



## Consumer perception of trademarks on fast-moving consumer goods: weight of visual impression overcomes high degree of phonetic similarity

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Legal updates: case law analysis and intelligence

- Fidia opposed an application for IALO TSP based on its earlier mark HYALO, both covering non-prescription pharmaceuticals
- The court held that, if the goods are usually sold in self-service stores, the visual similarity between the signs will, as a general rule, be more important
- It was unlikely that consumers seeking HYALO-branded products would be misled into buying products bearing the mark IALO TSP instead

In [\*Fidia Farmaceutici SpA v European Union Intellectual Property Office\*](#) (EUIPO) (Case T-333/20), the General Court (Ninth Chamber) has confirmed the lack of confusing similarity between the marks IALO TSP and HYALO as applied to, among other things, over-the-counter pharmaceuticals.

### Background

Giuliani SpA's application for the registration of the EU trademark IALO TSP was opposed by Fidia Farmaceutici SpA, owner of the prior mark HYALO. Both the Opposition Division and the Board of Appeal of the EUIPO (Case R 2107/2019-5), applying the standards of confusing similarity, found that the marks were not similar. The opponent appealed - in vain - to the General Court.

### Decision

The General Court confirmed the lack of likelihood of confusion between the signs on the grounds that the marks were dissimilar visually and conceptually, and created a different overall impression.

In particular, the court stated:

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*[A]lthough it is possible that mere phonetic similarity between two trademarks may create a likelihood of confusion, that finding is not, however, in itself a sufficient basis for holding that the marks in question, each considered as a whole, are similar. Consequently, in the context of the global assessment of the likelihood of confusion, the visual, phonetic or conceptual aspects of the signs at issue do not always have the same weight and it is appropriate then to examine the objective conditions under which the marks may be present on the market. The importance of the elements of similarity or dissimilarity between the signs at issue may depend, in particular, on the inherent qualities of the signs or the conditions under which the goods or services covered by them are marketed.*

”

The decision maintained that, unless proven otherwise, if the goods covered by the marks are sold in self-service stores, where consumers make their own assessment and mainly rely on the image (observable aspects) of the marks, the visual similarity between the signs would be more significant.

The court added:

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*If, on the other hand, the relevant goods are primarily sold orally, greater weight will usually be attributed to any phonetic similarity between the signs. Likewise, the degree of phonetic similarity between two marks is of less importance in the case of goods which are marketed in such a way that, when making a purchase, the relevant public usually perceives visually the mark designating those goods (see judgment of 23 May 2007, Henkel v OHIM – SERCA (COR), T-342/05, [...], Paragraphs 51 to 53 and the case law cited).*

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Despite the overwhelming phonetic similarity of the marks IALO TSP and HYALO, which covered similar goods, the General Court found that the visual comparison outweighed the phonetic impression, because consumers would decide what to purchase based on what they actually saw on the shelves. As a result, it would be unlikely that consumers seeking HYALO-branded products would be misled into buying products bearing the mark IALO TSP instead.

In addition, Fidia had not provided any evidence to show that the Italian consumer would understand the group of letters ‘ial’ or ‘ialo’ as a reference to hyaluronic acid. As was stated by the EUIPO, there was no actual evidence (and not even leads) showing that the group of letters ‘ial’ or ‘ialo’ have been used on the Italian market to refer to hyaluronic acid, which would make the marks conceptually identical. Fidia had only established that the expression ‘hyaluronic acid’ is translated into Italian as ‘acido ialuronico’.

The court concluded as follows:

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*[Fidia] cannot therefore usefully dispute the Board of Appeal's conclusion by confining itself to presuming that the Italian consumer, on account of the greater visual proximity of the element ‘ial’ or ‘ialo’ to ‘ialuronico’ than that of the element ‘hyal’, will understand the mark applied for as a reference to hyaluronic acid.*

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## Comment

This outcome provides companies and IP practitioners with clearer guidance on how to select trademarks for fast-moving consumer goods, where the consumer’s choice is primarily made by looking at the products on the shelves.

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