that he has kept in his mind” (with a reference to LLOYD “in different contexts”) (par. 64).

¹⁰ Opinion Case C-251/95, *Sabell/Puma*, [1997] par. 50–51; Opinion C-342/97, 22 June 1999, *Lloyd/Klijsen*, [1999] par. 20.

¹¹ LIBERTEL: “The perception of the relevant public is not necessarily the same in the case of a sign consisting of a colour per se as it is in the case of a word or figurative mark consisting of a sign that bears no relation to the appearance of the goods it denotes. While the public is accustomed to perceiving word or figurative marks instantly as signs identifying the commercial origin of the goods, the same is not necessarily true where the sign forms part of the look of the goods in respect of which registration of the sign as a trade mark is sought. Consumers are not in the habit of making assumptions about the origin of goods based on their colour or the colour of their packaging, in the absence of any graphic or word element, because as a rule a colour per se is not, in current commercial practice, used as a means of identification” (par. 65).

¹² HENKEL: “Account must be taken of the fact that the perception of the relevant section of the public is not necessarily the same in relation to a three-dimensional mark consisting of the shape and the colours of the product itself as it is in relation to a word mark, a figurative mark or a three-dimensional mark not consisting of the shape of the product. Whilst the public is used to recognising the latter marks instantly as signs identifying the product, this is not necessarily so where the sign is indistinguishable from the appearance of the product itself” (par. 46).

¹³ Case C-104/01 [2003], *Libertel*, ECR I-03793.

In HENKEL¹⁴ and in PROCTER & GAMBLE¹⁵, the Court admitted that:

- “where the goods or services with which the registration application is concerned are intended for all consumers, the relevant public must be deemed to be composed of the average consumer, reasonably wellinformed and reasonably observant and circumspect” (Procter & Gamble, par. 33).

and implicitly admitted that:

- “The way in which the public concerned perceives a trade mark is influenced by the average consumer's level of attention, which is likely to vary according to the category of goods or services in question” (Henkel, par. 56; Procter & Gamble, par. 53).

5. Besides, the Court notes consistently that the findings relating to the characteristics of the relevant public and its degree of attention, perception or attitude, as well as to the degree of attentiveness of that public represent appraisals of fact and do not constitute a point of law.¹⁶

§3. *Application of this standard by OHIM and the General Court*

In its *Manual concerning opposition*¹⁷ OHIM states that the level of purchase involvement has a significant impact on consumer choices concerning goods and services: “*The level of involvement relates to the importance of a decision (for) the consumer. Therefore, it corresponds to his/her degree of attention*”. Following this manual, a high level of attention is usually connected with expensive and infrequent purchases (cars, diamonds, financial and real-estate services), with potentially hazardous purchases (firelights, saws, ...) and with the purchase of products when their brand is important to the consumer (tobacco products, ...). On the contrary, according to the Manual, a low level of attention can be associated with “*habitual buying behaviour*”¹⁸ (for example: basic foodstuffs).

6. P. Maeyaert has recently identified a large number of cases where these criteria were applied by the General Court and has grouped these according to product category (food and drinks, cars, furniture, glasses, watches, chemicals, etc.).¹⁹

¹⁴ Joined Cases C-456/01 P and C-457/01 P [2004], *Henkel v OHIM*, ECR I-05089.

¹⁵ Case C-473/01 P [2004], *Procter & Gamble v OHIM*, ECR I-05173.

¹⁶ C461/09 P, *The Wellcome Foundation v OHIM* [2010], par. 20, and the case-law cited.

¹⁷ “Part 2 – Identity and likelihood of confusion- Chapter 6: relevant public and degree of attention”, p. 9 (http://oami.europa.eu/ows/rw/resource/documents/CTM/legalReferences/part_c_part_2_chapter_6_relevant_public.pdf).

¹⁸ Previous footnote, p. 12.

¹⁹ P. Maeyaert, “Verwarringsgevaar in het merkenrecht – Analyse van de rechtspraak in oppositieprocedures”, *RDC-TBH* 2011, p. 966–970.

In this contribution, I will particularly focus on the Koipe and Geemarc cases and on cases related to pharmaceutical trade marks.

7. *KOIPE*. The EU Court of First Instance (now called “General Court”) held that the opposition brought by Koipe was well-founded. This was its reasoning: olive oil is a consumer product which is very common in Spain, so the level of attention of the average consumer with respect to its external appearance is low (paragraph 108); in the particular circumstances in which that product is most commonly purchased (in supermarkets or establishments where goods bearing different trade marks are arranged on shelves) the figurative element of the marks at issue acquires greater importance, which increases the likelihood of confusion between the two marks at issue.

Aceites del Sur appealed to the court. Advocate General Mazák was of the opinion that the Court should set aside the judgment. In his view, in spite of having cited the correct case-law concerning the standard of “*a reasonably well-informed and reasonably observant and circumspect*” average consumer to be applied in the context of a global appreciation, “*the Court of First Instance in fact applied a standard which more closely resembles one of an excessively negligent consumer*”.²⁰

However, the Court upheld the judgment, considering that in the circumstances described by the Court of First Instance, the figurative element of the marks at issue acquires greater importance. Concerning the assessment of the average consumer’s level of attention, the Court observed that it related exclusively to factual elements (paragraph 77). This appraisal of facts does not constitute a point of law which is subject, as such, to review by the CJEU on appeal.

8. *GEEMARC*. The General Court observed that Geemarc did not dispute the definition of the relevant public suggested by the Board of Appeal, and stated that this definition complies with Regulation No 207/2009 on the Community trade mark. To decide that the term DECT is understood by the general public in France as relating to a technology applied mainly in the field of cordless telephony, the General Court noticed that it is not unusual for commercial advertisements for certain telephones to state that those telephones function by means of DECT technology (paragraph 47) and that it is of no importance that the term ‘dect’ is a technical term, as that characteristic alone does not mean that it does not have descriptive character in the view of the relevant consumers (paragraph 48). In addition, the Court stated that the term ‘ampli’ is most often used by the general public to describe the sound-amplifying function of a product (paragraph 49).

Concerning the sign ‘AMPLIDECT’ itself, the Court stated that since the term ‘ampli’ seeks to describe the function of amplifying a sound, its association

²⁰ Opinion, Case C-498/07 P.

with a noun evoking the field of cordless telephony is not unusual for the consumers concerned (paragraph 51) and that the term 'amplidect' immediately and unequivocally informs the relevant public of the essential characteristics of the goods covered by the disputed trade mark, namely an amplificatory function incorporated in a telephone and using DECT technology. "A sufficiently direct and specific link therefore exists, from the point of view of the relevant public, between the disputed mark and the characteristics of that mark" (paragraph 54). The Court added, following OHIM, that the descriptive character of the mark in question is even more markedly descriptive for consumers suffering from loss of hearing, who constitute a part of Geemarc's clientele, and that such consumers' degree of attention is high (paragraph 57).

Like the Board of Appeal, the General Court therefore held that the term 'amplidect' is descriptive from the point of view of the relevant public.

9. *PHARMACEUTICAL TRADE MARKS*. As far as pharmaceutical products are concerned, the CJEU's case-law is quite complex and unclear. On the one hand, the Court stated that the relevant public includes healthcare professionals (doctors, pharmacists) as well as the final users of the medicines²¹ and the General Court said that "the degree of attentiveness of the average consumer of pharmaceutical preparations must be determined on a case by case basis, according to the facts in the case-file, especially the therapeutic indications of the goods in question".²² Nevertheless, the General Court considers in some cases that the relevant consumers are "well informed and particularly attentive and circumspect"²³ and in others that their degree of attention is "above average"²⁴, since those goods relate to their health, even when pharmaceutical preparations are available to consumers over the counter. Even when medicines are sold on the Internet without prescription and without the advice of a pharmacist or doctor, the General Court considers that there is no reason to assume that the consumer is less attentive when purchasing such goods.²⁵

OHIM tried to synthesize this jurisprudence and showed that the General Court holds that the consumer's level of attention is high when the condition which the medicines at issue are designed to treat is serious, not high but above average when the disease is relatively serious, and so on...²⁶

²¹ Case C-412/05 P, *Alcon v OHIM (TRAVATAN/TRIVASTAN)*, [2007] ECR I-03569.

²² Cases T493/07, T26/08 and T27/08, *GlaxoSmithKline – Wellcome v OHIM (FAMOXIN/LANOXIN)*, [2009] ECR II-00175, par. 55.

²³ Case T256/04, *Mundipharma v OHIM (RESPICUR/RESPICORT)*, [2007] ECR II-00449.

²⁴ Case T288/08, *Cadila Healthcare v OHIM (ZYDUS/ZIMBUS)*, [2012] not published in the ECR par. 36; Case T131/09, *Farmeco v OHIM (BOTUMAX)*, [2010] not published in the ECR, par. 25 and 65, and Case T331/09, *Novartis v OHIM (TOLPOSAN)*, [2010] ECR II5967, par. 26.

²⁵ Case T331/09, *Novartis v OHIM (TOLPOSAN)*, [2010] ECR II5967, par. 28.

²⁶ *Manual concerning opposition*, part 2, chapter 6, p. 12–14.

In its study on the *Overall Functioning of the European Trade Mark System*²⁷, the Max Planck Institute for Intellectual Property and Competition Law does not hide its scepticism and even its criticism regarding this jurisprudence and points out that the European Medicines Agency (EMA), when judging the suitability of proposed names for new medicines, rejects proposed names in more than 50 per cent of cases because of their similarity to existing names “*even though the proposed names have been registered and continue to be registered as trade marks*”. The Institute concludes as follows: “*OHIM in its opposition or invalidation decisions should attempt to re-orient its practice in these cases, and it may be hoped that the Boards of Appeal and eventually the General Court and the ECJ will follow suit, particularly if appropriate factual assessments are presented by the parties to such cases. Also, OHIM should be encouraged to establish working relations with the EMA in order to obtain an alignment of the respective practices*”.

§4. Conclusion

10. “[A] cynic would say that [...] when the court wants to find no infringement, it says that the average buyer is cautious and careful [...] but if the judge thinks there is infringement, the judge sets the standard lower and says the average buyer is gullible and not so discerning”²⁸ and “it probably should not be surprising that this ‘reasonable consumer’ tends to look a lot like judges in certain respects”²⁹... These words relate to trade mark law in the United States where, even if the analysis of this issue is partly different, the situation is considered as unsatisfactory as in Europe.³⁰

Following the standard elaborated by the Court of Justice of the European Union, the assessment of the average consumer’s degree of attention can only relate to the variations of this degree according to the category of goods or services in question (LLOYD). However, this degree of attention may *de facto* vary according to many other factors: sales practices and points of sale, as well as the health, fatigue, age, level of education and motivation of the relevant public, etc.

In some cases, some of these other criteria are taken into account through the criterion of the products in question. In *Koipe*, the Court pointed out that the products at issue are mostly sold in supermarkets. However, in the cases related to medicines, we saw that the fact that they were sold on the Internet without a prescription has not been admitted as a reason for lowering the

²⁷ [Http://ec.europa.eu/internal_market/indprop/tm/index_en.htm](http://ec.europa.eu/internal_market/indprop/tm/index_en.htm), p. 106, par. 2.193.

²⁸ Th. Mc Carthy, *McCarthy on Trade marks and Unfair Competition*, 4th ed. 2007, §23:92.

²⁹ W.E. Gallagher and R.C. Goodstein, “Inference Versus Speculation in Trademark Infringement Litigation: Abandoning the Fiction of the Vulcan Mind Meld”, 94 *Trademark Rep.* 1229, 1230 (2004).

³⁰ T. Lee, E. Derosia and G. Christensen, “Trade marks, consumer psychology, and the sophisticated consumer”, Vol. 57, *Emory Law Journal* (2008), p. 627, www.law2.byu.edu/news/file/Christensen_DeRosia_Lee.pdf.

assumed degree of attention of the consumer. And in the Geemarc case, it is difficult to avoid the impression that the General Court mainly considered the level of attention of a consumer who is not the average consumer of the product in question but rather the most discerning consumer in this area.

The right question might very well be: is it possible to determine the average consumer of the goods or services at issue without taking into consideration those different assessment criteria? I do not think so. It seems to me that the reasoning in two steps (1° determination of the average consumer, 2° assessment of this average consumer's degree of attention) is artificial and produces perverse effects. Moreover, it is inconsistent with the reasoning and standard in consumer law, which nonetheless directly and explicitly inspired the Court.

The standard of the "average consumer" was elaborated in consumer law by the European Court of Justice and then included in the Unfair Commercial Practices Directives 2005/29³¹ "which gives this notion statutory authority, standing and permanence".³²

The same test was implemented in trade mark issues by the European Court of Justice but never included in the Directive on trade marks (not even in the proposal for a recast of the directive³³). As mentioned in the Max Planck Institute's Study, "trade mark law stands in close interaction with other legal fields, in particular with regulations of marketing practices. Coherence must therefore also be ensured with regard to European legislation concerning those adjacent fields. [...] This becomes particularly relevant where the scope of the [Directive 29/2005/EC on unfair commercial practices] and of trade mark law overlap, such as in case of use of signs creating a likelihood of confusion or deception".³⁴

According to the 18th recital to the Directive 2005/29: "In line with the principle of proportionality, and to permit the effective application of the protections contained in it, this Directive takes as a benchmark the average consumer, who is reasonably well-informed and reasonably observant and circumspect, taking into account social, cultural and linguistic factors, as

³¹ Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council ('Unfair Commercial Practices Directive'), OJ L 149, 11.6.2005, p. 22–39.

³² C. Poncibo, "A modernisation for European consumer law?" in J. Devenney and M. Kenny, (eds), *European Consumer Protection: Theory and Practice*, Cambridge University Press, 2012, p. 45.

³³ Proposal for a recast of the directive on trade marks, 27.3.2013, COM (2013) 162 final, 2013/0089 (COD).

³⁴ "Study on the Overall Functioning of the European Trade Mark System" http://ec.europa.eu/internal_market/indprop/tm/index_en.htm, 50, §1.21.

interpreted by the Court of Justice, but also contains provisions aimed at preventing the exploitation of consumers whose characteristics make them particularly vulnerable to unfair commercial practices. Where a commercial practice is specifically aimed at a particular group of consumers, such as children, it is desirable that the impact of the commercial practice be assessed from the perspective of the average member of that group”.

11. Assessing the degree of attention of the average consumer depending on the category of goods or services in question is not part of the test applicable in consumer law and appears to be an extremely difficult task, for which the courts are not equipped. Moreover, the reliability and relevance of such a criterion are questionable.³⁵ With specific regard to the cases discussed here, it must, for instance, be noted that the concept of ‘everyday product’ is very relative and subject to rapid evolution (examples: tablets for dishwasher, mobile phones, smartphones, etc.).

The fact that consumers are less attentive when it comes to a product widely consumed by them is also questionable. In Spain, olive oil is so strongly embedded in the Spanish culture that it is hard to believe that the average Spanish consumer would be careless when buying his olive oil, even at the supermarket. By contrast, the judgment in the case “Geemarc” seems particularly severe for the trade mark applicant, because the Court in its assessment only considered the group of consumers who were most well-informed about the products in question. We have also seen that the General Court generally assumes that a patient with a serious illness can easily distinguish between two similar pharmaceutical marks because his level of attention is proportional to the severity of the disease ... The higher the danger for the consumer, the higher his degree of attention is deemed to be in trade mark law – and the weaker consumer protection becomes (and *vice-versa*). Is this not a bit shocking? And inconsistent with European consumer law?

Let us be more consistent. The criterion related to the degree of attention is confusing, artificial, and impracticable; with regard to some products, like medicines, it leads to situations that are hardly acceptable; and it is useless. The standard of the average consumer elaborated in consumer law is consistent, stated in a clear manner and tempered by the obligation to seek the average consumer of the target group.

³⁵ See, *supra*, the issue on pharmaceutical brands; T. Lee, E. Derosia and G. Christensen, “Trade marks, consumer psychology, and the sophisticated consumer”, Vol. 57, *Emory Law Journal* (2008), p. 575.