

Judgment of the Court (Fourth Chamber) of 20 October 2011 — PepsiCo, Inc., v Grupo Promer Mon Graphic SA, Office for Harmonisation in the Internal Market (Trade Marks and Designs)

(Case C-281/10 P) ⁽¹⁾

(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)

(2011/C 362/12)

Language of the case: English

Parties

Appellant: PepsiCo, Inc., (represented by: E. Armijo Chávarri, abogado, and V. von Bomhard, Rechtsanwältin)

Other parties to the proceedings: Grupo Promer Mon Graphic SA (represented by: R. Almaraz Palmero, abogada), Office for Harmonisation in the Internal Market (Trade Marks and Designs) (represented by: A. Folliard-Monguiral, acting as Agent)

Re:

Appeal brought against the judgment of the General Court (Fifth Chamber) of 18 March 2010 in Case T-9/07 *Grupo Promer Mon Graphic v OHIM — Pepsico*, by which that Court upheld an action brought by the proprietor of Community design No 53186 1 against decision R 1001/2005-3 of the Third Board of Appeal of the Office for Harmonisation in the Internal Market (OHIM) of 27 October 2006, annulling the decision of the Invalidity Division which declared design No 74463 1 ('promotional item[s] for games') invalid

Operative part of the judgment

The Court:

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

⁽¹⁾ OJ C 234, 28.8.2010.

Judgment of the Court (Third Chamber) of 20 October 2011 — Freixenet SA v Office for Harmonisation in the Internal Market (Trade Marks and Designs)

(Joined Cases C-344/10 P and C-345/10 P) ⁽¹⁾

(Appeal — Applications for registration of Community trade marks representing a frosted white bottle and a frosted black matt bottle — Refusal to register — Lack of distinctive character)

(2011/C 362/13)

Language of the case: French

Parties

Appellant: Freixenet SA (represented by: F. de Visscher, E. Cornu and D. Moreau, avocats)

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

Re:

Appeal against the judgment of the General Court (Third Chamber) of 27 April 2010 in Case T-109/08 *Freixenet v OHIM*, by which that court dismissed the appellant's appeal against the decision of the First Board of Appeal of OHIM of 30 October 2007 (Case R 97/2001-1), concerning an application for registration of a sign representing a frosted white matt bottle as a Community trade mark — Infringement of Articles 7(1)(b), 73 and 38(3) of Council Regulation (EC) No 40/94 of 20 December 1993 on the Community trade mark (OJ 1994 L 11, p. 1) (now Articles 7(1)(b), 75 and 37(3) of Council Regulation (EC) No 207/2009 of 26 February on the Community trade mark (OJ 2009 L 78, p. 1)) — Infringement of the rights of the defence and the right to a fair hearing — Refusal to register a trade mark — Absence of distinctive character

Operative part of the judgment

The Court:

1. Sets aside the judgments of the General Court of the European Union of 27 April 2010 in Case T-109/08 *Freixenet v OHIM* (Frosted white bottle), and in Case T-110/08 *Freixenet v OHIM* (Frosted black matt bottle);
2. Annuls the decisions of the First Board of Appeal of the Office for Harmonisation in the Internal Market (Trade Marks and Designs) (OHIM) of 30 October 2007 (case R 97/2001-1) and of 20 November 2007 (Case R 104/2001-1);
3. Orders the Office for Harmonisation in the Internal Market (Trade Marks and Designs) (OHIM) to pay the costs both at first instance and in the appeals.

⁽¹⁾ OJ C 274, 9.10.2010.