

# Chiquita ends as top banana in Dutch court case

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[Manon Rieger-Jansen \(Bird & Bird\)](#)

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*On 15 July 2016 the PI judge in the District Court in The Hague, the Netherlands, rendered a decision in a banana case between competitors Chiquita and Fyffes International about a recently introduced new brand of Chiquita. The decision confirmed that descriptive elements cannot automatically be disregarded if these elements form a conceptual whole with the rest of trademark or sign and that it is all about the global impression.*

Chiquita is active on the European market for the production and distribution of bananas and recently started using the following signs:



Competitor Fyffes started a preliminary injunction case for trademark infringement arguing that Chiquita infringed its HOYA trademarks with the use of Chiquita's new HOLA BANANA! marks. Fyffes based its claims on three of its trademarks:

- Benelux wordmark HOYA

- EUTM 
- EUTM 

The trademarks are *inter alia* registered for fresh fruit and vegetables; bananas.

Chiquita first of all presented the defence that there had been no genuine use of the word mark HOYA and the diamond mark. The judge agreed with Chiquita and followed the argument that, if the marks would have been genuinely used, it should have been no problem at all for Fyffes to provide proof of such use and e.g. to submit photographs of bananas traded under those trade marks on shelves of, for example, a supermarket or in a catering establishment.

The judge based its assessment on the comparison of the HOLA BANANA! marks

with the third trademark of Fyffes, the EU logo  .

The judge ruled that it is not in dispute between the parties that the EUTM and the signs are used for identical goods, specifically bananas. However, in the court's provisional opinion, there is a low degree of similarity between the trademark and the signs.

The word 'Hoya' is the dominant component in the trademark. Fyffes had argued that in the signs Hola Banana! the word Hola would have to be regarded as the dominant element since the element Banana! is descriptive for bananas. According to Fyffes the comparison between the trademarks should have simply be reduced to the comparison of the word element HOYA versus HOLA. This oversimplification was however dismissed by the court.

The court ruled that, although there could be a slight aural similarity between the words HOLA and HOYA the average consumer will also include banana in the comparison. This is even more so for the visual similarity. Conceptually there is no similarity at all according to the court.

The fact that the average Dutch consumer knows that 'hola' means 'hello' is not in dispute, nor that the relevant Dutch public knows that 'banana' means 'banana' and will construe that element,

as a reference to the good for which the signs are used. Both words put together, also because of the use of the exclamation mark, **constitute a conceptual whole: 'Hello banana!'**. For that reason, the relevant public will not quickly disregard the (descriptive) element 'banana'. At the hearing, Chiquita asserted that the meanings of the Spanish words 'Hoya' and 'Hola' are not the same, which means that the words are not conceptually similar, supposing the (non-Spanish speaking) average consumer would even understand the meaning of the Spanish word 'Hoya'. Incidentally, 'hoya' means 'pit', 'burial pit'. The lack of conceptual similarity therefore fully applies to the conceptual comparison of 'Hoya' and 'Hola Banana'.

The court provisionally believes that no likelihood of confusion can be said to exist among the relevant public of the goods for which the EU trade mark has been registered, as the slight aural similarity does not sufficiently outweigh the differences in visual and conceptual terms.

In case law, elements referring to the goods for which a sign or trademark is used, are often easily disregarded in comparing with another trademark but Fyffes slipped on the banana peel here since the judge ruled that not one dominant component could be identified in the device mark.