

JUDGMENT OF THE GENERAL COURT (Third Chamber)

24 January 2024 (\*)

(Community design – Invalidity proceedings – Registered community design representing a building block from a toy building set – Ground for invalidity – Non-compliance with requirements for protection – Article 25(1)(b) of Regulation (EC) No 6/2002 – Features of appearance of a product solely dictated by its technical function – Features of appearance of a product to be necessarily reproduced in their exact form and dimensions in order to permit the interconnection with other products – Designs whose purpose is to allow multiple assembly or connection of mutually interchangeable products within a modular system – Article 8(1) to (3) of Regulation No 6/2002)

In Case T-537/22,

**Delta Sport Handelskontor GmbH**, established in Hamburg (Germany), represented by C. Klawitter and L.-E. Appel, lawyers,

applicant,

v

**European Union Intellectual Property Office (EUIPO)**, represented by J. Ivanauskas, acting as Agent,

defendant,

the other party to the proceedings before the Board of Appeal of EUIPO, intervener before the General Court, being

**Lego A/S**, established in Billund (Denmark), represented by V. von Bomhard and J. Fuhrmann, lawyers,

THE GENERAL COURT (Third Chamber),

composed of F. Schalin, President, P. Škvařilová-Pelzl and I. Nõmm (Rapporteur), Judges,

Registrar: G. Mitrev, Administrator,

having regard to the written part of the procedure,

further to the hearing on 11 October 2023,

gives the following

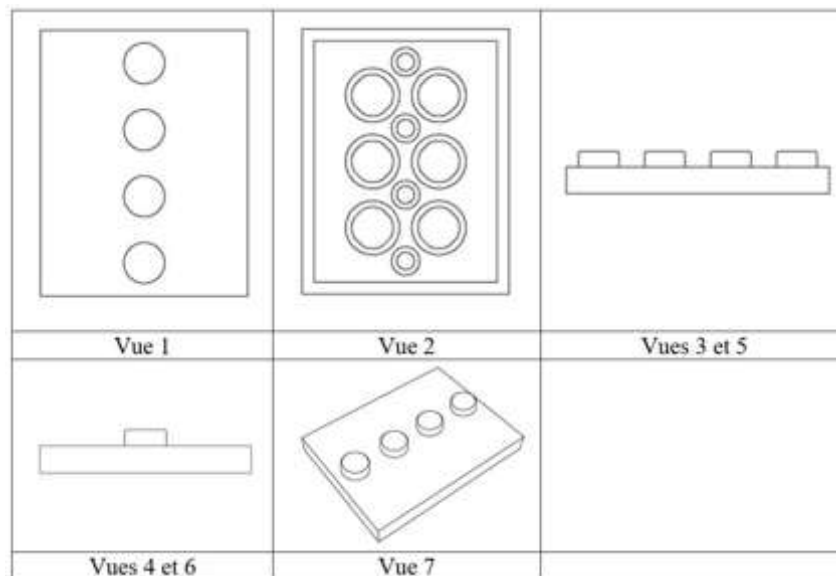
### Judgment

- 1 By its action under Article 263 TFEU, the applicant, Delta Sport Handelskontor GmbH, seeks the annulment of the decision of the Third Board of Appeal of the European Union Intellectual Property Office (EUIPO) of 30 May 2022 (Case R 1524/2021-3) ('the contested decision').

#### Background to the dispute

- 2 On 8 December 2016, the applicant filed with EUIPO an application for a declaration of invalidity of the registered Community design following an application filed on 2 February 2010, which is

represented in the following views:



- 3 The products to which the design, in respect of which a declaration of invalidity was sought, is intended to be applied, were in Class 21.01 of the Locarno Agreement of 8 October 1968 establishing an International Classification for Industrial Designs, as amended, and corresponded to the following description: ‘Building blocks from a toy building set’.
- 4 The ground relied on in support of the application for a declaration of invalidity was that set out in Article 25(1)(b) of Council Regulation (EC) No 6/2002 of 12 December 2001 on Community designs (OJ 2002 L 3, p. 1), read in conjunction with Articles 4 to 9 of the same regulation. In particular, the applicant claimed that all the features of appearance of the product concerned by the contested design were solely dictated by the technical function of the product and, for that reason, were excluded from protection under Article 8(1) of that regulation.
- 5 On 30 October 2017, the Invalidity Division of EUIPO rejected the application for a declaration of invalidity.
- 6 On 5 January 2018, the applicant filed a notice of appeal with EUIPO against the decision of the Invalidity Division.
- 7 By decision of 10 April 2019 (‘the earlier decision’), the Third Board of Appeal of EUIPO upheld the action for annulment of the decision of the Invalidity Division and delivered a declaration of the invalidity of the contested design on the ground that all the features of appearance of the product concerned by that design were solely dictated by the technical function of that product, within the meaning of Article 8(1) of Regulation No 6/2002.
- 8 In the first place, the Board of Appeal observed that the product concerned by the contested design was a building block that was part of a larger set of bricks and was intended to be assembled with other bricks of the set to build objects. Consequently, the technical function that that brick must fulfil was, therefore, the capability of being assembled, with sufficient stability, with other bricks of the set in order to create a toy building.
- 9 In the second place, it identified the features of appearance of the product, namely (i) the row of studs on the upper face of the brick; (ii) the row of smaller circles on the lower face of the brick; (iii) the two rows of bigger circles on the lower face of the brick; (iv) the rectangular shape of the brick; (v) the thickness of the walls of the brick; and (vi) the cylindrical shape of the studs.
- 10 In the third place, the Board of Appeal found that the six features referred to above were solely dictated by the technical function of the building brick, namely assembly with, and disassembly from, the rest of the bricks of the set.

- 11 By application lodged at the Court Registry on 19 July 2019, the intervener brought an action, under the case number T-515/19, seeking the annulment of the earlier decision.
- 12 By judgment of 24 March 2021, *Lego v EUIPO – Delta Sport Handelskontor (Building block from a toy building set)* (T-515/19, not published, EU:T:2021:155) (‘the annulment judgment’), the Court annulled the earlier decision.
- 13 First, the Court found that the Board of Appeal had infringed Article 8(3) of Regulation No 6/2002 laying down an exception protecting modular systems, in that it had not assessed whether the contested design met the requirements of that article, which, moreover, the intervener had relied on before it.
- 14 Secondly, the Court found that the Board of Appeal had infringed Article 8(1) of Regulation No 6/2002 in that it had not identified all the features of appearance of the product concerned by the contested design, in particular the smooth surface of the upper face of the toy brick (‘the smooth surface’), and, a fortiori, did not establish that all of those features were solely dictated by the technical function of that product.
- 15 Since the earlier decision was set aside, the Presidium of the Boards of Appeal of EUIPO referred the case to the Third Board of Appeal.
- 16 By the contested decision, the Board of Appeal dismissed the appeal on the ground that the application for invalidity was not substantiated. In particular, it found that even if all the features of appearance of the product concerned by the contested design, including the smooth surface, were solely dictated by the technical function of that product, within the meaning of Article 8(1) of Regulation No 6/2002, the contested design could not be declared invalid as it fell within the exception protecting modular systems referred to in Article 8(3) of that regulation. That provision was applied by way of derogation from Article 8(2) of Regulation No 6/2002, given that, as found by the Board of Appeal, all the characteristics of the appearance of the product covered by the design contested were covered not only by Article 8(1) of Regulation No 6/2002, but also by Article 8(2) of that regulation.

### **Forms of order sought**

- 17 The applicant claims, in essence, that the Court should:
- annul the contested decision;
  - order EUIPO and the intervener to pay the costs.
- 18 EUIPO contends that the Court should:
- dismiss the action;
  - order the applicant to pay the costs in the event that a hearing is convened.
- 19 The intervener contends that the Court should:
- dismiss the action;
  - order the applicant to pay the costs.

### **Law**

#### ***The independent plea put forward by the intervener, alleging infringement of Article 8(1) of Regulation No 6/2002***

- 20 The intervener submits, in its response, in essence, that the Board of Appeal infringed Article 8(1) of Regulation No 6/2002 when it held that all the features of appearance of the product concerned by the contested design, including the smooth surface, were solely dictated by the technical function of that

product, namely assembly with, and disassembly from, the other bricks of the set. According to the intervener, the Board of Appeal was right to dismiss the appeal before it, but should have reached that finding on the ground that the contested design did not fall within Article 8(1) of Regulation No 6/2002 and not on the ground that that design could fall within the exception provided for in Article 8(3) of that regulation.

21 In that regard, it is important to point out that the intervener's arguments must be regarded as constituting an independent plea within the meaning of Article 173(3) of the Rules of Procedure of the General Court, according to which, in litigation relating intellectual property rights, a party to the proceedings before the Board of Appeal, other than the applicant, intervening before the Court, 'may support the form of order sought by a main party and may apply for a form of order and put forward pleas in law independently of those applied for and put forward by the main parties'.

22 In its response, the intervener has not sought the annulment or alteration of the contested decision. On the contrary, it has submitted that the action brought by the applicant, which seeks the annulment of that decision, should be rejected.

23 Thus, the plea relied on by the intervener is incompatible with its own form of order and, since that plea does not support its form of order, it must be rejected (see judgment of 27 September 2018, *TenneT Holding v EUIPO – Ngrid Intellectual Property (NorthSeaGrid)*, T-70/17, not published, EU:T:2018:611, paragraph 35 and the case-law cited).

### ***Substance***

24 The applicant relies, in essence, on three pleas in law, alleging, first, infringement of Article 8(2) of Regulation No 6/2002, secondly, infringement of Article 8(3) of that regulation, and, thirdly, infringement of Article 63(1) of that regulation.

#### *The first plea, alleging infringement of Article 8(2) of Regulation No 6/2002*

25 In the first plea in law, alleging infringement of Article 8(2) of Regulation No 6/2002, the applicant claims that the Board of Appeal incorrectly found that all the features of appearance of the product concerned by the contested design fell within that article. It claims, in essence, that one of the seven characteristics identified by the Board of Appeal, namely the smooth surface, does not meet the requirements laid down in Article 8(2) of that regulation. Thus, the contested design cannot be considered as falling within the scope of that article.

26 EUIPO and the intervener dispute the applicant's argument.

27 In the first place, since Article 8(2) of Regulation No 6/2002 has not been relied on by the applicant as a ground for invalidating the contested design, the circumstances in which that article was applied by the Board of Appeal should be recalled.

28 In support of the application for a declaration of invalidity, the applicant relied on the ground for invalidity referred to in Article 8(1) of Regulation No 6/2002, according to which a Community design does not confer rights over the characteristics of the appearance of a product which are exclusively imposed by its technical function.

29 For its part, Article 8(2) of Regulation No 6/2002 provides that a Community design will not subsist in features of appearance of a product which must necessarily be reproduced in their exact form and dimensions in order to permit the product in which the design is incorporated or to which it is applied to be mechanically connected to or placed in, around or against another product so that either product may perform its function ('features of interconnection').

30 As the Court found in paragraph 33 of the annulment judgment, Article 8(3) of Regulation No 6/2002 is an exception to Article 8(2) of that regulation, which makes it possible to protect designs covering products which form part of a modular system despite their possible features of interconnection.

- 31 In paragraph 80 of the annulment judgment, the General Court also explained that, in order to preserve the effectiveness of Article 8(3) of Regulation No 6/2002, where EUIPO, when examining an application for a declaration of invalidity based on Article 25(1)(b) of that regulation, read in conjunction with Article 8(1) of that regulation, finds that the characteristics of the appearance of the product concerned by the contested design fall within both Article 8(1) and Article 8(2) of that regulation, and where the proprietor of the contested design relies on the benefit of Article 8(3) of that regulation, it must examine whether those features are capable of falling within the protection of modular systems for the purposes of that latter provision, including when the applicant for a declaration of invalidity did not rely on Article 8(2) of that regulation.
- 32 In the contested decision, after finding that all the characteristics of the contested design fell within Article 8(1) of Regulation No 6/2002, the Board of Appeal applied Article 8(2) of that regulation. Since that article applied, according to the Board of Appeal, to all the characteristics of that design, the Board of Appeal examined whether it met the requirements of the exception provided for by Article 8(3) of that regulation. The Board of Appeal concluded that that design fell within that exception protecting modular systems, with the result that the application for a declaration of invalidity had to be rejected.
- 33 It follows from the foregoing that the objective of the application of Article 8(2) of Regulation No 6/2002, in the contested decision, was to determine, in accordance with the annulment judgment, whether the exception provided for in Article 8(3) of that regulation could possibly be applied in the present case and whether the contested design could thus remain valid, although all its characteristics were solely dictated by its technical function within the meaning of Article 8(1) of that regulation.
- 34 In the second place, it is necessary to analyse whether, in this context, the applicant's arguments concerning the impossibility of applying Article 8(2) of Regulation No 6/2002, in relation to the characteristic of the smooth surface, are likely to result in the unlawfulness of the Board of Appeal's finding, according to which there was no reason to declare the contested design invalid.
- 35 In that regard, it should be borne in mind that, as the General Court found in paragraph 96 of the annulment judgment, if at least one of the features of appearance of the product concerned by a contested design is not solely dictated by the technical function of that product, the design at issue cannot be declared invalid under Article 8(1) of Regulation No 6/2002.
- 36 The same interpretation applies, by analogy, to Article 8(2) of Regulation No 6/2002, with the result that a design can only be declared invalid, pursuant to that article, in the case where all its characteristics fall under that article, which implies that, first, they meet the requirements provided for by that article and, secondly, none of them fall within the exception, provided for by Article 8(3) of that regulation.
- 37 It follows that a design is declared invalid, in accordance with the provisions of Article 8 of Regulation No 6/2002, only in the case where all of its characteristics are excluded from protection. If at least one of its characteristics is protected, in particular due to the application of the exception provided for in Article 8(3) of that regulation, the design remains valid.
- 38 In the present case, it should be observed that the parties do not dispute the Board of Appeal's findings according to which six of the seven characteristics of the appearance of the product concerned by the contested design, which are referred to in paragraph 9 above, fall within both Article 8(1) of Regulation No 6/2002 and Article 8(2) of that regulation. In support of its plea relating to the infringement of Article 8(2) of Regulation No 6/2002, the applicant claims that that article does not apply to the smooth surface, which constitutes only one of the seven characteristics identified by the Board of Appeal in the contested decision.
- 39 Thus, even in the event that, as the applicant maintains, one of the seven characteristics of the contested design, namely the smooth surface, would not be covered by Article 8(2) of Regulation No 6/2002, the application of the exception provided for in Article 8(3) of that regulation would possibly be affected in relation to that characteristic alone, with the result that that exception would in any event cover the other six.

40 To the extent that a design is declared invalid only in the case where all its characteristics are excluded from protection, the applicant's arguments which, even if they were assumed to be well founded, would have the result of affecting the protection of only one of the seven characteristics of the contested design, are therefore not likely to call into question the validity of that design as a whole.

41 Accordingly, as maintained by EUIPO, the arguments which the applicant has submitted to allege the infringement of Article 8(2) of Regulation No 6/2002 must be considered to be ineffective.

42 Consequently, the first plea in law must be rejected.

*The second plea in law, alleging infringement of Article 8(3) of Regulation No 6/2002*

43 The second plea in law is divided into two parts. Under the first part, the applicant alleges that the Board of Appeal made an error of law in that it applied Article 8(3) of Regulation No 6/2002 in relation to the contested design as a whole and not in relation to the features of interconnection only. Under the second part, the applicant claims that the Board of Appeal also made an error of law, by placing on it the burden of proof relating to the conditions of novelty and individual character provided for by Article 8(3) of Regulation No 6/2002.

44 It is appropriate to examine first the second part of the second plea, and then to analyse its first part.

– *The second part of the second plea in law, alleging an error of law concerning the person on whom the burden of proof lies*

45 In the second part of the second plea in law, the applicant claims that the Board of Appeal infringed Article 8(3) of Regulation No 6/2002 by placing on it the burden of proof relating to the conditions of novelty and individual character laid down in Articles 5 and 6 of that regulation. According to the applicant, it was for the intervener, namely the holder of the contested design, to prove that all the requirements for the application of Article 8(3) of Regulation No 6/2002 were met in the present case.

46 EUIPO and the intervener dispute the applicant's argument.

47 As a preliminary point, it should be borne in mind that Article 8(3) of Regulation No 6/2002 provides that, for a design to fall within the exception protecting modular systems provided for in that article, it must meet two conditions: first, meet the conditions of Articles 5 (novelty) and 6 (individual character) of that regulation and, secondly, serve the purpose of allowing the multiple assembly or connection of mutually interchangeable products within a modular system.

48 It should be observed that the applicant does not dispute the Board of Appeal's finding that the second of the abovementioned conditions is considered to be fulfilled. Its arguments, submitted in the context of the second part of the second plea in law, are intended to call into question the analysis of the Board of Appeal only with regard to the first condition for the application of Article 8(3) of Regulation No 6/2002, namely the satisfaction of the conditions of Articles 5 and 6 of that regulation.

49 In this regard, the Board of Appeal found, in essence, that the application of Articles 5 and 6 of Regulation No 6/2002 required proof of the disclosure of an earlier design in relation to which the novelty and character individual of the contested design would be assessed. The precise identification of an earlier design and the fact that it has been disclosed had, according to the Board of Appeal, to be proven by the applicant for a declaration of invalidity, which it failed to do in the present case. The Board of Appeal found that the absence of novelty and individual character of the contested design had not been established, since that design had to be considered as meeting the conditions of Articles 5 and 6 of the Regulation No 6/2002.

50 In the present case, in the light of the applicant's arguments, it is therefore necessary to ascertain whether the Board of Appeal made errors of law in determining the detailed rules of application of Articles 5 and 6 of Regulation No 6/2002, in the context of Article 8(3) of that regulation. In particular, the question arises, in essence, of whether, in that context, the Board of Appeal correctly considered that the conditions of Articles 5 and 6 of Regulation No 6/2002 had to be regarded as being fulfilled

until proof to the contrary was demonstrated, with the result that the burden of proof fell on the party relying on the failure to meet those requirements.

- 51 First, in that regard, it should be observed that Regulation No 6/2002 does not itself specify the specific arrangements for the application of its Articles 5 and 6, in particular in the context of Article 8(3) of that regulation. It is therefore necessary to analyse the significance and arrangements for applying those provisions in a broader context, namely that of the system of protection of Community designs established by Regulation No 6/2002.
- 52 It should be borne in mind that Articles 5 and 6 of Regulation No 6/2002 determine the criteria of novelty and individual character, which, under the wording of Article 4(1) of that regulation, constitute conditions which must be complied with so that the protection of a design by a Community design is guaranteed.
- 53 With regard to registered Community designs, such as the contested design, it should be noted that their registration procedure, established by Regulation No 6/2002, amounts to an essentially formal, expeditious check, which, as indicated in recital 18 of that regulation, does not require any substantive examination as to compliance with the requirements for protection prior to registration (judgment of 16 February 2012, *Celaya Emparanza y Galdos International*, C-488/10, EU:C:2012:88, paragraph 43).
- 54 Under Article 48 of Regulation No 6/2002, EUIPO is required to register a Community design in so far as it finds, following the examination laid down in Article 45 of that regulation, that the application for registration satisfies the formal requirements for filing and that such an application has not been refused by virtue of Article 47 of that regulation. In accordance with Article 47(1), EUIPO is required to refuse the application for registration if it notices that the design covered by that application does not correspond to the definition of the design under Article 3(a) of that regulation, namely the appearance of the whole or a part of the product resulting from the features of the product itself, or if that design is contrary to public policy or to accepted principles of morality (order of 25 October 2021, *4B Company v EUIPO – Deenz (Pendant (jewellery))*, T-329/20, EU:T:2021:732, paragraph 32).
- 55 Thus, the system put in place by Regulation No 6/2002 for the registration of Community designs is based on the principle that all applications which satisfy formal requirements are to be entered in the Register of Community designs. The corollary of that principle is that it is only following an application for a declaration of invalidity of a Community design which has been registered that that design may be declared invalid (see, to that effect, order of 25 October 2021 February, *Pendant (jewellery)*, T-329/20, EU:T:2021:732, paragraph 35).
- 56 Article 25(1) of Regulation No 6/2002 lists the grounds on which a Community design may be declared invalid. A Community design may only be declared invalid in the cases listed in that provision, and in particular if it does not meet the requirements set out in Articles 4 to 9 of the same regulation, which include the novelty and individual character of that design.
- 57 It follows that, during the registration procedure for Community designs, EUIPO is not to check that the conditions of novelty and individual character set out in Articles 5 and 6 of Regulation No 6/2002 are met. As maintained by EUIPO, the new and individual character of a registered Community design is therefore presumed during the registration procedure. If that design does not meet those requirements, it can only be declared invalid in the context of invalidity proceedings provided for by Article 25(1) of Regulation No 6/2002. Consequently, it can be inferred that, as long as a Community design is not declared invalid, it enjoys the presumption that the conditions of novelty and individual character are met.
- 58 That finding is also confirmed by the fact that Article 85 of Regulation No 6/2002 establishes a presumption of validity of Community designs, whether or not they are registered. With regard to registered Community designs, paragraph 1 of that provision provides that, ‘in proceedings in respect of an infringement action or an action for threatened infringement of [such] a registered Community design, the Community design court shall treat the Community design as valid’ without any further requirement. That demonstrates, once again, that compliance with the requirements for validity of a

Community design, including those of novelty and individual character, is presumed until proven otherwise.

- 59 Furthermore, contrary to what the applicant maintains, there is no reason to believe that the requirements laid down in Articles 5 and 6 of Regulation No 6/2002 apply differently depending on whether they are applied as grounds for invalidity, under Article 25(1)(b) of Regulation No 6/2002, or as requirements which must be met in order to fall within the exception provided for in Article 8(3) of that regulation. Although those last two provisions have, as is maintained by the applicant, a different objective, it should be pointed out that, in both cases, Articles 5 and 6 of that regulation are applied within the framework of invalidity proceedings, admittedly based on different grounds for invalidity. The application of the presumption of validity of a design cannot depend on the ground for invalidity relied on by the applicant for invalidity before the adjudicating bodies of EUIPO.
- 60 To argue otherwise would lead to denying the very existence of the aforementioned presumption. Since compliance with the conditions of novelty and individual character is presumed from the registration stage of a Community design, that presumption must be applied consistently and indiscriminately throughout the duration of the protection of a design, irrespective of the provision of Regulation No 6/2002 in the context of which those requirements are relied on.
- 61 It follows that it would be contrary to the very logic of the system of Community designs arising from Regulation No 6/2002 to require, as the applicant proposes, the holder of a registered design wishing to rely on the exception provided for in Article 8(3) of Regulation No 6/2002 to prove compliance with the conditions of novelty and individual character provided for in Articles 5 and 6 of that regulation.
- 62 Secondly, it should be pointed out that Articles 5 and 6 of Regulation No 6/2002 imply that the assessment of the novelty and individual character of a design must be conducted in relation to one or more specific designs, individualised, defined and identified designs from among all the designs which have been made available to the public previously (see, to that effect, judgments of 19 June 2014, *Karen Millen Fashions*, C-345/13, EU:C:2014:2013, paragraphs 25 and 35, and of 21 September 2017, *Easy Sanitary Solutions and EUIPO v Group Nivelles*, C-361/15 P and C-405/15 P, EU:C:2017:720, paragraph 61). It follows that the question relating to the disclosure of an earlier design is a key issue, whose resolution at the outset is necessary for the correct application of Articles 5 and 6 of Regulation No 6/2002 (judgment of 23 October 2018, *Mamas and Papas v EUIPO – Wall-Budden (Cot bumper)*, T-672/17, not published, EU:T:2018:707, paragraph 30).
- 63 Under Article 5(1)(b) of Regulation No 6/2002, a registered Community design is to be considered to be new if no identical design has been made available to the public before the date of filing of the application for registration of the design for which protection is claimed.
- 64 Likewise, Article 6(1)(b) of Regulation No 6/2002 provides that a registered Community design is considered to have individual character if the overall impression it produces on the informed user differs from the overall impression produced on such a user by any design which has been made available to the public before the date of filing the application for registration.
- 65 It follows that, as was found by the Board of Appeal, placing the burden of proof of the novelty and individual character of the contested design on the intervener would amount to requiring it to prove that its design is compatible with those two requirements in relation to all earlier designs which were disclosed before the relevant date. In other words, in such a case, the intervener would have to prove the absence of disclosure of any design which could prevent its design from being considered new or having an individual character under the provisions of Articles 5 and 6 of Regulation No 6/2002. It must therefore be stated, like the Board of Appeal, that this would mean imposing negative proof, and, therefore, impossible or particularly difficult evidence to provide (*probatio diabolica*), on the intervener.
- 66 Thirdly, the applicant cannot validly maintain that the intervener, as the holder of the contested design, should have, in the present case, ‘at least furnish[ed] some information’ as to compliance with the conditions of novelty and individual character of the contested design, following the logic of the judgment of 26 January 2022, *Unger Marketing International v EUIPO – Orben Wasseraufbereitung (Water purifiers)* (T-325/20, not published, EU:T:2022:23).

- 67 Admittedly, the Court considered in that judgment that, to the extent that the applicant for a declaration of invalidity had provided arguments and evidence corroborating its thesis that all the characteristics of the appearance of the product concerned were imposed by its technical function (ground for invalidity provided for in Article 8(1) of Regulation No 6/2002), it was for the holder of the contested design to demonstrate the contrary, in particular the aesthetic considerations which had influenced the choice of characteristics beyond the technical function (see, to that effect, judgment of 26 January 2022, *Water purifiers*, T-325/20, not published, EU:T:2022:23, paragraphs 35 to 45).
- 68 However, contrary to what the applicant maintains, the Board of Appeal's approach, in the present case, does not contradict the argument of the Court, as set out above.
- 69 It follows from that argument that the General Court applied, in the context of Article 8(1) of Regulation No 6/2002, the general rule on the allocation of the burden of proof, according to which, when an applicant for a declaration of invalidity refers to the ground of invalidity set out in Article 25(1)(b) of Regulation No 6/2002, it is for that applicant to provide evidence to demonstrate that the contested design does not fulfil the requirements of Articles 4 to 9 of that regulation (judgment of 21 September 2017, *Easy Sanitary Solutions and EUIPO v Group Nivelles*, C-361/15 P and C-405/15 P, EU:C:2017:720, paragraph 60). Once that obligation has been fulfilled, it is then for the holder of the contested design to produce counter-arguments and evidence demonstrating why the contested design should not be declared invalid. The final outcome depends on an evaluation of all the facts, arguments and evidence provided by the parties as is required by Article 63(1) of Regulation No 6/2002 (judgment of 29 March 2023, *Tinnus Enterprises v EUIPO – Mystic Products (Fluid distribution equipment)*, T-505/21, not published, EU:T:2023:174, paragraph 48).
- 70 That rule on the allocation of the burden of proof was applied correctly by the Board of Appeal in the contested decision. In the present case, the applicant for a declaration of invalidity had not provided evidence capable of demonstrating that the contested design did not meet the conditions set out in Articles 5 and 6 of Regulation No 6/2002. Thus, the holder of that design was also not required to produce counter-arguments and evidence demonstrating the reasons why that design should not be declared invalid.
- 71 Consequently, the applicant's arguments concerning the application of the judgment of 26 January 2022, *Water purifiers* (T-325/20, not published, EU:T:2022:23) must be rejected.
- 72 In the light of the foregoing, it must be held that the applicant cannot validly claim that the Board of Appeal should, in the context of the application of Article 8(3) of Regulation No 6/2002, have placed the burden of proof on the intervener as to the requirements of novelty and individual character of the contested design. The Board of Appeal therefore correctly allocated the burden of proof by finding that it was for the applicant for a declaration of invalidity, which disputed the application of Article 8(3) of Regulation No 6/2002, to establish the disclosure of earlier designs in relation to which the contested design cannot be considered as being new and having an individual character.
- 73 Consequently, the second part of the second plea in law must be rejected.
- *The first part of the second plea in law, alleging infringement of Article 8(3) of Regulation No 6/2002*
- 74 In the first part of the second plea in law, the applicant claims that the Board of Appeal erred in law by applying Article 8(3) of Regulation No 6/2002 to the contested design as a whole and not only in relation to the features of interconnection. More specifically, as is apparent from all of the applicant's arguments, the Board of Appeal made that error in the context of the assessment of one of the conditions required for the application of Article 8(3) of that regulation, namely compliance with the requirements set out in Articles 5 and 6 of the same regulation.
- 75 EUIPO and the intervener dispute the applicant's argument.
- 76 In that regard, it should be observed that, by its arguments submitted in the context of the first part of the second plea in law, the applicant seeks to set out the methods which the Board of Appeal should, in

the applicant's view, have applied during its examination concerning the novelty and individual character of the contested design.

77 The Board of Appeal stated, in paragraphs 126 and 127 of the contested decision that, in the present case, it was not necessary to assess the alleged lack of novelty or individual character of the contested design, being given that, first, the disclosure of an earlier design, under Article 7 of Regulation No 6/2002, had not been established and, secondly, that disclosure constituted a prerequisite for the application of Articles 5 and 6 of that regulation.

78 That finding of the Board of Appeal is exempt of any error of law. As is apparent from the case-law cited in paragraph 62 above, the assessment of Articles 5 and 6 of Regulation No 6/2002 can only be conducted to the extent that the disclosure of one or more earlier designs is demonstrated. Furthermore, as was found in paragraph 72 above, it was for the applicant for a declaration of invalidity, which contested the application of Article 8(3) of Regulation No 6/2002, to establish that disclosure. Thus, to the extent that the Board of Appeal found that no disclosure had been demonstrated by the applicant for a declaration of invalidity, it correctly considered that there was no need to carry out the assessment of the novelty and individual character of the contested design.

79 Under those circumstances, it must be found, as EUIPO submits, that the applicant's argument, which relates to the assessment of the novelty and individual character of the contested design, lacks, without doubt, relevance, since that issue is not part of the Board of Appeal's analysis which led it to conclude that the conditions for the application of Article 8(3) of Regulation No 6/2002 were met.

80 Consequently, the first part of the second plea in law must be rejected.

*The third plea in law, alleging infringement of Article 63(1) of Regulation No 6/2002*

81 By its third plea in law, the applicant alleges that the Board of Appeal infringed Article 63(1) of Regulation No 6/2002, in that it did not take into account, in the context of the assessment of the disclosure of earlier designs, certain well-known and/or undisputed facts as well as some information provided by it in this regard, in particular screenshots of a website and a reference to a judgment of the Court of Justice.

82 EUIPO and the intervener dispute the applicant's argument.

83 In the present case, the Board of Appeal found that the evidence provided by the applicant was not sufficient to establish the disclosure of the earlier designs before the date of filing of the application for registration of the contested design, within the meaning of Article 7(1) of Regulation No 6/2002.

84 In that regard, it should be borne in mind that, under Article 7(1) of Regulation No 6/2002, a design is deemed to have been made available to the public if it has been published following registration or otherwise, or exhibited, used in trade or otherwise disclosed, before the date on which the design for which protection is claimed has first been made available to the public, except where these events could not reasonably have become known in the normal course of business to specialist circles in the sector concerned operating within the European Union.

85 Article 63(1) of Regulation No 6/2002, whose breach is relied on in that plea, specifies that, 'in proceedings before it, [EUIPO] shall examine the facts of its own motion', 'however, in proceedings relating to a declaration of invalidity, [EUIPO] shall be restricted in this examination to the facts, evidence and arguments provided by the parties and the relief sought'.

86 First, the applicant claims that the Board of Appeal infringed Article 63(1) of Regulation No 6/2002, in that it did not take into account, when assessing the disclosure of the earlier designs, the fact that the interconnecting characteristics of the product to which the contested design is intended to be applied existed for decades before the date of filing of its application for registration. The applicant argues, in that regard, that, first, this is a well-known fact and, secondly, that fact was not disputed by the holder of that design before the Board of Appeal.

- 87 It should be borne in mind that the disclosure of an earlier design within the meaning of Article 7(1) of Regulation No 6/2002 does not, as such, constitute a fact within the meaning of Article 63(1) of Regulation No 6/2002, but the ‘result of a factual assessment’, EUIPO being required to examine all evidence submitted in order to establish whether it actually proves disclosure of the earlier design (judgment of 23 October 2018, *Cot bumper*, T-672/17, not published, EU:T:2018:707, paragraph 36).
- 88 Thus, as maintained by EUIPO, the disclosure of an earlier design cannot be considered to be a well-known fact which is not required to be demonstrated, even in the event that the products in which that design is incorporated or to which it applies would have been present on the market for a long time and would be generally known to the public.
- 89 On the contrary, according to case-law, it is essential that the adjudicating bodies of EUIPO have an image of the earlier design that makes it possible to see the appearance of the product in which the design is incorporated and to identify the earlier design precisely and with certainty, so that they may, in accordance with Articles 5 to 7 of Regulation No 6/2002, assess the novelty and individual character of the contested design and carry out a comparison of the designs at issue as part of that assessment. It is a prerequisite of an examination whether the contested design does in fact lack novelty or individual character that a specific and defined earlier design is available (judgment of 21 September 2017, *Easy Sanitary Solutions and EUIPO v Group Nivelles*, C-361/15 P and C-405/15 P, EU:C:2017:720, paragraph 64).
- 90 It is also important to point out that the evidence relied on in this regard must be capable of establishing to the requisite legal standard that the earlier design was actually disclosed to the public before the date of filing of the application for registration of the contested design (judgments of 21 June 2018, *Haverkamp IP v EUIPO – Sissel (Pebble beach surface pattern)*, T-228/16, not published, EU:T:2018:369, paragraph 27, and of 21 June 2018, *Haverkamp IP v EUIPO – Sissel (Foot mat)*, T-227/16, not published, EU:T:2018:370, paragraph 28). Likewise, the disclosure of an earlier design cannot be proved by means of probabilities or suppositions, but must be demonstrated by solid and objective evidence that proves effective disclosure of the earlier design on the market (see judgment of 27 February 2018, *Gramberg v EUIPO – Mahdavi Sabet (Case for a mobile telephone)*, T-166/15, EU:T:2018:100, paragraph 23 and the case-law cited).
- 91 Therefore, the applicant cannot criticise the Board of Appeal for having failed to consider, for the purposes of assessing the new and individual character of the contested design, that the disclosure of the earlier designs was established, in the present case, on the basis of well-known facts. In the light of the foregoing, it must be held that the Board of Appeal did not make an error of assessment, in that it based its findings concerning that disclosure on the factual assessment of the evidence submitted by the applicant in this regard.
- 92 For those same reasons, the disclosure of an earlier design cannot be demonstrated by the mere circumstance that the owner of the design does not contest it. In this regard, it should also be stated that, in accordance with case-law, EUIPO is entitled, inter alia in the context of assessing the disclosure of earlier designs, to arrive at a finding which is different from that sought by the parties, provided that that finding is based on an assessment of the facts and evidence presented by them (see, to that effect, judgment of 23 October 2018, *Cot bumper*, T-672/17, not published, EU:T:2018:707, paragraph 37).
- 93 Secondly, in that context, the applicant cannot validly rely on the fact that it had referred, before the Board of Appeal, to the judgment of 14 September 2010, *Lego Juris v OHIM* (C-48/09 P, EU:C:2010:516), dealing with a Lego brick which, in its view, predated the date of filing of the application for registration of the contested design and displayed the same features of interconnection as those displayed in that design. It is apparent from the EUIPO file that, in its observations of 1 February 2022, although the applicant had referred to that judgment in the context of the application of Article 8(1) of Regulation No 6/2002, this was, however, done without any explanation regarding the issue of the disclosure of the earlier designs or their identification. Such a reference, provided without the aim of demonstrating the disclosure of an earlier design and without any concrete identification of that earlier design, cannot be considered, within the meaning of the case-law cited in paragraphs 89 and 90 above, as being sufficient proof of that disclosure.

94 Thirdly, the Board of Appeal's findings cannot be called into question by the applicant's argument by which it underlines, by referring to the judgment of 20 October 2021, *JMS Sports v EUIPO – Intervention (Spiral hair tie)* (T-823/19, EU:T:2021:718), that screenshots of websites can serve as reliable proof of disclosure of an earlier design. As is apparent from paragraph 120 of the contested decision, the Board of Appeal did not refuse to consider screenshots of websites as sufficient proof of disclosure, but only mere links allowing access to those sites. What is more, the Board of Appeal itself stated that the applicant should have supplemented those links 'with additional evidence, such as a printout or a screenshot of the relevant information contained therein'. Thus, it must be stated that the Board of Appeal did not depart from the case-law relied on by the applicant.

95 In the light of the foregoing, it must be held that the applicant's arguments are not capable of demonstrating that, when assessing the disclosure of the earlier designs, the Board of Appeal infringed Article 63(1) of Regulation No 6/2002.

96 Consequently, the third plea must be rejected and therefore the action must be dismissed in its entirety.

### **Costs**

97 Under Article 134(1) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings.

98 Since a hearing was convened and the applicant has been unsuccessful, it must be ordered to pay the costs, in accordance with the forms of order sought by EUIPO and the intervener.

On those grounds,

THE GENERAL COURT (Third Chamber)

hereby:

- 1. Dismisses the action;**
- 2. Orders Delta Sport Handelskontor GmbH to pay the costs.**

Schalin

Škvařilová-Pelzl

Nõmm

Delivered in open court in Luxembourg on 24 January 2024.

V. Di Bucci

M. van der Woude

Registrar

President

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\* Language of the case: English.