

JUDGMENT OF THE COURT (Fourth Chamber)

20 October 2011 (*)

(Appeal – Regulation (EC) No 6/2002 – Articles 5, 6, 10 and 25(1)(d) – Community design – Registered Community design representing a circular promotional item – Prior Community design – Different overall impression – Degree of freedom of the designer – Informed user – Scope of review by the Courts – Distortion of the facts)

In Case C-281/10 P,

APPEAL under Article 56 of the Statute of the Court of Justice of the European Union, brought on 3 June 2010,

PepsiCo, Inc., established in New York (United States), represented by E. Armijo Chávarri, abogado, and V. von Bomhard, Rechtsanwältin,

appellant,

the other parties to the proceedings being:

Grupo Promer Mon Graphic SA, established in Sabadell (Spain), represented by R. Almaraz Palmero, abogada,

applicant at first instance,

Office for Harmonisation in the Internal Market (Trade Marks and Designs) (OHIM), represented by A. Folliard-Monguiral, acting as Agent,

defendant at first instance,

THE COURT (Fourth Chamber),

composed of J.-C. Bonichot, President of the Chamber, K. Schiemann, L. Bay Larsen, C. Toader (Rapporteur) and E. Jarašiūnas, Judges,

Advocate General: P. Mengozzi,

Registrar: A. Impellizzeri, Administrator,

having regard to the written procedure and further to the hearing on 10 March 2011,

after hearing the Opinion of the Advocate General at the sitting on 12 May 2011,

gives the following

Judgment

1 By its appeal, PepsiCo Inc. ('PepsiCo') seeks to have set aside the judgment of the General Court of the European Union of 18 March 2010 in Case T-9/07 *Grupo Promer Mon Graphic v OHIM – PepsiCo (Representation of a circular promotional item)* [2010] ECR II-0000 ('the judgment under appeal'), allowing the action brought by Grupo Promer Mon Graphic SA ('Grupo Promer') seeking annulment of the decision of the Third Board of Appeal of the Office for Harmonisation in the Internal Market (Trade Marks and Designs) ('OHIM') of 27 October 2006 (Case R 1001/2005-3) relating to invalidity proceedings between Grupo Promer and PepsiCo ('the contested decision').

Legal context

2 Article 4 of Council Regulation (EC) No 6/2002 of 12 December 2001 on Community designs (OJ 2002 L 3, p. 1) provides:

'1. A design shall be protected by a Community design to the extent that it is new and has individual character.

...'

3 Article 5 of Regulation No 6/2002 provides:

'1. A design shall be considered to be new if no identical design has been made available to the public:

- (a) in the case of an unregistered Community design, before the date on which the design for which protection is claimed has first been made available to the public;
- (b) in the case of a registered Community design, before the date of filing of the application for registration of the design for which protection is claimed, or, if priority is claimed, the date of priority.

2. Designs shall be deemed to be identical if their features differ only in immaterial details.'

4 Article 6 of that regulation reads as follows:

'1. A design shall be 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:

- (a) in the case of an unregistered Community design, before the date on which the design for which protection is claimed has first been made available to the public;
- (b) in the case of a registered Community design, before the date of filing the application for registration or, if a priority is claimed, the date of priority.

2. In assessing individual character, the degree of freedom of the designer in developing the design shall be taken into consideration.'

5 Article 10 of Regulation No 6/2002 provides:

'1. The scope of the protection conferred by a Community design shall include any design which does not produce on the informed user a different overall impression.

2. In assessing the scope of protection, the degree of freedom of the designer in developing his design shall be taken into consideration.’

6 Article 25 of that regulation provides:

‘1. A Community design may be declared invalid only in the following cases:

...

(b) if it does not fulfil the requirements of Articles 4 to 9;

...

(d) if the Community design is in conflict with a prior design which has been made available to the public after the date of filing of the application or, if a priority is claimed, the date of priority of the Community design, and which is protected from a date prior to the said date by a registered Community design or an application for such a design, or by a registered design right of a Member State, or by an application for such a right;

...

3. The grounds provided for in paragraph (1)(d), (e) and (f) may be invoked solely by the applicant for or holder of the earlier right.

...’

7 Article 52(1) of Regulation No 6/2002 provides that ‘[s]ubject to Article 25(2), (3), (4) and (5), any natural or legal person, as well as a public authority empowered to do so, may submit to [OHIM] an application for a declaration of invalidity of a registered Community design’.

8 Under Article 61(1) to (3) of Regulation No 6/2002:

‘1. Actions may be brought before the Court of Justice against decisions of the Boards of Appeal on appeals.

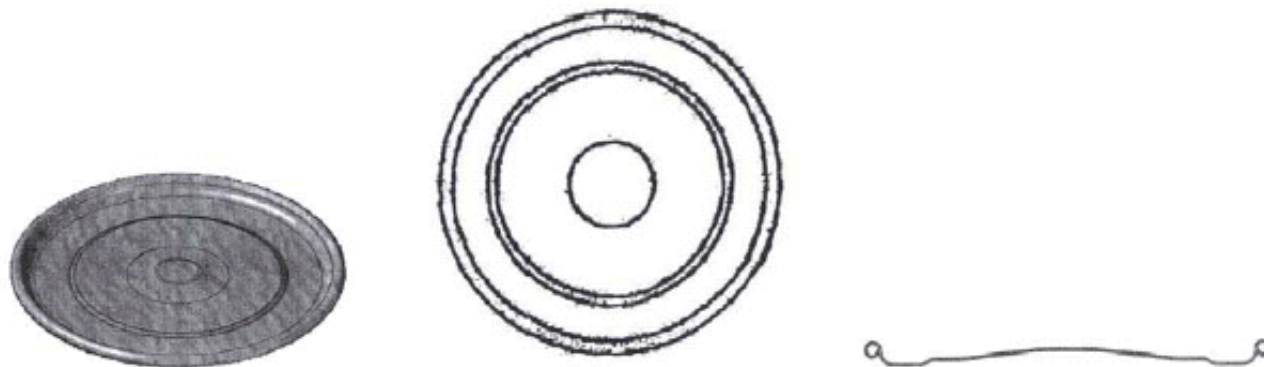
2. The action may be brought on grounds of lack of competence, infringement of an essential procedural requirement, infringement of the Treaty, of this Regulation or of any rule of law relating to their application or misuse of power.

3. The Court of Justice has jurisdiction to annul or to alter the contested decision.’

Background to the dispute and the contested decision

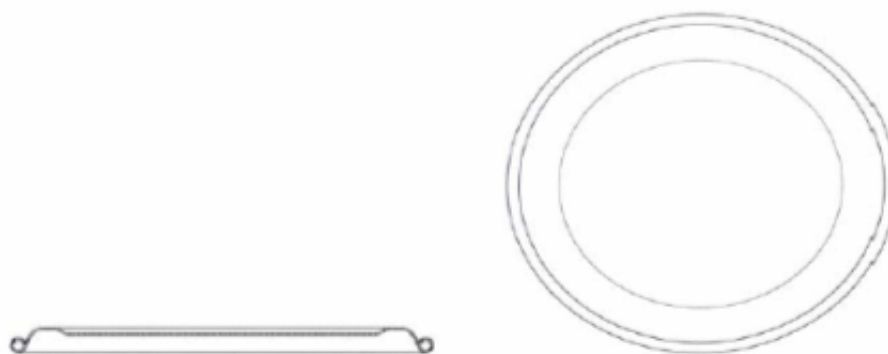
9 On 9 September 2003, PepsiCo filed an application for registration of a Community design at OHIM, based on Regulation No 6/2002. When the registration was applied for, priority was claimed for Spanish design No 157156, which had been filed on 23 July 2003 and the application for registration of which was published on 16 November 2003.

10 The Community design was registered by OHIM under number 74463–0001 for the following goods: ‘promotional item[s] for games’. It is represented as follows:



11 On 4 February 2004, Grupo Promer filed an application for a declaration of invalidity against design No 74463-0001 ('the contested design') pursuant to Article 52 of Regulation No 6/2002.

12 The application for a declaration of invalidity was based on registered Community design No 53186-0001 ('the prior design'), which has a filing date of 17 July 2003 and in respect of which priority is claimed for Spanish design No 157098, which was filed on 8 July 2003 and the application for registration of which was published on 1 November 2003. The prior design is registered for 'metal plate[s] for games'. It is represented as follows:



13 The grounds relied on in support of the application for a declaration of invalidity related to the lack of novelty and individual character of the contested design for the purposes of Article 25(1)(b) of Regulation No 6/2002 and to the existence of a prior right within the meaning of Article 25(1)(d) thereof.

14 By decision of 20 June 2005, the Invalidity Division of OHIM upheld the application for a declaration of invalidity of the contested design on the basis of Article 25(1)(d) of Regulation No 6/2002.

15 On 18 August 2005, PepsiCo filed a notice of appeal with OHIM against that decision of the Invalidity Division, pursuant to Articles 55 to 60 of Regulation No 6/2002.

16 By the contested decision, the Third Board of Appeal of OHIM ('the Board of Appeal') annulled that decision of the Invalidity Division and dismissed the application for a declaration of invalidity. After rejecting Grupo Promer's argument alleging bad faith on the part of PepsiCo, the Board of Appeal held, in essence, that the contested design was not in conflict with Grupo Promer's prior right and that the conditions set out in Article 25(1)(d) of Regulation No 6/2002 had not therefore been fulfilled.

17 In that connection, the Board of Appeal held that the goods covered by the designs at issue concerned a particular category of promotional items, namely ‘tazos’ or ‘rappers’, and that, consequently, the freedom of the designer of those promotional items was ‘severely constricted’. The Board of Appeal concluded that the difference in the profile of the designs at issue was sufficient for a finding that they produced a different overall impression on the informed user.

The proceedings before the General Court and the judgment under appeal

18 By application lodged at the Registry of the General Court on 9 January 2007, Grupo Promer brought an action against the contested decision, claiming that the decision should be annulled and OHIM and PepsiCo ordered to pay the costs.

19 In support of its action, Grupo Promer put forward three pleas in law, alleging, first, bad faith on the part of PepsiCo and a restrictive interpretation of Regulation No 6/2002, second, lack of novelty of the contested design and, third, breach of Article 25(1)(d) of Regulation No 6/2002.

20 By the judgment under appeal, the General Court rejected the first plea in law, upheld the third plea in law and therefore found that there was no need to consider the second plea in law.

21 The third plea in law was divided into four parts.

22 First, Grupo Promer contested the definition of the category of goods identified by the designs at issue as being that of ‘pogs’, ‘rappers’ or ‘tazos’, arguing that these were different goods. According to Grupo Promer, the Board of Appeal ought to have taken into consideration the general category of promotional items for games.

23 In this respect, at paragraph 60 of the judgment under appeal, the General Court concluded that the Board of Appeal had properly found that the product in question belonged, within the broad category of promotional items for games, to the particular category of game pieces known as ‘pogs’, ‘rappers’ or ‘tazos.’

24 Second, proceeding on the basis that the contested design relates to the general category of promotional items for games, Grupo Promer challenged the assessment made in the contested decision, according to which the freedom of the designer in developing the contested design had been ‘severely constricted’.

25 The General Court held, at paragraph 70 of the judgment under appeal, that the Board of Appeal had been correct to find that, on the date of priority claimed for the contested design, the designer’s freedom had been ‘severely restricted’, inter alia since he had to incorporate the common features of the goods in question in his design.

26 Third, according to Grupo Promer, the informed user was a child in the approximate age range of 5 to 10, and not a marketing manager as was stated in the contested decision. Such a marketing manager working in the food industry is not an end user and has a higher degree of expertise than a simple user.

27 In that respect, the General Court defined the concept of an informed user at paragraph 62 of the judgment under appeal and, at paragraphs 64 and 65 of that judgment, found that the Board of Appeal had been correct to find that, in the present case, it makes little difference whether the informed user is a child in the approximate age range of 5 to 10 or the marketing manager in a company that makes goods which are promoted by giving away ‘pogs’, ‘rappers’ or ‘tazos’, the

important point being that both those categories of person are familiar with the phenomenon of ‘rappers’.

- 28 Fourth, according to Grupo Promer, the designs at issue produced the same overall impression, since, contrary to the analysis carried out by the Board of Appeal in the contested decision, the differences in the profile of the designs at issue are not obvious, particular attention and careful observation of the disc being required in order to discover them.
- 29 On this issue, at paragraph 72 of the judgment under appeal, the General Court, taking into account the designer’s degree of freedom in developing the contested design, found – in a similar way to the Board of Appeal – that, in so far as similarities between the designs at issue relate to common features, those similarities have only minor importance in the overall impression produced by those designs on the informed user. In addition, the more the designer’s freedom in developing the contested design is restricted, the more likely it is that minor differences between the designs at issue will be sufficient to produce a different overall impression on the informed user.
- 30 The General Court then went on, at paragraphs 77 to 82 of the judgment under appeal, to identify five similarities between the two designs in conflict. The two designs were discs that are almost flat, with a concentric circle very close to the edge and a concentric circle approximately one third of the way from the edge to the centre; the rounded edge of the disc is raised in relation to the intermediate area of the disc between the edge and the raised central area; and the respective dimensions of the raised central part and the intermediate area of the disc, between the edge and the raised central part, are similar.
- 31 Having found that the first similarity was a feature common to the designs for the goods of the type of product at issue and that the second similarity might constitute a constraint linked to the safety requirements to which the designer is subject, the General Court held that those similarities would not be remembered by the informed user in the overall impression of the designs at issue.
- 32 By contrast, with regard to the last three similarities, the General Court found that these related to elements in respect of which the designer was free to develop the contested design, and that they would, therefore, attract the informed user’s attention, all the more so because the upper surfaces are, in the present case, the most visible surfaces for that user.
- 33 As regards the differences between the designs at issue, the General Court, at paragraph 83 of the judgment under appeal, found that, when viewed from above, the contested design has two additional concentric circles compared with the prior design and that, in profile, the two designs differ in that the contested design is more curved, though that curvature is still very slight.
- 34 However, the General Court held that the differences observed by the Board of Appeal were insufficient for the contested design to produce an overall impression on the informed user that differed from that produced by the prior design. Consequently, the General Court annulled the contested decision.

Forms of order sought by the parties before the Court of Justice

- 35 PepsiCo claims that the Court should:
- set aside the judgment under appeal;
 - give final judgment on the dispute by rejecting the order sought at first instance or, in the

alternative, refer the case back to the General Court; and

– order Grupo Promer to pay the costs.

36 OHIM requests the Court to uphold the appeal and to order Grupo Promer to pay the costs.

37 Grupo Promer contends that the Court should:

– dismiss the appeal as inadmissible and unfounded;

– order PepsiCo to pay the costs of the present appeal;

– order PepsiCo and OHIM to pay the costs incurred by Grupo Promer before the General Court; and

– order PepsiCo to pay the costs of the proceedings before OHIM.

The appeal

38 In support of its appeal, PepsiCo relies on a single ground of appeal, alleging breach of Article 25(1)(d) of Regulation No 6/2002. This ground of appeal consists of five parts, the first four of which concern various errors allegedly committed by the General Court in relation to (i) the constraints on the designer's freedom, (ii) the concept of the informed user and his attention level, (iii) the scope of the General Court's power of review, and (iv) whether it was possible to compare the goods rather than the contested designs, while the last part of the ground concerns (v) an alleged distortion of the facts.

The first part of the single ground of appeal, concerning the constraints on the designer's freedom

Arguments of the parties

39 PepsiCo submits that the three similarities observed by the General Court (central circular shape, raised edge, dimensions) are all due to the functions of and common to the products at issue, thereby limiting the designer's freedom. The General Court, however, failed to take into account those constraints when comparing the designs at issue. Finding the designs at issue similar on account of those precise common features means nothing less than granting exclusive rights to Grupo Promer for those common features, which does not correspond to the objective pursued by Article 25(1)(d) of Regulation No 6/2002.

40 OHIM submits that, even if features such as the shape of the flat disc or the curved central area are not dictated by a function or by statutory requirements, they are, however, dictated by market constraints, thereby limiting the designer's freedom.

41 The evidence on the file illustrates that the great majority – if not all – of the pogs existing on the date of priority of the contested design had a circular central bulge. The reason for this is that pogs with central bulges which are not circular could not be stacked with the vast majority of those having such a feature.

42 Grupo Promer contends that this part of the single ground of appeal is inadmissible in that it seeks to call into question findings of a factual nature made in the judgment under appeal.

Findings of the Court

- 43 It should be observed that, by the first part of its single ground of appeal, PepsiCo objects, essentially, that the General Court found that the central circular shape, the raised edge and the similar dimensions of the designs at issue were not the result of a constraint on the designer's freedom, whereas in actual fact those elements of similarity are necessary if the goods at issue are to fulfil their function. According to PepsiCo, that led the General Court to assess incorrectly the overall impression produced by each of the designs in conflict.
- 44 PepsiCo thus seeks to call into question findings of a factual nature made by the General Court, without proving that those facts were distorted, and without disputing either the relevance of the criteria for establishing the designer's degree of freedom in developing a design, as identified by the General Court in paragraph 67 of the judgment under appeal – namely, inter alia, the constraints of the features imposed by the technical function of the product or an element thereof or by statutory requirements applicable to the product – or the inferences drawn from them by the General Court in paragraph 72 of that judgment.
- 45 It is, however, settled case-law that the General Court has exclusive jurisdiction to find the facts, save where a substantive inaccuracy in its findings is attributable to the documents submitted to it, and to appraise those facts. That appraisal of the facts thus does not, save where the clear sense of the evidence has been distorted, constitute a point of law which is subject, as such, to review by the Court of Justice in an appeal (Case C-470/00 P *Parliament v Ripa di Meana and Others* [2004] ECR I-4167, paragraph 40 and case-law cited).
- 46 It must therefore be held that the first part of the single ground of appeal is inadmissible.

The second part of the single ground of appeal, concerning the concept of the 'informed user' and his level of attention

Arguments of the parties

- 47 PepsiCo submits that the General Court applied incorrect criteria when denying that the designs at issue conveyed a different overall impression on the 'informed user'. The 'informed user', it is argued, does not correspond to the average consumer who is reasonably well informed and reasonably observant and circumspect, as defined by trade mark law, or solely to the end user of the goods at issue.
- 48 In addition, the informed user must be assumed to be in a position to compare the designs side by side and, in contrast to the position in trade mark law, does not have to rely on an 'imperfect recollection'.
- 49 Had the General Court applied the correct criteria, it would have found that the informed user easily distinguished the designs at issue by reason of the two most significant differences between them, that is to say, first, the two additional concentric circles clearly visible on the surface of the contested design, and, second, the curved shape of the contested design as opposed to the complete flatness (apart from the brim) of the prior design.
- 50 In addition, PepsiCo submits that the informed user will not only consider the 'most visible surfaces' of a design and focus on 'easily perceived' elements (paragraph 83 of the judgment under appeal), but will have a chance to consider the design as a whole in more detail, and compare it to earlier designs, taking into account the designer's freedom.

51 OHIM also submits that the comparison should be based, not on the informed user's imperfect recollection, but on a direct comparison of the designs.

52 Grupo Promer contends that this part of the single ground of appeal also concerns a question of fact. It further contends that the General Court did not apply criteria concerning trade mark law such as the likelihood of confusion between the two conflicting designs at issue.

Findings of the Court

53 It should be noted, first, that Regulation No 6/2002 does not define the concept of the 'informed user'. However, as the Advocate General correctly observed in points 43 and 44 of his Opinion, that concept must be understood as lying somewhere between that of the average consumer, applicable in trade mark matters, who need not have any specific knowledge and who, as a rule, makes no direct comparison between the trade marks in conflict, and the sectoral expert, who is an expert with detailed technical expertise. Thus, the concept of the informed user may be understood as referring, not to a user of average attention, but to a particularly observant one, either because of his personal experience or his extensive knowledge of the sector in question.

54 It must be held that it is indeed that intermediate formulation that was adopted by the General Court in paragraph 62 of the judgment under appeal. This is, moreover, illustrated by the conclusion drawn from that formulation by the General Court in paragraph 64 of the judgment under appeal, in identifying the informed user relevant in the present case as capable of being a child in the approximate age range of 5 to 10 or a marketing manager in a company that makes goods which are promoted by giving away 'pogs', 'rappers' or 'tazos'.

55 Second, as the Advocate General observed in points 51 and 52 of his Opinion, it is true that the very nature of the informed user as defined above means that, when possible, he will make a direct comparison between the designs at issue. However, it cannot be ruled out that such a comparison may be impracticable or uncommon in the sector concerned, in particular because of specific circumstances or the characteristics of the devices which the designs at issue represent.

56 Therefore, the General Court cannot reasonably be criticised as having erred in law on the ground that it assessed the overall impression produced by the designs in conflict without starting from the premiss that an informed user would in all likelihood make a direct comparison of those designs.

57 That is true all the more so since, in the absence of any precise indications to that effect in the context of Regulation No 6/2002, the European Union legislature cannot be regarded as having intended to limit the assessment of potential designs to a direct comparison.

58 It follows that, even if the General Court's formulation – in paragraph 77 of the judgment under appeal – that 'that similarity would not be remembered by the informed user in the overall impression of the designs at issue' might indicate, when taken out of context, that the General Court based its reasoning on an indirect method of comparison based on an imperfect recollection, it does not reveal any error on the General Court's part.

59 Third, as regards the informed user's level of attention, it should be noted that, although the informed user is not the well-informed and reasonably observant and circumspect average consumer who normally perceives a design as a whole and does not proceed to analyse its various details (see, by analogy, Case C-342/97 *Lloyd Schuhfabrik Meyer* [1999] ECR I-3819, paragraphs 25 and 26), he is also not an expert or specialist capable of observing in detail the minimal differences that may exist between the designs in conflict. Thus, the qualifier 'informed' suggests that, without being a

designer or a technical expert, the user knows the various designs which exist in the sector concerned, possesses a certain degree of knowledge with regard to the features which those designs normally include, and, as a result of his interest in the products concerned, shows a relatively high degree of attention when he uses them.

- 60 Thus, the use of the words ‘easily perceived’ in paragraph 83 of the judgment under appeal must be understood in a broader context as simply providing clarification as to the greater degree of curvature displayed by the contested design. Since the General Court adopted a correct approach in defining the informed user, it cannot be inferred that the words used in paragraph 83 of the judgment under appeal, by themselves, mean that the informed user’s level of attention had been incorrectly assessed by the General Court.
- 61 In the light of the foregoing considerations, the second part of the single ground of appeal must be rejected as unfounded.

The third part of the single ground of appeal, concerning the scope of review by the Courts

Arguments of the parties

- 62 PepsiCo, referring to a recent judgment of the Court concerning plant varieties (Case C-38/09 P *Schröder v CPVO* [2010] ECR I-3209, paragraph 77), submits that the General Court’s minute examination of the differences and similarities between the designs at issue went beyond its task under Article 61(2) of Regulation No 6/2002. PepsiCo accordingly submits that the determination of whether or not there is a similar overall impression must be left to the Board of Appeal’s assessment.
- 63 OHIM also submits that, in refusing to restrict itself to a review of manifest errors of assessment, the General Court went beyond what Article 61 of Regulation No 6/2002 allows in Community design matters.
- 64 Grupo Promer contends that PepsiCo’s argument is unfounded. The Court’s findings in *Schröder v CPVO*, it argues, arose from the fact that that case concerned a complex technical examination, whereas the present case concerns the simple examination of designs in order to determine whether the contested design lacks individual character.

Findings of the Court

- 65 In the present case, it is common ground that the General Court carried out an in-depth examination of the designs at issue before annulling the Board of Appeal’s decision.
- 66 In that context, it should be recalled that the General Court has jurisdiction to conduct a full review of the legality of OHIM’s assessment of the particulars submitted by an applicant (see Case C-263/09 P *Edwin v OHIM* [2011] ECR I-0000, paragraph 52).
- 67 Admittedly, by analogy with the judgment in *Schröder v CPVO*, the General Court may afford OHIM some latitude, in particular where OHIM is called upon to perform highly technical assessments, and restrict itself, in terms of the scope of its review of the Board of Appeal’s decisions in industrial design matters, to an examination of manifest errors of assessment.
- 68 However, it must be observed that, in the specific circumstances of the present case, the General Court did not carry out a review of the contested decision which went beyond its power to alter decisions under Article 61 of Regulation No 6/2002.

69 Therefore, the third part of the single ground of appeal must be rejected as being unfounded.

The fourth part of the single ground of appeal, alleging that the review focused on the goods rather than on the designs at issue

Arguments of the parties

70 PepsiCo submits that it is mistaken to base the assessment of the designs in conflict on a comparison of samples of actual products submitted by the parties for illustration purposes. In particular, there is no need for OHIM, in such invalidity proceedings, to anticipate any potential parallel or future infringement actions based on the same earlier design and the more recent design as used in the marketplace.

71 Grupo Promer notes that the sample products were also examined by the Invalidity Division and by the Board of Appeal. Consequently, the General Court's assessment of all the evidence already on the file is a question of fact which cannot be advanced as a ground of appeal before the Court of Justice.

Findings of the Court

72 It should be observed that, in paragraph 83 of the judgment under appeal, the General Court stated that its assessment of the degree of curvature of the designs at issue is 'borne out by the goods actually marketed, as contained in OHIM's file forwarded to the Court'.

73 However, since in design matters the person making the comparison is an informed user who – as noted in paragraphs 53 and 59 above – is different from the ordinary average consumer, it is not mistaken, in the assessment of the overall impression of the designs at issue, to take account of the goods actually marketed which correspond to those designs.

74 In any event, it follows from the use of the verb 'to bear out' in paragraph 83 of the judgment under appeal that the General Court did indeed base its assessments on the designs in conflict as described and reproduced in the respective applications for registration, with the result that the comparison of the actual goods was used only for illustrative purposes in order to confirm the conclusions already drawn and cannot be regarded as forming the basis of the statement of reasons given in the judgment under appeal.

75 Accordingly, the fourth part of the single ground of appeal must be rejected as unfounded.

The fifth part of the single ground of appeal, alleging distortion of the facts

Arguments of the parties

76 PepsiCo, supported by OHIM, submits that there has been distortion of the facts by the General Court, since, in particular, it is unrealistic and contrary to general experience to assume that the informed user would limit his perceptions of the device at hand to the 'view from above'. In addition, even when the designs at issue are examined flat from above, the differences between them are, it is submitted, immediately perceptible.

77 Grupo Promer contends that alleging distortion of the facts without mentioning distortion of the assessment of evidence is not admissible as an argument justifying an appeal to the Court of Justice. That assessment of the facts and the evidence does not, save where they have been distorted, constitute a point of law which is subject, as such, to review by the Court of Justice on appeal.

Findings of the Court

- 78 The Court has already held that, given the exceptional nature of a complaint that there has been a distortion of the facts, Article 256 TFEU, Article 58, first paragraph, of the Statute of the Court of Justice of the European Union and Article 112(1)(c) of the Rules of Procedure of the Court provide, in particular, that an appellant must indicate precisely the evidence alleged to have been distorted by the General Court and show the errors of appraisal which, in its view, led to that distortion (see, to that effect, Joined Cases C-204/00 P, C-205/00 P, C-211/00 P, C-213/00 P, C-217/00 P and C-219/00 P *Aalborg Portland and Others v Commission* [2004] ECR I-123, paragraph 50).
- 79 Such distortion must be obvious from the documents on the Court's file, without there being any need to carry out a new assessment of the facts and evidence (Case C-16/06 P *Les Éditions Albert René v OHIM* [2008] ECR I-10053, paragraph 69 and the case-law cited).
- 80 In the present case, PepsiCo complains, essentially, that the General Court distorted the facts by comparing the designs at issue only with regard to their view 'from above', thereby overlooking the differences which are obvious when those designs are viewed in profile. In so doing, PepsiCo fails to indicate precisely which evidence was distorted by the General Court or to demonstrate the errors in analysis which, in its view, led to such distortion.
- 81 In those circumstances, it must be held that the arguments put forward by PepsiCo on this point do not satisfy the requirements laid down by the case-law referred to. The fifth part of the single ground of appeal must for that reason be rejected as being inadmissible.
- 82 Since PepsiCo has been unsuccessful in all the parts of its single ground of appeal, the appeal must be dismissed in its entirety.

Costs

- 83 Under Article 69(2) of the Rules of Procedure, applicable to the procedure on appeal pursuant to Article 118 of those Rules, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since Grupo Promer has applied for costs and PepsiCo has been unsuccessful, the latter must be ordered to pay the costs.

On those grounds, the Court (Fourth Chamber) hereby:

- 1. Dismisses the appeal;**
- 2. Orders PepsiCo Inc. to pay the costs.**

[Signatures]

* Language of the case: English.