# General Court: figurative mark consisting of two geometrical shapes will not be perceived as letters

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- **The EUIPO found that a figurative mark representing two geometrical shapes was dissimilar to the earlier figurative marks MÓ**
- **The General Court agreed that it was unlikely that the relevant public would associate the geometrical shapes with any combination of letters**
- **Since the relevant public would not recognise the letters 'n' and 'o' in the mark applied for, it would not describe it by pronouncing those letters**

In *Multiópticas S Coop v European Union Intellectual Property Office* (EUIPO) (Case T-487/22, 12 July 2023), the First Chamber of the General Court has dismissed an action seeking annulment of a decision of the Fourth Board of Appeal of the EUIPO of 2 June 2022 (Case R 1762/2021-4).

## Background

In November 2019 US company Nike Innovate CV applied for the registration of the EU figurative trademark reproduced below, to cover services in Class 35:

In April 2020 Spanish company **Multiópticas** S Coop opposed the application for all the services applied for, on the basis of the following earlier EU figurative marks, alleging a breach of Articles 8(1)(b) and (5) of Regulation 2017/1001:

- Registration No 7 491 095:

- Registration No 7 490 923:

- Registration No 11 810 595:

Multiópticas also invoked the prior Spanish figurative trademark (Registration No M 3066116) shown below:

All earlier trademark registrations designated the services in Class 35 covered by the contested application.

The opposition was rejected in its entirety by the Opposition Division of the EUIPO. Multiópticas appealed, but the Board of Appeal agreed with the Opposition Division that the signs at issue were dissimilar.

## Appeal to the General Court

Multiópticas turned to the General Court by way of an appeal, claiming that there was a certain similarity between the signs at issue and questioning the findings of the Board of Appeal as regards Article 8(5) of the regulation. It claimed that, contrary to the board's opinion, the signs at issue were not dissimilar, and argued that Article 8(1)(b) of the regulation applies when there is a degree of similarity between the signs at issue which causes a likelihood of confusion among the relevant public, while the existence of such a likelihood is not necessary for the protection conferred by Article 8(5). Thus, the types of damage referred to in Article 8(5) may be the consequence of a lower degree of similarity between the signs at issue, provided that it is sufficient for the relevant public to establish a link between those signs.

## Decision

Upon examination of Multiópticas' allegations, the General Court held as follows:

- Visually, the opposed mark was characterised as a whole by a juxtaposition of two black geometrical shapes, consisting in a square the upper part of which was rounded, and a basic circle to the right. In the absence of any line or clear outline which could be perceived as representing letters, that mark was purely figurative. Consequently, it was unlikely that the relevant public would associate the combination of geometrical shapes with any combination of letters, especially with the clear word elements of the earlier marks.
- The comparison of a purely figurative mark with word marks cannot be made on a phonetic basis. In this case, since the relevant public would not recognise the letters 'n' and 'o' in the mark applied for, it would not describe it by pronouncing those letters. Consequently, a phonetic comparison of the signs at issue was irrelevant.
- Where neither of the signs at issue taken as a whole has a meaning, a conceptual comparison is also impossible.

The General Court thus concluded that the Board of Appeal had not erred in finding that the signs at issue were dissimilar.

While agreeing with Multiópticas that the types of damage referred to in Article 8(5) may result from a lower degree of similarity between the earlier and later marks, provided that it is sufficient for the relevant public to make a connection between those marks, the General Court stressed that neither the wording of Articles 8(1)(b) and (5) nor the case law implied that the similarity between the signs at issue must be assessed in a different way, according to whether the assessment is carried out under one or other of those provisions.

In any event, as it was found that the signs at issue were dissimilar, not even a lower degree of similarity could be established. Thus, taking into consideration that the conditions set out in Article 8(5) are cumulative, meaning that failure to meet one of them sufficed for rendering this provision inapplicable, the General Court confirmed that the Board of Appeal was right in not considering whether the other conditions of Article 8(5) were satisfied.

In the light of all the above, the General Court upheld the decision of the Board of Appeal in its entirety.


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