



Reports of Cases

JUDGMENT OF THE GENERAL COURT (Second Chamber)

16 February 2017*

(Community design — Invalidity proceedings — Registered Community designs representing thermosiphons for radiators — Earlier designs — Plea of unlawfulness — Article 1(d) of Regulation (EC) No 216/96 — Article 41(1) of the Charter of Fundamental Rights — Principle of impartiality — Composition of the Board of Appeal — Ground for invalidity — No individual character — Article 6 and Article 25(1)(b) of Regulation (EC) No 6/2002 — Enforcement by EUIPO of a judgment setting aside a decision of one of its Boards of Appeal — Saturation of the state of the art — Date of assessment)

In Joined Cases T-828/14 and T-829/14,

Antrax It Srl, established in Resana (Italy), represented by L. Gazzola, lawyer,

applicant,

v

European Union Intellectual Property Office (EUIPO), represented initially by M. P. Bullock, and subsequently by L. Rampini and S. Di Natale, acting as Agent,

defendant,

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

Vasco Group NV, formerly Vasco Group BVBA, established in Dilsen (Belgium), represented by J. Haber, lawyer,

ACTION brought against the decision of the Third Board of Appeal of EUIPO of 10 October 2014 (Cases R 1272/2013-3 and R 1273/2013-3), relating to invalidity proceedings between Vasco Group BVBA and Antrax It,

THE GENERAL COURT (Second Chamber),

composed of S. Gervasoni, acting President of the Chamber, L. Madise and Z. Csehi (Rapporteur), Judges,

Registrar: A. Lamote, Administrator,

having regard to the applications lodged at the Court Registry on 29 December 2014,

having regard to the responses of EUIPO lodged at the Court Registry on 18 March 2015,

* * Language of the case: Italian

having regard to the response of the intervener lodged at the Court Registry on 7 April 2015,
having regard to the replies lodged at the Court Registry on 8 June 2015,
having regard to the decision of 5 August 2016 joining Cases T-828/14 and T-829/14 for the purposes of the oral procedure and of the decision which closes the proceedings,
further to the hearing on 4 October 2016,
gives the following

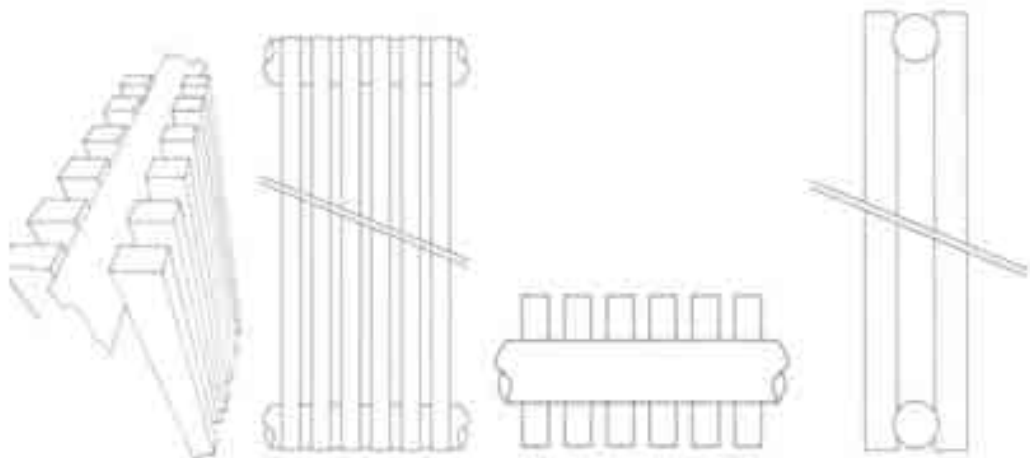
Judgment

Background to the dispute

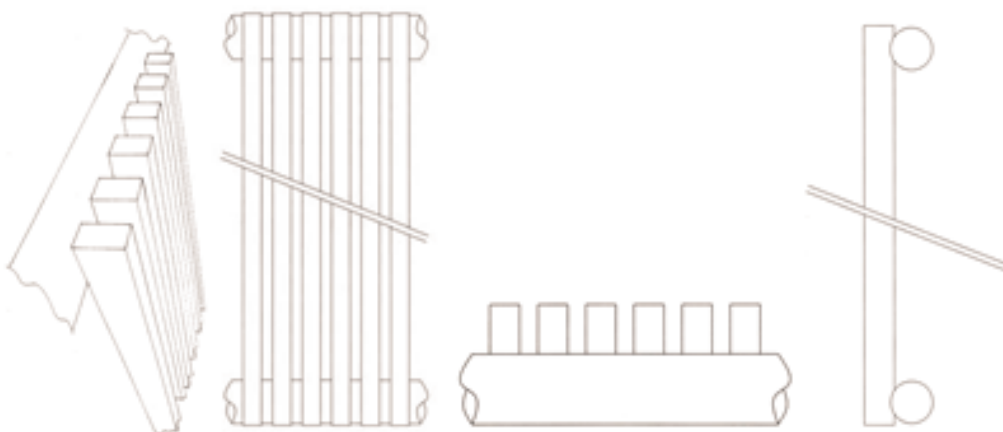
- 1 The applicant, Antrax It Srl, is the holder of two Community designs, No 000593959-0001 and No 000593959-0002, which were filed on 25 September 2006 at the European Union Intellectual Property Office (EUIPO) pursuant to Council Regulation (EC) No 6/2002 of 12 December 2001 on Community designs (OJ 2002 L 3, p. 1), and published in the *Community Designs Bulletin* on 21 November 2006.

2 The contested designs are represented as follows:

— design No 000593959-0001 (Case T-828/14):



— design No 000593959-0002 (Case T-829/14):

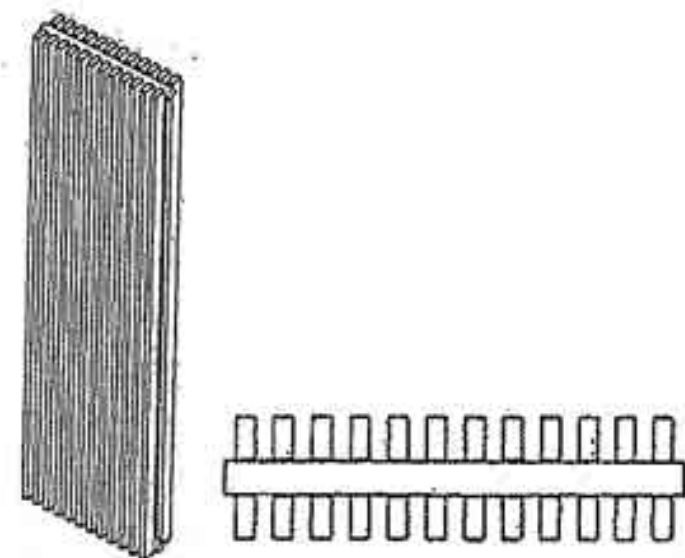


3 According to the actual wording of the applications for registration, all the contested designs were intended to be applied to thermosiphons ('modelli di termosifoni'), which were intended to be applied to 'radiators for heating' in Class 23.03 of the Locarno Agreement Establishing an International Classification for Industrial Designs of 8 October 1968, as amended.

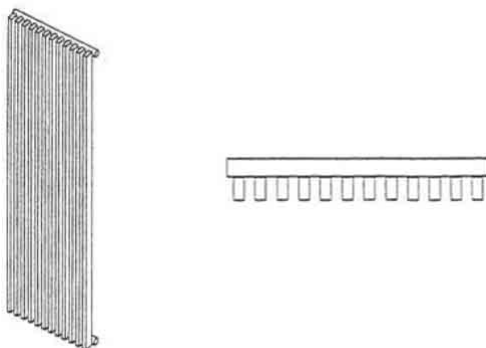
4 On 16 April 2008, the predecessor to Vasco Group NV, the intervener, filed before EUIPO applications for a declaration of invalidity of the contested designs, pursuant to Article 52 of Regulation No 6/2002. In support of its applications, the intervener relied on German designs bearing the numbers 4 and 5 respectively included in multiple registration No 40110481.8, which was published on 10 September 2002 and extended to France, Italy and the Benelux countries as an international design bearing the reference No DM/060899.

5 The earlier designs are represented as follows:

— earlier design No 5 (opposed to registration No 000593959-0001, corresponding to Case T-828/14):



— earlier design no 4 (opposed to registration No 000593959-0002, corresponding to Case T-829/14):



- 6 The ground relied on in support of those applications for a declaration of invalidity was that referred to in Article 25(1)(b) of Council Regulation No 6/2002, to the effect that the contested designs did not fulfil the requirements of Articles 4 to 9 thereof.
- 7 By decisions of 30 September 2009, the Cancellation Division declared the contested designs invalid on the ground of lack of novelty within the meaning of Article 5 of Regulation No 6/2002.
- 8 On 27 November 2009, the applicant filed a notice of appeal with EUIPO, pursuant to Articles 55 to 60 of Regulation No 6/2002, against the Cancellation Division's decisions.

- 9 By decisions of 2 November 2010 (Cases R 1451/2009-3 and R 1452/2009-3), the Third Board of Appeal of EUIPO annulled the Cancellation Division's decisions, in view of a failure to provide an adequate statement of reasons in respect of the ground for invalidity relating to the lack of novelty, and declared the contested designs invalid on the ground of lack of individual character within the meaning of Article 6 of Regulation No 6/2002.
- 10 On 11 February 2011, the applicant brought appeals against those decisions before the General Court.
- 11 By judgment of 13 November 2012, *Antrax It v OHIM (Radiators for heating)* (T-83/11 and T-84/11, 'the judgment of 13 November 2012', EU:T:2012:592), the General Court annulled the decisions of 2 November 2010 on the ground that the argument put forward by the applicant concerning the state of saturation of the reference sector had not been examined by the Board of Appeal. The General Court emphasised that any saturation of the state of the art resulting from the alleged existence of other thermosiphon or radiator designs having the same overall features as the designs at issue was relevant for the assessment of the individual character of the designs at issue, in that it might be liable to make an informed user more sensitive to the differences in the internal proportions of those different designs. Consequently, the General Court annulled the decisions of 2 November 2010 for failure to state reasons on the point of saturation of the state of the art.
- 12 Following the judgment of 13 November 2012 (T-83/11 and T-84/11, EU:T:2012:592), the cases were referred back to EUIPO and were given the new references R 1272/2013-3 and R 1273/2013-3 respectively. They were assigned to the Third Board of Appeal of EUIPO.
- 13 On 13 February 2014, the Rapporteur of the Third Board of Appeal in the two cases referred to in paragraph 12 above called on the parties to submit, within one month, their observations and evidence as to the existence or non-existence of saturation in the reference sector and the resulting overall impression of the designs in question for an informed user.
- 14 On 12 March 2014, the applicant submitted observations and evidence. The same day, the intervener submitted observations.
- 15 By decisions of 10 October 2014 ('the contested decisions'), the Third Board of Appeal dismissed the actions and declared the contested designs invalid.
- 16 The Board of Appeal considered that, pursuant to Article 61(6) of Regulation No 6/2002, it had to rule on the question of saturation of the reference sector or market, as the General Court, in its judgment of 13 November 2012 (T-83/11 and T-84/11, EU:T:2012:592), had considered that the question of saturation of the state of the art, which was capable of influencing the informed user's perception of the differences in the internal proportions of the designs at issue, had not been properly examined in the decisions annulled previously. The Board of Appeal took the view that it had to determine, on the basis of evidence and arguments presented by the parties, whether there was a situation of saturation in the reference sector arising from the existence of a multitude of other designs having the same overall features as the designs at issue (paragraphs 14, 17 to 19 and 25 of the contested decisions). The Board of Appeal held that, in the case before it, the sector to be so assessed was specifically that of thermosiphons and not heating equipment (paragraph 29 of the contested decisions).
- 17 The Board of Appeal considered in that regard that it was necessary for the party alleging saturation of the state of the art to present a clear, precise, coherent and current set of evidence (paragraphs 36, 41 and 50 of the contested decisions). Elle found, in essence, that the evidence adduced by the applicant in order to demonstrate the state of saturation of the reference sector was not exhaustive, poor in quality and ought to have been more coherent and more precise. It further observed that the catalogues annexed to the applicant's observations of 12 March 2014 did not bear a date or, in some cases, dated from 2004 and 2006 (paragraphs 41 to 46 of the contested decisions).

18 As regards the comparison of the conflicting designs, the Board of Appeal found, in essence, that their similarities in shape and arrangement of the thermosiphons and the radiant tubes outweighed the minimal differences in depth or internal proportions, respective distance between tubes and number of tubes, which required an attentive examination (paragraphs 52 to 62 of the contested decisions). The Board of Appeal went on to conclude that the contested designs lacked specific individual character within the meaning of Article 6 of Regulation No 6/2002, as the overall impression produced by them on an informed user was no different from that produced by the shape and aspect of the earlier designs (paragraph 64 of the contested decisions).

Forms of order sought

19 The applicant claims that the Court should:

- annul the contested decisions;
- consequently, declare the contested designs to be valid without referring the cases back to EUIPO;
- ‘declare the conflict between Article 1(d) of Regulation (EC) No 216/96 and Article 41 of the Charter of Fundamental Rights of the European Union’;
- order EUIPO and the intervener jointly and severally to pay the costs and order the intervener to pay the costs of the proceedings before EUIPO.

20 EUIPO contends that the Court should:

- dismiss the actions;
- order the applicant to pay the costs.

21 The intervener contends that the Court should:

- dismiss the actions and declare the contested designs invalid;
- order the applicant to pay the costs, including the costs of the proceedings before EUIPO.

Law

22 In support of its actions for annulment, the applicant puts forward, in essence, four pleas in law: (i) infringement of the obligation of impartiality by the Board of Appeal in the light of Article 41(1) of the Charter of Fundamental Rights of the European Union (‘the Charter’) and infringement of Commission Regulation (EC) No 216/96 of 5 February 1996 laying down the rules of procedure of the Boards of Appeal of [EUIPO] (OJ 1996 L 28, p. 11), as amended by Commission Regulation (EC) No 2082/2004 of 6 December 2004 (OJ 2004 L 360, p. 8); (ii) infringement of Article 6 and Article 61(6) of Regulation No 6/2002; (iii) in the alternative, infringement of Article 6 and Article 63(1) of that regulation and also of the principles of the protection of legitimate expectations, sound administration and equal treatment; and (iv) in the further alternative, infringement of Article 6 and the first sentence of Article 62 of the same regulation, concerning the obligation to state reasons.

23 At the hearing, the applicant put forward a plea alleging infringement by EUIPO of the principle that cases are to be dealt with within a reasonable time.

- 24 Under Article 48(1) of the General Court's Rules of Procedure, no new plea in law may be introduced in the course of proceedings unless it is based on matters of law or of fact which come to light in the course of the procedure. However, a submission or argument which may be regarded as amplifying a plea made previously, whether directly or by implication, in the original application, and which is closely connected therewith, will be declared admissible (see judgment of 30 May 2013, *Moselland v OHIM — Renta Siete (DIVINUS)*, T-214/10, not published, EU:T:2013:280, paragraph 69 and the case-law cited). In the present case, the applicant acknowledged before the Court that its plea alleging infringement of the principle that cases are to be dealt with within a reasonable time was not included in its application, which refers to Article 41 of the Charter only to allege infringement of the Board of Appeal's obligation of impartiality.
- 25 Accordingly, the plea based on the principle that cases are to be dealt with by EUIPO within a reasonable time must be dismissed as inadmissible, as EUIPO has argued.

First plea: infringement of Article 41(1) of the Charter and Regulation No 216/96

- 26 The applicant alleges, in essence, infringement of its right to have its affairs dealt with impartially, as provided for in Article 41(1) of the Charter, and infringement of Regulation No 216/96. As part of its first plea, the applicant also raises a plea of unlawfulness against Article 1(d) of Regulation No 216/96.
- 27 The General Court considers it appropriate to begin by examining the plea of unlawfulness.

The plea of unlawfulness

- 28 As a preliminary point, the applicant requests the General Court to assess and find that there is a conflict between Article 1(d) of Regulation (EC) No 216/96 and Article 41 of the Charter. That request, expressed in paragraphs 19 and 20 of the applications, is also found in the third head of claim under the applicant's forms of order sought.
- 29 EUIPO contends, in essence, that the applicant's request is inadmissible as being outside the General Court's jurisdiction and within solely the Court of Justice's jurisdiction.
- 30 It must be observed at the outset that Article 61(2) of Regulation No 6/2002 provides that actions before the General Court against decisions of the Boards of Appeal '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'. In the present case, it is apparent from the actions brought by the applicant that it criticises the Board of Appeal for having applied rules that are unlawful because of their incompatibility with the Charter which, under Article 6(1) TEU, has the same legal value as the treaties. Thus, without referring explicitly to Article 277 TFEU, the applicant raised a plea of unlawfulness within the meaning of that article, requesting that the General Court declare Article 1(d) of Regulation (EC) No 216/96 inapplicable to the present dispute (see, to that effect and by analogy, judgment of 12 July 2001, *Kik v OHIM*, T-120/99, EU:T:2001:189, paragraph 20).
- 31 According to the wording of Article 277 TFEU, the inapplicability of an act of general application adopted by an institution or body of the European Union may be relied upon, on the basis of the grounds set out in the second paragraph of Article 263 TFEU, before the Court of Justice of the European Union, including infringement of the Treaty. It is settled law that Article 277 TFEU expresses a general principle conferring upon any party to proceedings the right to challenge, for the purposes of obtaining the annulment of a decision of direct and individual concern to that party, the validity of previous acts of the institutions which form the legal basis of the decision under challenge, if that party was not entitled under Article 263 TFEU to bring a direct action challenging those acts and by which it was thus affected without having been in a position to seek to have them declared void

(judgment of 6 March 1979, *Simmenthal v Commission*, 92/78, EU:C:1979:53, paragraph 39). Consequently, the fact that Regulation No 6/2002 does not expressly mention the plea of unlawfulness as a collateral legal remedy which persons bringing actions may use before the General Court when seeking the annulment or alteration of a decision of a Board of Appeal of EUIPO does not mean that they cannot raise such a plea in those actions. That right is apparent from the general principle referred to above (see, to that effect and by analogy, judgment of 12 July 2001, *Kik v OHIM*, T-120/99, EU:T:2001:189, paragraph 21).

32 It should be observed that EUIPO's argument to the effect that only the Court of Justice has jurisdiction to declare acts contrary to EU law in fact arises from a confusion with the Court of Justice's exclusive jurisdiction to rule on requests for preliminary rulings on validity under the second paragraph of Article 267 TFEU. The present case, however, does not involve a question referred by a court of a Member State in the context of national proceedings.

33 Accordingly, EUIPO's argument that the applicant's request is inadmissible must be rejected.

34 Turning to the substance, the applicant submits that Article 1(d) of Regulation No 216/96, in not providing for the obligation to change the composition of the Board of Appeal when the action is referred back, following annulment of a decision, to the Chamber that ruled on it previously, is at odds with the obligation of impartiality as provided for in Article 41(1) of the Charter.

35 Article 41(1) of the Charter, concerning the right to sound administration, states, in paragraph 1, that '[e]very person has the right to have his or her affairs handled impartially, fairly and within a reasonable time by the institutions and bodies of the Union'.

36 Article 1(d) of Regulation No 216/96, as amended, is worded as follows:

'1. If ... the measures necessary to comply with a judgment of the Court of Justice [of the European Union] annulling all or part of a decision of a Board of Appeal or of the Grand Board include re-examination by the Boards of Appeal of the case which was the subject of that decision, the Presidium shall decide if the case shall be referred to the Board which adopted that decision, or to another Board, or to the Grand Board.

2. If the case is referred to another Board, that Board shall not comprise members who were party to the contested decision. This provision shall not apply if the case is referred to the Grand Board.'

37 There is nothing in that wording to indicate that, when the case is referred back to the Board of Appeal which previously adopted the annulled decision, there is an obligation for Presidium to structure the Board of Appeal so as to include none of the members who took part in the previous decision.

38 It must be remembered that proceedings before the Boards of Appeal of EUIPO are administrative and not judicial in nature (see judgment of 20 April 2005, *Krüger v OHIM — Calpis (CALPICO)*, T-273/02, EU:T:2005:134, paragraph 62 and the case-law cited).

39 The General Court has held that there is no rule of law or principle which prevents an administration from entrusting to the same officials re-examination of a case in compliance with a judgment annulling a decision, and that it cannot be stated as a general rule resulting from the obligation to be impartial that an administrative or judicial authority is bound to send the case back to a different authority or to a differently composed branch of that authority (see, to that effect, as regards examination by an administrative authority, judgment of 11 July 2007, *Schneider Electric v Commission*, T-351/03, EU:T:2007:212, paragraphs 185 to 188 and case-law of the European Court of Human Rights cited

and, as regards the composition of a court ruling on a case, judgment of 1 July 2008, *Chronopost and La Poste v UFEX and Others*, C-341/06 P and C-342/06 P, EU:C:2008:375, paragraphs 51 to 60 and case-law of the European Court of Human Rights cited).

- 40 Accordingly, the referral by the Presidium back to the same Chamber that ruled on it previously, pursuant to Article 1(d) of Regulation No 216/96 and without any obligation to compose that chamber differently, does not infringe the administration's obligation of impartiality under Article 41(1) of the Charter.
- 41 Accordingly, the applicant's plea of unlawfulness and, consequently, the applicant's third form of order sought, must be rejected.

Infringement of Regulation No 216/96 and of the Board of Appeal's obligation of impartiality

- 42 By its first plea, the applicant also alleges infringement of its right to have its affairs dealt with impartially, as provided for in Article 41(1) of the Charter and, implicitly, infringement of Regulation No 216/96. It submits, firstly, that the cases were referred back to the same Board of Appeal, which included in particular one member of the Board of Appeal that adopted the decisions annulled by the General Court; secondly, that the present cases ought to have been referred to an extended chamber, as allowed by EUIPO's rules; and, thirdly, that the Board of Appeal at the very least lacked subjective impartiality.
- 43 EUIPO and the intervener dispute those arguments. As regards the referral of the cases back to the Board of Appeal that had adopted the annulled decisions, in partly the same composition, EUIPO submits, firstly, that such a referral is a possibility provided for by Article 1(d) of Regulation (EC) No 216/96; next, that the applicant had not challenged the reassignment of the action to the same Board of Appeal before EUIPO; and, lastly, that it is only when the case is referred to another Board of Appeal that it will be composed in such a way as to include none of the members who took part in the annulled decision. EUIPO submits, with regard to the possibility of designating a Grand Board following an annulment pronounced by the General Court, that the conditions laid down in Article 1(b)(1) and (2) of were not met in the present case.
- 44 Firstly, the criticisms about the fact that the cases were referred by the Presidium to the same Board of Appeal, including one of the members of the Board of Appeal that adopted the decisions annulled by the General Court, must be rejected. As observed in paragraphs 36 and 37 above, as the Presidium decided to refer the cases back to the same Board of Appeal, it had no obligation under Regulation No 216/96 to establish a differently-composed Board of Appeal. It is also apparent from paragraphs 38 to 40 above that no infringement of the obligation of impartiality under Article 41(1) of the Charter can arise from the mere fact that cases have been referred to an entity comprised in part of the members who previously examined them.
- 45 Secondly, regarding the argument that the Presidium ought to have referred the cases to the Grand Board, it can be useful to recall the grounds on which the Presidium may refer to the Grand Board pursuant to Regulation No 216/96.
- 46 Article 1(b)(3) of Regulation No 216/96 provides that '[t]he Presidium may, on a proposal made by the President of the Boards of Appeal on his or her own initiative or at the request of a member of the Presidium, refer to the Grand Board a case allocated to a Board if it believes that this is justified by the legal difficulty or importance of the case or by special circumstances, for example, if Boards of Appeal have issued diverging decisions on a point of law raised by that case'. Article 1(b)(1) provides that a Board of Appeal may refer a case allocated to it to the Grand Board on the basis of the same criteria.

- 47 In the present case, it should be noted that, in the light of the combined wording of Article 1(b)(3) and Article 1(d) of Regulation No 216/96, referral to the Grand Board is left entirely to the discretion of the Presidium and that, in any event, the applicant has not put forward any arguments establishing that, in the present case, the conditions laid down in both Article 1(b)(3) and Article 1(b)(1) of that regulation justifying referral to the Grand Board were met. It merely emphasises the importance of the decision in the light of the General Court's observations and 'the legal difficulty', without providing any further explanation as to the alleged importance of the case. The fact that the judgment of 13 November 2012 (T-83/11 and T-84/11, EU:T:2012:592) annulled the decisions of 2 November 2010 on grounds of lack of statement of reasons on a point of reasoning relating to the saturation of the state of the art reveals no particular legal difficulty, importance of the case or special circumstance justifying a referral to a Grand Board. Consequently, without its being necessary to examine whether the alleged irregularity is liable to justify annulment of the contested decisions, there were, in any event, no grounds in the present case to justify referring the cases to a Grand Board.
- 48 Thirdly, regarding the argument concerning a supposed lack of subjective impartiality on the part of the Board of Appeal, the applicant has not put forward any argument alleging any personal partiality on the part of any members of the Board of Appeal.
- 49 Therefore, the first ground of appeal must be rejected.

The second plea: infringement of Article 6 and Article 61(6) of Regulation No 6/2002

- 50 By its second plea, the applicant seeks to demonstrate that the Board of Appeal erred in its assessment of the evidence of saturation of the state of the art and, therefore, of the individual character of the contested designs within the meaning of Article 6 of Regulation No 6/2002. In so doing, the Board of Appeal failed in its obligation to 'take the necessary measures to comply with' the judgment of 13 November 2012 (T-83/11 and T-84/11, EU:T:2012:592), as required by Article 61(6) of that regulation.
- 51 EUIPO and the intervener dispute those arguments.
- 52 It is apparent from the wording of Article 6(1)(b) of Regulation No 6/2002 that individual character must, in the case of a registered Community design, be assessed in the light of the overall impression it produces on the informed user. The overall impression produced on the informed user must be different from the one produced by any design made available to the public before the date on which the application for registration is filed or, if a priority is claimed, the date of priority. Article 6(2) of Regulation No 6/2002 states that in the assessment of individual character, the degree of freedom of the designer in developing the design is to be taken into consideration.
- 53 As evidenced by the case-law, the individual character of a design results from an overall impression of difference or lack of 'déjà vu', from the point of view of an informed user, in relation to any previous presence in the design corpus, without taking account of any differences that are insufficiently significant to affect that overall impression, even though they may be more than insignificant details, but taking account of differences that are sufficiently marked so as to produce dissimilar overall impressions (see judgment of 7 November 2013, *Budziewska v OHIM — Puma SE (Bounding feline)*, T-666/11, not published, EU:T:2013:584, paragraph 29 and the case-law cited).
- 54 In the assessment of the individual character of a design in relation to any previous presence in the design corpus, account must be taken of the nature of the product to which the design is applied or in which it is incorporated, in particular the industrial sector to which it belongs (recital 14 of Regulation No 6/2002), the degree of freedom of the designer in developing the design, whether there is saturation of the state of the art, which could be capable of making the informed user more attentive to the differences in the designs compared, and also the manner in which the product at issue is used,

in particular according to the manner in which it is normally handled when used (see judgment of 7 November 2013, *Bounding feline*, T-666/11, not published, EU:T:2013:584, paragraph 31 and the case-law cited).

- 55 Although saturation of the state of the art cannot be said to limit the freedom of the designer, it may, once proven, make the user more attentive to the differences of detail between the conflicting designs. Consequently, a design may, due to saturation of the state of the art, have individual character resulting from features which, in the absence of saturation, would not tend to give rise to a different overall impression for an informed user (see, to that effect, judgments of 12 March 2014, *Tubes Radiatori v OHIM — Antrax It (Radiator)*, T-315/12, not published, EU:T:2014:115, paragraph 87 and the case-law cited, and 29 October 2015, *Roca Sanitario v OHIM — Villeroy & Boch (Single control handle faucet)*, T-334/14, not published, EU:T:2015:817, paragraph 83).
- 56 In the assessment of the individual character of a design, account must also be taken of the point of view of an informed user. According to settled case-law, an informed user is a person who is particularly observant and who has some awareness of the previous state of the art, that is to say, the corpus of previous designs relating to the product in question that had been made available to the public on the date of filing of the contested design or the date of priority claimed (judgments of 18 March 2010, *Grupo Promer Mon Graphic v OHIM — PepsiCo (Representation of a circular promotional item)*, T-9/07, EU:T:2010:96, paragraph 62; 9 September 2011, *Kwang Yang Motor v OHIM — Honda Giken Kogyo (Internal combustion engine)*, T-11/08, not published, EU:T:2011:447, paragraph 23; and 6 June 2013, *Kastenholz v OHIM — Qwatchme (Watch dials)*, T-68/11, EU:T:2013:298, paragraph 57).
- 57 In the present case, the Board of Appeal defined the informed user as being someone who purchases radiators for heating in order to install them in their home and who, without being an expert in industrial design (as an architect or an interior decorator would be), is aware of what the market offers, fashion trends and the basic features of the product. The Board of Appeal found, correctly, that that definition had been upheld in paragraphs 41 and 42 of the judgment of 13 November 2012 (T-83/11 and T-84/11, EU:T:2012:592). That definition has not been challenged by the parties.
- 58 Moreover, the Board of Appeal found that, as there were no particular technical or regulatory constraints, the designer was free to choose from among a broad range of different shapes for tube cross-section and collector design. The Board of Appeal also found, correctly, that the finding that the degree of freedom of the designer had not been limited in the present case had been confirmed in paragraphs 46 to 52 of the judgment of 13 November 2012 (T-83/11 and T-84/11, EU:T:2012:592).
- 59 In support of its second plea, alleging errors by the Board of Appeal in its assessment of the evidence relating to saturation of the state of the art, the applicant submits, in essence, two complaints. By its first complaint, the applicant submits that the Board of Appeal erred as to when the assessment of the saturation of the state of the art is to be done, by taking the date of delivery of the contested decisions in October 2014 as the correct point in time, whereas it should have been assessed by reference to the time when the application for registration of the contested designs was filed, in September 2006. The Board of Appeal thus found, incorrectly, that the evidence of the saturation of the state of the art provided by the applicant in the attachments to its observations of 12 March 2014, which referred to the period of registration (between 2004 and 2006) was not ‘current’. Further evidence of that error is also apparent from the use of the present tense in the contested decisions and the various allusions to the ‘current’ situation of the reference sector.
- 60 EUIPO disputes the fact that the analysis of whether the sector was saturated had been carried out as at the date of the contested decisions. It further submits that, even if that were correct, given that the evidence provided was inadequate to establish that the sector was saturated on the date of the

contested decisions, *a fortiori* it was inadequate to prove the saturation of the state of the art at the time the application for registration of the contested designs was filed, given that it would be illogical to conclude that a sector previously considered saturated would have subsequently ceased to be so.

- 61 The Board of Appeal found that, given *inter alia* the judgment of 13 November 2012 (T-83/11 and T-84/11, EU:T:2012:592), the concept of saturation in the reference sector could not be alleged or, at first glance, summarily established in the present case, as had sometimes been the case previously. It found that, given the importance and relevance of the legal principle of saturation of the state of the art, and in order to determine the individual character of a particular design, it was necessary, for the party relying on it, namely the applicant, to present sufficiently clear, precise and coherent evidence. In paragraph 41 of the contested decisions, it added that that evidence also had to be ‘current’. It observed that it had set a new time limit for the parties to present their arguments and evidence on this point. It found, in particular, that the documents lodged by the applicant in the attachments to its observations of 12 March 2014, including the extracts from one of its catalogues, extracts from a catalogue of the intervener, extracts taken from five catalogues from other undertakings in the sector (Tubes, Tubor, The Radiator Company, Metalform and Rondra) and an image comparing a radiator manufactured in accordance with one of the contested designs and one of the earlier designs, was not exhaustive, since the catalogue extracts showed only a few radiators for heating proposed by only five manufacturers, without showing the entire range of products proposed by those manufacturers or by others. The Board of Appeal further noted the very poor quality of certain reproductions of radiators, with the result that it was not in a position to assess correctly their lines and contours, and deplored the fact that the images had been taken from catalogues and not design registrations. Lastly, the Board of Appeal stated, in paragraph 46 of the contested decisions, that the catalogues in question were not dated or, if they were, were from 2004 and 2006. The Board of Appeal added that proof of the high level of density in the reference sector ought to have consisted of more coherent and precise evidence, such as other catalogues and documentary evidence relating to the products proposed by a large number of competing undertakings, statements by sectoral experts, statements from manufacturers’ or consumers’ associations, catalogues and price lists from large-scale distributors operating in the reference sector and, lastly, surveys and sectoral studies conducted by third-party undertakings. The Board of Appeal went on to conclude that all of the documentation produced was insufficient to establish the degree of saturation of the state of the art, much less corroborate the applicant’s statement to the effect that the sector was saturated. The Board of Appeal added that some of the designs represented in the evidence provided were even visually different from the other examples provided by the applicant.
- 62 Regarding earlier decisions of EUIPO relevant to the issue of whether there is saturation in the sector in question, including, in particular, the decision of 17 April 2008 (Case R 976/2007-3), in which the same Board of Appeal had mentioned that it was ‘well known’ that the sector for radiators for heating (radiatori per riscaldamento) was saturated, the Board of Appeal found, in essence, that its earlier decision-making practice was sufficient indication only if corroborated by documentation showing, unequivocally, ‘the current situation’, which was not the case here.
- 63 In the first place, the case-law shows that it is by reference to the date on which the application for registration of the design is filed that the individual character of the contested design must be assessed under Article 6(1) of Regulation No 6/2002 and a determination made as to whether there is saturation of the state of the art (see, to that effect, judgment of 29 October 2015, *Single control handle faucet*, T-334/14, not published, EU:T:2015:817, paragraph 87).
- 64 In the present case, the Board of Appeal erred as to the date by which a determination is to be made as to whether there is saturation of the state of the art, as argued by the applicant. The Board of Appeal found, in paragraph 46 of the contested decisions, that those catalogues provided by the applicant that were dated ‘were from 2004 and 2006’ (the Italian version of the contested decisions reads as follows: ‘Infine, occorre anche sottolineare che i cataloghi in questione sono non datati, o che quando presentano data, essi corrispondono agli anni 2004 e 2006’), thereby indicating that those years were

not relevant for its determination of whether there was saturation of the state of the art. The 2006 catalogue, at the very least, corresponds to the year in which the contested designs were registered and was therefore relevant for determining whether there was saturation of the state of the art. Moreover, in paragraph 41 of the contested decisions, the Board of Appeal stated that ‘given the crucial nature of that factor [i.e., saturation of the state of the art], it could not be presumed and had to be determined in the light of a set of clear, precise, coherent and current evidence’, thereby indicating that it would examine the saturation of the state of the art at the time of the contested decisions. This is corroborated by paragraph 49 of the contested decisions, where the Board of Appeal stated the following:

‘... [t]he decisions [of 2007 and 2008] taken previously by [EUIPO] in relation to the saturation of the reference sector and relied on by the proprietor are not sufficient indication if they are not corroborated by documentation showing, unequivocally, the current situation ...’

- 65 The term ‘current situation’ cannot, in that context, be taken as referring to 2006.
- 66 Accordingly, in the light of the foregoing, the conclusion is that the Board of Appeal used the incorrect date in its assessment of the state of the art. Contrary to EUIPO’s submissions, taken together, the various references to the current situation set out in paragraph 64 above, the fact that the catalogues from 2004 and 2006 were found not to refer to the correct period and the use of the present tense in the relevant paragraphs of the contested decisions all constitute sufficient evidence to establish that there was such an error in the present case.
- 67 Moreover, EUIPO’s argument consisting, in essence, of maintaining that since the Board of Appeal found that as the sector was not saturated on the date of the contested decisions, nor could it have been eight years previously, as it would be illogical to find that a sector that had previously been saturated would subsequently cease to be so, must be rejected. Firstly, it is incorrect to state that the Board of Appeal found, in the contested decisions, that the reference sector was not saturated at the time of the contested decisions. It simply found that it had not been established to the requisite legal standard that there was saturation of the state of the art as at the date of the contested decisions. Secondly, that argument is based on a mere, unsubstantiated assertion; EUIPO has not demonstrated why saturation of the state of the art might not be liable to vary over a lengthy eight-year period.
- 68 However, the Board of Appeal’s error is not such as to entail annulment of the contested decisions.
- 69 Although it found, incorrectly, that the catalogues from 2004 and 2006 did not refer to years that were relevant for its assessment, the Board of Appeal nevertheless took the trouble to examine them and conclude that they were insufficient to make out proof of saturation of the state of the art, on the basis of other substantive factors. Thus it observed, in paragraph 40 of the contested decisions, that the extracts from the catalogues from 2004 (Tubor) and 2006 (The Radiator Company) were insufficient in terms of numbers of designs presented and did not show the entire range of products proposed by those manufacturers (two designs in the Tubor catalogue, three designs in The Radiator Company catalogue) and that the images from the 2006 catalogue from The Radiator Company (Volcano and Volcano Verticale designs) were of poor quality. Moreover, its finding that the extracts from catalogues proposed concerned only five manufacturers indeed took account of the catalogues from 2004 and 2006. The Board of Appeal found that the evidence should have consisted of more coherent and precise evidence, such as other catalogues and documentary evidence relating to the products proposed by a larger number of competing undertakings, statements by sectoral experts, statements from manufacturers’ or consumers’ associations, catalogues and price lists from large-scale distributors operating in the reference sector and, lastly, surveys and sectoral studies conducted by third-party undertakings, but that the applicant had presented only a few images taken from five catalogues from undertakings manufacturing radiators. Moreover, in paragraph 44 of the contested decisions, the Board of Appeal observed that some of the designs from the catalogues differed visually from the other examples provided, in particular certain ones in the 2006 catalogue from The Radiator

Company, thereby indicating that those examples were not relevant for establishing that there were designs very similar to those at issue and, therefore, a saturation of the state of the art. Those considerations, which relate to the insufficiency of the number and irrelevance of the evidence, are valid, including as regards a determination of whether there was saturation of the state of the art as at the date on which the application for registration of the contested designs was filed.

70 Consequently, the ultimate conclusion is that the Board of Appeal was correct in finding that the evidence concerning the relevant period for assessing the issue of saturation of the state of the art (in particular the 2006 evidence) was insufficient in number, quality and relevance.

71 Accordingly, the first complaint cannot succeed.

72 By its second complaint, the applicant submits that the Board of Appeal failed to take account of evidence about saturation of the market submitted previously by it in the proceedings before EUIPO which led to the decisions of 2 November 2010.

73 Firstly, it must be remembered that, following the judgment of 13 November 2012 (T-83/11 and T-84/11, EU:T:2012:592), the Rapporteur called on the parties to submit any evidence and observations they might have on the question of saturation of the state of the art. The applicant lodged observations and evidence on that question on 12 March 2014. That evidence, attached to the applicant's observations of 12 March 2014, is duly listed in paragraph 39 of the contested decisions. The Board of Appeal also referred to EUIPO's earlier decision-making practice on this point, in paragraphs 48 to 51 of the contested decisions.

74 It should be noted that the documents expressly referred to in the contested decisions were not the only ones examined by the Board of Appeal, inasmuch as paragraph 39 of the contested decisions begins with the wording '[i]n particular', which indicates that the following list of documents on saturation of the state of the art provided by the applicant was not exhaustive in nature and that the Board of Appeal's analysis was carried out on the basis of a larger set of documents. It should be noted in that regard that the Board of Appeal is not required to provide an account which follows exhaustively and one by one all the arguments put forward by the parties to the case, and the reasoning may therefore be implicit, on condition that it enables the persons concerned to know why the Board of Appeal has not upheld their arguments and provides the competent court with sufficient material for it to exercise its power of review (see, by analogy, judgment of 9 July 2008, *Reber v OHIM — Chocladefabriken Lindt & Sprüngli (Mozart)*, T-304/06, EU:T:2008:268, paragraph 55 and the case-law cited).

75 Secondly, all of the evidence of saturation of the state of the art submitted by the applicant was considered insufficient to establish that there was saturation of the state of the art in the sector concerned, as evidenced by paragraph 41 of the contested decisions.

76 Thirdly, the evidence attached to the applicant's observations of 3 September 2008 in the form of photos of E.CO.TERM, Cordivari, and Runtal radiators do not change the finding in the contested decisions that it was insufficient. They were a few photos of radiators, spread out over a mere three pages. The only photo showing six intermingled (and not very visible) Cordivari radiators is from 1997, nine years before the point when saturation of the state of the art should be assessed, and shows radiators, four of which do not share the same overall characteristics as the designs at issue. The same holds true for the six photos of Runtal radiators, two of which are very dissimilar to those at issue here. Furthermore, those photos are not dated or, if the reference to the price list is taken as a date, they are in any event from 2000. The applicant's observations of 6 August 2009 do not contain any argument establishing that any evidence therein shows that there is saturation of the state of the art. Accordingly, the conclusion is that the applicant has not shown which evidence of saturation of the state of the art was omitted in the assessment that was so relevant and decisive that it would have changed the Board of Appeal's position.

77 Therefore, the second complaint and, accordingly, the second plea in its entirety must be rejected.

The third and fourth pleas, put forward in the alternative: infringement of Article 6 and Article 63(1) of Regulation No 6/2002, of the principles of the protection of legitimate expectations, sound administration and equal treatment, and infringement of Article 6 and the first sentence of Article 62 of Regulation No 6/2002, as regards EUIPO's obligation to state reasons for its decisions

78 By its third and fourth pleas, put forward in the alternative, the applicant complains, in essence, that the Board of Appeal departed from its own earlier decision of 17 April 2008 (Case R 976/2007-3), presented as evidence by the applicant, a decision in which the Board of Appeal had found that it was 'well known' that the market for radiators for heating was saturated. By its fourth plea, put forward in the further alternative, the applicant criticises the statement of reasons for that reversal, given in paragraph 51 of the contested decisions, as being overly brief.

79 EUIPO and the intervener dispute those arguments.

80 In the present case, in paragraphs 48 and 49 of the contested decisions, the Board of Appeal found that, notwithstanding the Cancellation Division's findings in a decision of 12 April 2007, and those of the Board of Appeal in the decision of 17 April 2008 (Case R 976/2007-3), referred to by the applicant, the documentation presented by the applicant could not be held to be sufficient for the purposes of demonstrating that, in the circumstances, the reference sector was so saturated that an informed user would pay considerable attention to the differences between the designs compared. The Board of Appeal found that EUIPO's earlier decisions on saturation of the reference sector was not a sufficient indication when not corroborated by documentation showing, unequivocally, the current situation, about which no assumptions could be made, as a finding of saturation of the state of the art could not simply be found to be 'well known'. In paragraph 50 of the contested decisions, the Board of Appeal observed that, given the importance of the concept of saturation of the state of the art, in particular in the context of the present case, it was absolutely necessary that the proprietor present a set of sufficiently clear, precise and coherent evidence, not merely a few photos taken from catalogues or, as in the present case, a mere reference to earlier EUIPO or Board of Appeal decisions. In paragraph 51 of the contested decisions, the Board of Appeal observed that the legitimacy of decisions taken by EUIPO had to be assessed solely on the basis of Regulation No 6/2002 as interpreted by the European Union courts, not on the basis of any earlier decision-making practice by EUIPO. The Board of Appeal went on to note that, in the light of the principles of equal treatment and sound administration, EUIPO of course had to take account of decisions taken on similar applications and consider with especial care whether it should decide in the same way, but the application of those principles nevertheless had to observe also the principle of lawfulness. Thus, the proprietor of a contested design could not rely on any unlawful act committed at the expense of others in order to obtain an identical decision; a thorough examination had to be conducted in each specific case.

81 The Court finds it appropriate to examine the fourth plea first, alleging infringement of the obligation to state the reasons on which the decision is based.

– Infringement of the obligation to state reasons

82 It should be recalled that, under the first sentence of Article 62 of Regulation No 6/2002, decisions of EUIPO must state the reasons on which they are based. That duty to state reasons has the same scope as that under Article 296 TFEU, pursuant to which the reasoning of the author of the act must be shown clearly and unequivocally. That duty has two purposes: to allow interested parties to know the justification for the measure taken so as to enable them to protect their rights and to enable the Courts of the European Union to exercise their power to review the legality of the decision (see, by analogy, judgment of 12 July 2012, *Gucci v OHIM — Chang Qing Qing (GUDDY)*, T-389/11, not published, EU:T:2012:378, paragraph 16 and the case-law cited).

83 In the judgment of 13 November 2012 (T-83/11 and T-84/11, EU:T:2012:592), the General Court held that the Board of Appeal had failed to provide a statement of reasons addressing the applicant's arguments about saturation of the state of the art, if only to reject them as unproven (judgment of 13 November 2012, T-83/11 and T-84/11, EU:T:2012:592, paragraphs 79, 87, 97 to 99).

84 Following that judgment, before the Board of Appeal, the applicant, inter alia in its observations of 12 March 2014, relied on the earlier decisions of the Cancellation Division of 12 April 2007 and the Third Board of Appeal of 17 April 2008 which both found that it was 'well known' that the market for radiators for heating was saturated.

85 In the light of paragraphs 48 to 51 of the contested decisions referred to in paragraph 80 above, it is clear that, contrary to the applicant's assertions, the contested decisions do contain a sufficient statement of reasons as to why the Board of Appeal decided not to find that it was 'well known' that the market for radiators for heating was saturated, contrary to the earlier EUIPO decisions. In paragraphs 48 and 49 of the contested decisions, the Board of Appeal explained that EUIPO's earlier decisions relied on could have been sufficient indication only if corroborated by documentation showing, unequivocally, 'the current situation', about which no assumptions could be made, as a finding of saturation of the state of the art could not simply be found to be 'well known'. Although the reference to the current situation shows an error as to the date of assessment to be taken into account, the statement of reasons shows clearly that the Board of Appeal decided that its earlier decision-making practice had to be corroborated by evidence relating to the date on which the saturation of the state of the art had to be assessed. Moreover, in paragraphs 51 and 52 of the contested decisions, the Board of Appeal referred to settled case-law to the effect that EUIPO is not bound by its decision-making practice and that the application of the principles of equal treatment and sound administration must be reconciled with the principle of lawfulness, with each specific case having to be examined thoroughly. It is clear from that statement of reasons that the Board of Appeal took the view that it should depart from its findings made in earlier decisions, which were not sufficiently substantiated or possibly vitiated by unlawfulness. The question whether those reasons are relevant goes to the analysis of the merits of the contested decisions.

86 The applicant's assertion to the effect that the contested decisions do not indicate which circumstances would establish whether the market is not or is no longer saturated is ineffective, as the Board of Appeal, in the contested decisions, sets out other grounds explaining why it did not reach the same conclusion as in earlier EUIPO decisions.

87 It follows from the foregoing that the plea alleging infringement of the obligation to state reasons is unfounded.

– Alleged infringement of Article 63(1) of Regulation No 6/2002 and of the principles of the protection of legitimate expectations, equal treatment and sound administration

88 The applicant criticises the Board of Appeal for not having applied in the present case the finding made in its earlier decision of 17 April 2008 (Case R 976/2007-3), to the effect that it was 'well known' that the market for radiators for heating was saturated. The applicant submits that the fact that the Board of Appeal departed from such an earlier finding of fact constitutes an infringement of Article 63(1) of Regulation No 6/2002, of the principle of the protection of legitimate expectations and of the principles of equal treatment and sound administration. The applicant relies inter alia on the case-law according to which, in the light of the latter two abovementioned principles, EUIPO must, when dealing with a registration application, take into consideration decisions taken earlier on similar applications and consider with especial care whether it should decide in the same way. The applicant takes the view that, in the light of those obligations, the Board of Appeal could not change

its mind about a question of fact such as saturation of the market, unless there had been circumstances had arisen justifying such a reversal, circumstances that it did not, in any event, explain.

- 89 EUIPO and the intervener dispute those arguments. EUIPO submits that the judgment of 12 March 2014, *Radiator* (T-315/12, not published, EU:T:2014:115, paragraph 87) that imposed an evidence-based requirement to demonstrate saturation of the state of the art and ruled out presuming saturation of the reference sector or considering it simply to be a well-known fact, as it had done in earlier decisions.
- 90 As a preliminary point, the General Court observes that, contrary to EUIPO's assertions, the judgment of 12 March 2014, *Radiator* (T-315/12, not published EU:T:2014:115), did not lay down an evidence-based requirement of demonstration of saturation and did not preclude its being considered simply 'well known'. The allusion, in paragraph 87 of that judgment, to the fact that saturation of the state of the art, once proven, may be liable to make an informed user more sensitive to differences of detail in the designs at issue, did not preclude the Board of Appeal from finding that it was well known the state of the art was saturated. A 'proven' fact means merely that an act has been recognised as being true and accurate. Facts which are well known are those which are 'likely to be known by anyone or which may be learnt from generally accessible sources' (judgment of 22 June 2004, *Ruiz-Picasso and Others v OHIM — DaimlerChrysler (PICARO)*, T-185/02, EU:T:2004:189, paragraph 29). A well-known fact is thus one that is sufficiently known to be true so that it is not necessary to prove it.
- 91 Next, it must be remembered that Article 63(1) of Regulation No 6/2002 provides that '[i]n proceedings before it, [EUIPO] shall examine the facts', but that '... 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'. That provision is a statement of the duty of diligence, under which the relevant institution is required to examine carefully and impartially all the relevant factual and legal aspects of the case in question (see, by analogy, judgment of 15 July 2011, *Zino Davidoff v OHIM — Kleinakis kai SIA (GOOD LIFE)*, T-108/08, EU:T:2011:391, paragraph 19 and the case-law cited).
- 92 In the present case, the applicant has failed to establish how the failure to apply the fact that it was 'well known' that the reference sector was saturated gives rise to an infringement of that provision, inasmuch as that provision merely sets out the factors to be examined by EUIPO and does not predetermine the outcome of that examination. The fact that its final position is not the one advocated by the applicant is in no way an infringement of Article 63(1) of Regulation No 6/2002.
- 93 As regards the complaint alleging infringement of the principles of the principle of the protection of legitimate expectations, equal treatment and sound administration, it is settled case-law that the decisions concerning registration of a sign as an EU trade mark which the Boards of Appeal of EUIPO are led to take under Council Regulation No 207/2009 of 26 February 2009 on the [EU] trade mark (OJ 2009, L 78, p. 1) are adopted in the exercise of circumscribed powers and are not a matter of discretion. Accordingly, the legality of those decisions must be assessed solely on the basis of that regulation and not on the basis of a previous decision-making practice (judgment of 26 April 2007, *Alcon v OHIM*, C-412/05 P, EU:C:2007:252, paragraph 65, and 24 November 2005, *Sadas v OHIM — LTJ Diffusion (ARTHUR et FELICIE)*, T-346/04, EU:T:2005:420, paragraph 71). The Court of Justice has held that, in the light of the principles of equal treatment and sound administration, EUIPO must, when examining an application for registration of an EU trade mark, take into account the decisions already taken in respect of similar applications and consider with especial care whether it should decide in the same way. It added, however, that the way in which the principles of equal treatment and sound administration are applied must be consistent with respect for legality. Consequently, the person who seeks registration of a sign as a trade mark cannot rely, to his own benefit, on any unlawful act committed in favour of another in order to obtain an identical decision. Moreover, for reasons of legal certainty and, indeed, of sound administration, the examination of any trade mark

application must be stringent and comprehensive, in order to prevent trade marks being improperly registered. That examination must be undertaken in each individual case. The registration of a sign as a mark depends on specific criteria, which are applicable in the factual circumstances of the particular case and the purpose of which is to ascertain whether the sign at issue is caught by a ground for refusal (judgment of 10 March 2011, *Agencja Wydawnicza Technopol v OHIM*, C-51/10 P, EU:C:2011:139, paragraphs 74 to 77). That case-law, referred to in paragraph 51 of the contested decisions, is applicable by analogy to the treatment of applications for a declaration of invalidity of designs.

- 94 Regarding more specifically the criticism directed against the Board of Appeal for having suddenly, in paragraph 35 of the contested decisions, raised the level of proof of saturation of the market in relation to what it required in the past, when it was no longer possible for the applicant to submit new evidence, suffice it to observe that, contrary to the applicant's assertions, it had ample opportunity to lodge evidence and observations on the saturation of the state of the art following the judgment of 13 November 2012 (T-83/11 and T-84/11, EU:T:2012:592), as the Rapporteur called on the parties to do so following that judgment from the General Court, which the applicant did on 12 March 2014. The Board of Appeal therefore did not, in any event, undermine the principle of the protection of legitimate expectations.
- 95 Therefore, the third and fourth pleas must be rejected, as must the actions in their entirety.

Costs

- 96 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.
- 97 Since the applicant has been unsuccessful, it must be ordered to pay the costs incurred by EUIPO and the intervener, in accordance with the forms of order sought by them.
- 98 The intervener has also claimed that the applicant should be ordered to pay the costs incurred by the intervener in the administrative proceedings before EUIPO. In that regard, it must be borne in mind that, pursuant to Article 190(2) of the Rules of Procedure, costs necessarily incurred by the parties for the purposes of the proceedings before the Board of Appeal are to be regarded as recoverable costs. However, that is not the case with regard to the costs incurred for the purposes of proceedings before the Cancellation Division. Accordingly, the intervener's request that the applicant, having been unsuccessful, be ordered to pay the costs of the administrative proceedings before EUIPO can be allowed only as regards the costs necessarily incurred by the intervener for the purposes of the proceedings before the Board of Appeal (see, to that effect, judgment of 12 January 2006, *Devinlec v OHIM — TIME ART (QUANTUM)*, T-147/03, EU:T:2006:10, paragraph 115). That order applies only to the proceedings R 1272/2013-3 and R 1273/2013-3 before the Board of Appeal.

On those grounds,

THE GENERAL COURT (Second Chamber)

hereby:

- 1. Dismisses the appeals;**
- 2. Orders Antrax It Sarl to bear its own costs and to pay those incurred by the European Union Intellectual Property Office (EUIPO) and Vasco Group, including those incurred by Vasco Group NV for the proceedings before the Board of Appeal in Cases R 1272/2013-3 and R 1273/2013-3.**

Gervasoni

Madise

Csehi

Delivered in open court in Luxembourg on 16 February 2017.

[Signatures]