



Reports of Cases

JUDGMENT OF THE GENERAL COURT (First Chamber)

13 June 2017*

(Community design — Invalidity proceedings — Registered Community design representing three cans — Earlier design — Ground for invalidity — Individual character — Different overall impression — Article 6 and Article 25(1)(b) of Regulation (EC) No 6/2002 — Group of articles constituting a single unit — Scope of the description of the registered Community design — Obligation to state reasons — Replacement of a party to the proceedings)

In Case T-9/15,

Ball Beverage Packaging Europe Ltd, established in Luton (United Kingdom), represented by A. Renck, lawyer, authorised to replace Ball Europe GmbH,

applicant,

v

European Union Intellectual Property Office (EUIPO), represented by S. Hanne, acting as Agent,

defendant,

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

Crown Hellas Can SA, established in Athens (Greece), represented by N. Coulson and J. Koepp, Solicitors,

ACTION brought against the decision of the Third Board of Appeal of EUIPO of 8 September 2014 (Case R 1408/2012-3), relating to invalidity proceedings between Crown Hellas Can and Ball Europe,

THE GENERAL COURT (First Chamber),

composed of H. Kanninen, President, E. Buttigieg (Rapporteur) and L. Calvo-Sotelo Ibáñez-Martín, Judges,

Registrar: A. Lamote, Administrator,

having regard to the application lodged at the Court Registry on 9 January 2015,

having regard to the response of EUIPO lodged at the Court Registry on 20 April 2015,

having regard to the response of the intervener lodged at the Court Registry on 16 April 2015,

* Language of the case: German.

having regard to the reply lodged at the Court Registry on 10 July 2015,

having regard to the rejoinder lodged at the Court Registry on 14 October 2015,

having regard to the application for replacement of a party, under Article 174 of the Rules of Procedure of the General Court, lodged by the applicant at the Court Registry on 27 October 2016 and the observations of EUIPO and Ball Europe lodged at the Court Registry respectively on 2 and 18 November 2016,

having regard to Article 174 and Article 176(3) and (5) of the Rules of Procedure,

further to the hearing on 28 October 2016,

gives the following

Judgment

Background to the dispute

- 1 Ball Europe GmbH is the holder of the Community design registered under number 2309900006 on 24 September 2004 with respect to '[beverage] cans'. The contested design is represented as follows:



- 2 In the context of the application for registration of the contested design with the European Intellectual Property Office (EUIPO), Ball Europe claimed the priority of two German designs of 27 March 2004 and of 27 April 2004, respectively.
- 3 The application for registration of the contested design was made in Germany and Ball Europe had indicated English as the second language, in accordance with Article 98(2) of Council Regulation (EC) No 6/2002 of 12 December 2001 on Community designs (OJ 2002 L 3, p. 1).
- 4 In the part of the official application for registration form reserved for describing the design for which registration was sought, Ball Europe had entered the following text in English:

'Group of cans for drink, all having a sleek but high appearance with reduced neck, preferably made of thin sheet metal, especially for filling volumes of 250 ml, 300 ml or 330 ml, respectively.'
- 5 On 14 February 2011, the intervener, Crown Hellas Can SA, filed an application for a declaration of invalidity of the contested design with EUIPO. It invoked Article 25(1)(b) of Regulation No 6/2002 as a ground for invalidity in so far as the contested design was not new for the purposes of Article 5 of that regulation and did not have individual character for the purposes of Article 6 of that regulation.

- 6 The intervener, in particular, contended that the contested design was identical with the three cans reproduced below, which had been disclosed to the public before the priority date of the contested design:



- 7 By decision of 8 June 2012, the Cancellation Division rejected the application for a declaration of invalidity of the contested design on the ground that the latter had the required novelty and individual character.

- 8 On 30 July 2012, the intervener appealed under Articles 55 to 60 of Regulation No 6/2002 against the decision of the Cancellation Division.
- 9 By decision of 8 September 2014 ('the contested decision'), the Third Board of Appeal of EUIPO annulled the decision of the Cancellation Division and declared the contested design invalid on the ground that it had no individual character within the meaning of Article 6 of Regulation No 6/2002. It did not rule on the novelty of that design.
- 10 The Board of Appeal examined the matter to be protected by the contested design and concluded that it consisted in the appearance of an individual can represented in three different sizes. Invoking Article 98(1) of Regulation No 6/2002, it refused to take into consideration the description in English of the contested design, included in the application for registration, on the ground that that description had not been made in the language of application chosen by Ball Europe.
- 11 Moreover, in the context of the assessment of the individual character of the contested design, the Board of Appeal, in essence, concluded that the differences between the contested design and the earlier designs were insignificant and had no impact on the overall impression of the informed user who, in the present case, had been defined as persons who, in the drinks industry, are responsible for bottling.

Forms of order sought

- 12 Ball Europe claims that the Court should:
- annul the contested decision;
 - order EUIPO and the intervener to pay the costs.
- 13 EUIPO contends that the Court should:
- dismiss the application;
 - order Ball Europe to pay the costs.
- 14 The intervener contends that the Court should:
- uphold the contested decision;
 - order Ball Europe to pay the costs incurred in the context of the present action, the proceedings before the Cancellation Division and the proceedings before the Board of Appeal.

Law

- 15 The parties having been heard, it is necessary to admit Ball Beverage Packaging Europe Ltd to replace Ball Europe, in accordance with Article 176(3) of the Rules of Procedure of the General Court.
- 16 It should also be noted that, under Article 176(5) of the Rules of Procedure, if the application for replacement is granted, the successor to the party who is replaced must accept the case as he finds it at the time of that replacement. He is bound by the procedural documents lodged by the party who he replaces.

- 17 The applicant, Ball Beverage Packaging Europe, raises two pleas in law, the first alleging an infringement of the first sentence of Article 62 of Regulation No 6/2002, relating to the obligation to state reasons and the second an infringement of the combined provisions of Article 25(1)(b) and Article 6 of that regulation.
- 18 In response to a question put by the Court during the hearing, the applicant claimed that, in paragraph 21 of the application, a third plea in law was also implicitly set out and alleged an infringement of the rights of the defence in so far as the Board of Appeal should have given it the possibility to take a position on the question relating to the definition of the subject matter of the protection afforded by the contested design, a question which was addressed for the first time in the contested decision. EUIPO and the intervener contested that that paragraph contains an independent plea in law alleging an infringement of the rights of the defence and contended that, in so far as they did not interpret that paragraph in that way, they were unable to submit observations on that alleged plea in law.
- 19 Under Article 44(1)(c) of the Rules of Procedure of the General Court of 2 May 1991, the application must state the subject matter of the dispute and a summary of the pleas in law on which the application is based.
- 20 It is apparent from the case-law that the summary of the pleas in law must be sufficiently clear and precise to enable the defendant to prepare his defence and the Court to rule on the action, even without any other information (see judgment of 13 June 2012, *Insula v Commission*, T-246/09, not published, EU:T:2012:287, paragraph 221 and the case-law cited). It follows therefrom that the meaning and scope of a plea in law raised in support of an action must be unambiguously apparent from the application (judgment of 13 June 2012, *Insula v Commission*, T-246/09, not published, EU:T:2012:287, paragraph 262).
- 21 In the present case, the applicant puts forward clearly, in the application, the two pleas in law set out in paragraph 17 above. Moreover, it must be noted that, in paragraph 21 of the application, the applicant complains that the Board of Appeal amended the subject matter of the protection afforded by the contested design ‘although that matter had not been brought before it’. Furthermore, in paragraph 19 of the application, the applicant concluded that the Board of Appeal’s observations relating to the registrability of the contested design in the light of Article 3(a) of Regulation No 6/2002 are irrelevant in so far as the parties did not take a position on that issue, as is required by the second sentence of Article 62 of Regulation No 6/2002. Nevertheless, it cannot be concluded from those claims that the applicant puts forward an independent plea in law alleging an infringement of its rights of defence. That plea in law is not expressly put forward, as was admitted by the applicant at the hearing, and was not sufficiently developed. Neither the structure and titles used in the application, nor the part thereof entitled ‘Summary of the pleas in law’, nor the rest of its contents demonstrate that the applicant raised an independent plea in law alleging an infringement of its rights of defence. In particular, it should be noted that paragraphs 19 and 21 of the application were placed under the heading ‘*Obiter dictum* concerning Article 3(a) of Regulation [No 6/2002]’ and that the contents of the part of the application placed under that heading clearly highlights two arguments, the first alleging that the Board of Appeal’s findings relating to the registrability of the contested design were irrelevant and the second alleging that the latter had incorrectly defined the subject matter of the protection afforded by that design. Moreover, neither EUIPO nor the intervener understood that the abovementioned claims made in paragraphs 19 and 21 of the application contained a plea in law alleging an infringement of rights of the defence, so that those parties failed to respond to that plea in law in their pleadings.
- 22 In those circumstances, it must be concluded that the plea in law alleging an infringement of the rights of the defence, allegedly set out in the application, does not fulfil the requirements imposed by Article 44(1)(c) of the Rules of Procedure of 2 May 1991 as interpreted by the case-law, with the result that it must be dismissed as inadmissible.

The plea in law alleging infringement of the first sentence of Article 62 of Regulation No 6/2002

- 23 The applicant claims that the Board of Appeal's assertion, in paragraph 34 of the contested decision, that the informed user knew the usual sizes of beverage cans and does not attach importance to the different sizes thereof, is vitiated by a failure to state reasons, since no reasons are provided in support thereof. According to the applicant, that assertion was decisive in the context of the contested decision, since it led the Board of Appeal to declare the contested design invalid and, consequently, the lack of reasoning in that regard constituted an infringement of the obligation to state reasons set out in the first sentence of Article 62 of Regulation No 6/2002.
- 24 At the hearing, the applicant also complained that the Board of Appeal failed to 'take into account' an article in a specialist journal and other documents submitted during the administrative procedure which show the importance attached by the informed user to the different sizes of the beverage cans. The failure to 'take into account' that evidence also constitutes a failure to state reasons.
- 25 EUIPO and the intervener contend that the present plea in law is unfounded.
- 26 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 obligation 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, and its purpose is twofold: first, to enable the persons concerned to ascertain the reasons for the measure taken in order to defend their rights and, second, to enable the European Union Courts to exercise their power to review the legality of the decision. However, the Boards of Appeal cannot be required to provide an account that follows exhaustively and one by one all the lines of reasoning articulated by the parties before them. The reasoning may therefore be implicit, on condition that it enables the persons concerned to know the reasons for the Board of Appeal's decision and provides the competent Court with sufficient material for it to exercise its power of review (judgments of 25 April 2013, *Bell & Ross v OHIM — KIN (Wristwatch)*, T-80/10, not published, EU:T:2013:214, paragraph 37, and of 18 November 2015, *Liu v OHIM — DSN Marketing (Case for a portable computer)*, T-813/14, not published, EU:T:2015:868, paragraph 15).
- 27 Moreover, it should be noted that the obligation to give reasons for decisions is an essential procedural requirement, as distinct from the question whether the reasons given are correct, which goes to the substantive legality of the contested measure. The reasoning of a decision consists in a formal statement of the grounds on which that decision is based. If those grounds contain errors, those errors will affect the substantive legality of the decision, but not the statement of reasons in it, which may be adequate even though it sets out reasons which are incorrect (see judgment of 25 April 2013, *Wristwatch case*, T-80/10, not published, EU:T:2013:214, paragraph 38 and the case-law cited).
- 28 In the present case, in paragraph 34 of the contested decision, in the context of the assessment of the overall impression produced by the contested design on the informed user for the purposes of Article 6(1) of Regulation No 6/2002, the Board of Appeal stated the following:
- 'The differences between the proportions claimed by the holder are not noticeable. The height/width ratio is approximately identical in the designs being compared. Even if the informed user noticed the differences between the proportions, those differences would not have an impact on the overall impression. Even the representation of [the contested design] in three different sizes does not substantiate a relevant difference. The informed user knew the usual capacities for beverage cans and does not attach importance to the differences in sizes thereof in the overall impression.'
- 29 The findings set out in paragraph 34 of the contested decision and read also in the context of that decision are not vitiated by a defective statement of reasons.

- 30 In paragraph 25 of the contested decision, the Board of Appeal defined the informed user as the person, in the drinks industry, who is responsible for bottling the beverages and who obtained information about relevant offers by means inter alia of specialised journals.
- 31 In paragraph 27 of the contested decision, the Board of Appeal found that the capacity of the beverage cans did not usually exceed 500 ml, that that capacity corresponded to the normal quantities used in business for the sale of drinks and that that capacity affected the size of the cans.
- 32 Finally, in paragraph 37 of the contested decision, the Board of Appeal stated that neither the actual dimensions nor the capacity could be deduced from the contested design and that, for the purposes of assessing the individual character, solely the overall impression produced by the designs being compared was relevant.
- 33 In the light, first, of the finding of standardisation relating to the capacity of beverage cans, secondly, of the statement that the capacity affects the size of cans, thirdly, of the statement that the informed user in the present case was defined as the bottler and, fourthly, of the findings that neither the actual dimensions nor the capacity could be deduced from the contested design and according to which only the overall impression is relevant, the Board of Appeal's assertion, made in the last sentence of paragraph 34 of the contested decision, that the informed user knew the usual capacities for beverage cans and does not attach importance to the differences in sizes thereof in the overall impression, is supported by reasons to the requisite legal standard.
- 34 Moreover, contrary to the applicant's argument, the findings in paragraph 34 of the contested decision were general in nature and were not decisive for the conclusion reached by the Board of Appeal. That conclusion was based on the finding that the overall impression produced by the contested design on the informed user did not differ from the overall impression produced on that user by the earlier designs, since the Board of Appeal noted at the outset, in particular, that the differences in the design of the neck and the base of the cans were insignificant (paragraph 33 of the contested decision), that the differences between the proportions invoked by the applicant were not noticeable, that the height/width ratio was almost identical (paragraph 34 of the contested decision) and that neither the dimensions nor the capacity could be deduced from the contested design (paragraph 37 of the contested decision).
- 35 In so far as the applicant also claims that the findings in paragraph 34 of the contested decision are wrong, it should be noted that that complaint concerns not the reasoning but the substance of the dispute and will be examined in the context of the assessment of the second plea in law.
- 36 It is necessary, finally, to reject the applicant's complaint, invoked at the hearing, relating to Board of Appeal's failure to 'take into account' a certain number of documents submitted during the administrative procedure (see paragraph 24 above). With regard to the article in a specialist journal, which is sufficiently identified by the applicant in its argument, it must be noted that the Board of Appeal expressly refers to that article in the second indent of paragraph 6 of the contested decision, in the context of the presentation of the applicant's arguments during the administrative procedure. Moreover, in so far as that article sought to highlight the difference between the diameter of the 'sleek' can placed on the market by the applicant and the already existing cans, additional explanations relating to that article were not necessary for the purpose of providing reasons for the contested decision, in the light, in particular, of the finding, in paragraph 34 of that decision, according to which the differences between the proportions of the designs being compared were not noticeable and the finding, in paragraph 37 of that decision, according to which neither the dimensions nor the capacity could be deduced from the contested design.
- 37 On the basis of the foregoing considerations, it is, therefore, necessary to reject the present plea in law as unfounded.

The plea in law, alleging an infringement of the combined provisions of Article 25(1)(a) and Article 6 of Regulation No 6/2002

38 The present plea in law is essentially divided into two parts.

39 The first part alleges that the Board of Appeal incorrectly assessed the scope of the protection conferred by the contested design, in so far as it refused to find that the latter represented a group of three cans of different sizes, that is to say, a unitary object.

40 The second part alleges that the Board of Appeal incorrectly assessed the individual character of the contested design.

The first part of the plea in law, alleging an incorrect assessment of the scope of protection afforded by the contested design

41 It should be noted that, in the contested decision, the Board of Appeal defined, first of all, the subject matter of the protection afforded by the contested design. In that context, it stated that, under Article 3(a) of Regulation No 6/2002, the subject matter of a design could only be a unitary object and that the combination of several unconnected products could be assessed as one article only on condition that those products are linked by aesthetic and functional complementarity and are usually marketed as a unitary product. By way of example, it referred to table cutlery consisting of a knife, a fork and a spoon, and to a set consisting of a chess board and chess pieces.

42 The Board of Appeal considered that, in the present case, the contested design did not satisfy those conditions and could not be considered to be a unitary object in the form of a group of three cans, but that, for the purposes of assessing the novelty and individual character of that design, it was necessary to use as a basis the appearance of the individual can represented in three different sizes.

43 Moreover, relying on Article 98(1) of Regulation No 6/2002, the Board of Appeal refused to take into account the description in English of the contested design, in the context of the application for registration, on the ground that that description had not been produced in the language of the application chosen by the applicant.

44 The applicant raises three complaints regarding the analysis of the Board of Appeal at issue.

45 In the first place, the applicant complains that the Board of Appeal refused to protect the contested design as a group of cans despite the fact that it had been registered as such.

46 In the second place, the applicant contests the Board of Appeal's finding that the contested design did not constitute 'a product' for the purposes of Article 3(a) of Regulation No 6/2002.

47 In the third place, the applicant complains that the Board of Appeal failed to take into account the description in English of the contested design.

48 EUIPO and the intervener dispute the merits of those complaints.

49 As regards the applicant's first complaint, it is necessary to examine, first of all, the basis of its argument that the contested design had been registered as a group of cans. In that regard, the applicant claims that it follows from correspondence exchanged between itself and EUIPO during the process of registration of the contested design that EUIPO had agreed to register that design as a group of cans.

- 50 As is apparent from the case file, by letter of 18 November 2004, EUIPO informed the applicant, during the registration process, that the contested design, as reproduced in the application for registration, contained more than one design. EUIPO requested the applicant to rectify ‘those shortcomings’ by 18 January 2005, otherwise the application for application would be dismissed.
- 51 By letter dated 14 December 2004, the applicant requested that the objection of EUIPO be withdrawn in so far as the three cans represented in the contested design formed a group and constituted therefore a unitary design.
- 52 Following that letter, the contested design was finally registered as ‘[beverage] cans’, as is apparent from its certificate of registration.
- 53 It follows from those facts that it is possible that the applicant’s application relating to the registration of the contested design as a group of cans was taken into account, although that is not certain.
- 54 Nevertheless, even assuming that EUIPO decided during the registration process to register the contested design as a group of cans, that position does not bind the Board of Appeal in the context of the application for a declaration of invalidity of that design.
- 55 It should be noted that the procedure for the registration of Community designs established by Regulation No 6/2002 consists of an essentially formal, expeditious check, which, as indicated in recital 18 of that regulation, does not require any substantive examination as to compliance with the requirements for protection prior to registration, and which, unlike the registration procedure under Council Regulation (EC) No 207/2009 of 26 February 2009 on the Community trade mark (OJ 2009 L 78, p. 1), does not provide for any stage during which the holder of an earlier registered design can oppose registration (judgments of 16 February 2012, *Celaya Empananza y Galdos International*, C-488/10, EU:C:2012:88, paragraphs 41 and 43, and of 27 June 2013, *Beifa Group v OHIM — Schwan-Stabilo Schwanhäußler (Instruments for writing)*, T-608/11, not published, EU:T:2013:334, paragraph 77).
- 56 In the present case, the Board of Appeal was requested to carry out a substantive examination of the registration of the contested design in order to determine whether the latter satisfies the condition set out in Article 6 of Regulation No 6/2002, relating to individual character. In the context of that examination, the Board of Appeal was required to assess the overall impression produced by the designs being compared on the informed user. The issue of the definition of the subject matter of the protection afforded by the contested design was a preliminary question which needed to be decided since it was clearly connected with the overall impression and, ultimately, with the assessment of individual character. It follows that, in so far as the definition of the subject matter of the protection afforded by the contested design was part of the substantive examination of the registration of that design, a possible position on the part of EUIPO on that question during the registration process could not bind the Board of Appeal in the light of the essentially formal and expeditious nature of the review carried out by EUIPO during that registration process.
- 57 Moreover, it should be noted that the refusal by the Board of Appeal to define the subject matter of the protection afforded by the contested design as a group of cans did not lead to an unlawful questioning of the validity of the contested design, as the applicant alleges. In paragraph 19 of the contested decision, the Board of Appeal, while considering that the contested design failed to satisfy the conditions set out in Article 3(a) of Regulation No 6/2002, in so far as it did not constitute a unitary object, correctly stated that, to the extent that the intervener had not put forward the ground for invalidity of Article 25(1)(a) of Regulation No 6/2002, that fact (namely, the failure to satisfy the conditions set out in Article 3(a) of Regulation No 6/2002) could not justify the invalidity of the contested design.

- 58 It follows that the applicant's first complaint must be rejected as ineffective in so far as, even assuming that EUIPO agreed to register the contested design as a group of cans, that position would not bind the Board of Appeal.
- 59 In the context of the second complaint raised by the applicant, it is necessary to assess the justification for the refusal by the Board of Appeal to define the contested design as a group of cans or, in other words, to regard the three cans of different sizes represented in the contested design as a unitary object. The importance for the applicant of the definition of the contested design as a group of cans consists in the fact that the earlier designs invoked by the intervener did not represent groups of cans but a single can. Therefore, the definition of the contested design as a group of cans would amount to an element of differentiation between that design and the earlier designs, as, moreover, the Cancellation Division had mentioned in paragraph 17 of its decision of 8 June 2012.
- 60 As the Board of Appeal correctly notes in paragraph 18 of the contested decision, the subject matter of a design may only be a unitary object, since Article 3(a) of Regulation No 6/2002 refers expressly to the appearance of 'a product'. Moreover, the Board of Appeal correctly stated, in paragraph 18 of the contested decision, that a group of articles may constitute 'a product' within the meaning of the abovementioned provision if they are linked by aesthetic and functional complementarity and are usually marketed as a unitary product.
- 61 Proceeding from that premiss, which is not contested by the parties, the Board of Appeal concluded, in paragraph 19 of the contested decision, that the contested design did not satisfy the three conditions set out in paragraph 60 above and that, consequently, it could not be perceived as a unitary object. According to the Board of Appeal, when groups of beverage cans are offered, they always consist of cans of the same size, which is understandable, inter alia, in the light of transport and storage.
- 62 The Board of Appeal's conclusion relating, in the present case, to the lack of a unitary object is also not vitiated by error. Irrespective of the way beverage cans are marketed, it is clear that the three cans represented in the contested design do not perform a common function in the sense of a function which cannot be performed by each of them individually as is the case, for example, of table cutlery or a chess board and chess pieces, invoked by the Board of Appeal (see, to that effect, judgment of 25 October 2013, *Merlin and Others v OHIM — Dusyma (Game)*, T-231/10, not published, EU:T:2013:560, paragraph 32).
- 63 It follows from the reasoning in paragraphs 59 to 62 above that the applicant's second complaint must be rejected as unfounded.
- 64 It should be noted that, in the context of the third complaint, the applicant complains that the Board of Appeal refused, in paragraph 20 of the contested decision, to take into account the description in English of the contested design, on the ground that it had not been produced in the language of the application for registration chosen by it, namely German. That error vitiated the contested decision since, by failing to take that description into account, the Board of Appeal incorrectly defined the contested design as an individual can represented in three different sizes and not as a group of cans.
- 65 That complaint of the applicant must be rejected as ineffective.
- 66 It follows, first, from Article 36(3)(a) of Regulation No 6/2002, that the function of the description which may be contained in the application for registration of a design is to explain the representation or the specimen and, secondly, from Article 36(6) of that regulation, that that description may not affect the scope of protection of the design as such. Article 10(1) of that regulation, under the heading 'Scope of protection', states that the protection conferred by the Community design is to include any design which does not produce on the informed user a different overall impression.

- 67 It follows that the description which may be contained in the application for registration may not influence the substantive assessments relating to the novelty or individual character of the design at issue. That is moreover confirmed by Article 1(2)(a) of Commission Regulation (EC) No 2245/2002 of 21 October 2002 implementing Council Regulation (EC) No 6/2002 on Community designs (OJ 2002 L 341, p. 28), which provides in particular that the description must relate only to those features which appear in the reproductions of the design or the specimen and that that description may not contain statements as to the purported novelty or individual character of the design or its technical value.
- 68 It also follows that that description may also not have an influence on the question of what is the subject matter of the protection afforded by the design at issue, which is clearly connected with the assessments relating to novelty and individual character (see paragraph 56 above).
- 69 In the present case, as has already been noted, the Board of Appeal, without committing an error, defined the subject matter of the protection afforded by the contested design as consisting in the shape of an individual can represented in three different sizes and refused to define that subject matter as a group of cans. In the light of the considerations in paragraphs 66 to 68 above, it follows that, in any event, the hypothetical consideration by the Board of Appeal of the description in English of the contested design cannot call into question the definition of the subject matter of the protection afforded by the contested design as undertaken by the Board of Appeal. It can also not call into question the other assessments relating to individual character made by the Board of Appeal. To that effect, the applicant's present complaint must be rejected as ineffective.
- 70 In so far as the applicant complains also, implicitly, that the Board of Appeal failed to take into account descriptions of German designs with respect to which priority had been claimed (see paragraph 2 above), that complaint must be rejected as unfounded, since there are no rules of law imposing, in the present case, on the Board of Appeal the requirement to take those descriptions into account. In any event, that complaint is also inoperative for reasons identical to those set out in paragraphs 66 to 69 above.
- 71 Having regard to the foregoing considerations, the first part of the present plea in law must be rejected.

The second part of the plea in law alleging an erroneous assessment of the individual character of the contested design

- 72 The applicant raises, in essence, two complaints against the Board of Appeal's conclusion relating to the lack of individual character on the part of the contested design.
- 73 In the first place, the applicant contests the Board of Appeal's finding, in paragraph 34 of the contested decision, that the height/width ratio (that is to say, the proportions) is almost identical in the designs to be compared. When coming to that conclusion, the Board of Appeal ignored the fact that the contested design represents a group of three cans of different proportions and it is clear that the earlier designs could not simultaneously produce the same overall impression in relation to those three cans.
- 74 In the second place, the applicant complains that the Board of Appeal found, in paragraph 34 of the contested decision, that the informed user does not attach importance to the size of the beverage cans and that it failed to take into account the state of that informed user's knowledge.

- 75 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.
- 76 The overall impression referred to concerns an overall visual impression produced by the visible characteristics of the design at issue. That finding follows from Article 3(a) of Regulation No 6/2002, which defines ‘design’ as ‘the appearance of a product or part of it, resulting from the features of, in particular, the lines, contours, colours, shape, texture and/or materials of the product itself and/or its ornamentation’. That finding follows also from Article 10(1) of Regulation No 6/2002, which in all the language versions, refers to an overall impression, which, as the General Court has already held, can only be visual (see judgment 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 50).
- 77 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.
- 78 According to 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 (judgments of 7 November 2013, *Budziewska v OHIM — Puma (Bounding feline)*, T-666/11, not published, EU:T:2013:584, paragraph 29, and of 29 October 2015, *Roca Sanitario v OHIM — Villeroy & Boch (Single control handle faucet)*, T-334/14, not published, EU:T:2015:817, paragraph 16).
- 79 The comparison of the overall impressions produced by the designs must be synthetic and may not be limited to an analytic comparison of a list of similarities and differences. That comparison must relate solely to the elements actually protected, without taking account of characteristics excluded from the protection (judgment of 7 November 2013, *Bounding feline*, T-666/11, not published, EU:T:2013:584, paragraph 30).
- 80 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 the case-law, an ‘informed user’ within the meaning of Article 6 of Regulation No 6/2002 is neither a manufacturer nor a seller of the products in which the designs at issue are intended to be incorporated or to which they are intended to be applied. The informed user is particularly observant and has some awareness of the state of the prior art, that is to say the previous designs relating to the product in question that had been disclosed on the date of filing of the contested design, or, as the case may be, on the date of priority claimed (judgments of 18 March 2010, *Representation of a circular promotional item*, T-9/07, EU:T:2010:96, paragraph 62, and of 29 October 2015, *Single control handle faucet*, T-334/14, not published, EU:T:2015:817, paragraphs 18 and 23).
- 81 As regards the informed user’s level of attention, the Union judicature has stated 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, 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 (judgment of 20 October 2011, *PepsiCo v Grupo Promer Mon Graphic*, C-281/10 P, EU:C:2011:679, paragraph 59).

- 82 It is in the light of those principles that it is necessary to assess the lawfulness of the contested decision.
- 83 In the first place, it should be noted that, in paragraph 25 of the contested decision, the Board of Appeal defined the informed user as the person who, in the drinks industry, was responsible for bottling the beverages and who obtained information about relevant offers by means of specialised journals and catalogues as well as by attending specialised exhibitions. The parties did not contest that definition of an informed user and it is not apparent from the file that it is mistaken.
- 84 In the second place, the Board of Appeal considered, in paragraph 27 of the contested decision, that, as regards the beverage cans, the degree of freedom of the designer was limited only in so far as the basic cylindrical shape had been established as a standard and the round shape of the lid and base resulted necessarily from that basic shape. In addition, it found that limitations relating to the size of the cans resulted from the capacity, which normally did not exceed 500 ml and corresponded to normal quantities used in business for the sale of drinks. According to the Board of Appeal, there were no other limitations and the applicant did not set out any others. It concluded, in paragraph 27 of the contested decision, that the freedom of the designer was unlimited with regard to the configuration of the basic cylindrical shape, the neck of the can and the base of the can. In order to substantiate that finding, it referred to the reproduction of a can used for beer of the Heineken brand submitted by the intervener.
- 85 Those considerations of the Board of Appeal which, moreover, were not contested by the parties, must be approved.
- 86 In the third place, the Board of Appeal carried out a comparison of the contested design with the earlier designs.
- 87 In that context, in paragraph 29 of the contested decision, the Board of Appeal correctly noted that the contested design showed three beverage cans, without printed text, in black and white and that it was not possible to clearly determine, from the representation, whether the cans were fitted with a lid. The Board of Appeal correctly concluded that, in so far as the comparison could be based solely on the features which are disclosed in the contested design, the configuration of the lid of the can should not be taken into consideration in the assessment of the overall impression.
- 88 In paragraph 32 of the contested decision, the Board of Appeal correctly stated that the designs being compared all showed a cylindrical can with smooth surfaces which was slightly bevelled both towards the base and towards the lid, so that the diameter of the base and of the neck of the can was slightly smaller.
- 89 In paragraph 33 of the contested decision, the Board of Appeal concluded that the differences in the neck and base of the can invoked by the applicant were at most insignificant and could not be seen with the naked eye. According to the Board of Appeal, even in so far as the designs being compared differed in the presentation of the base, those differences were not relevant to the overall impression.
- 90 In paragraph 34 of the contested decision, the Board of Appeal found that the differences between the proportions of the cans, which were invoked by the applicant, were not visible and that the height/width ratio appeared to be approximately identical in the designs being compared. According to the Board of Appeal, even if the informed user noticed differences between the proportions, they are not relevant to the overall impression. It also considered that the representation in three sizes of

the contested design did not show the existence of a relevant difference in so far as the informed user knew the normal capacity of beverage cans and did not attach importance to the differences in size thereof in the overall impression.

- 91 The Board of Appeal therefore concluded, in paragraph 35 of the contested decision, that the contested design was devoid of individual character.
- 92 The assessments and the conclusion at issue of the Board of Appeal are not vitiated by error. They are not, in particular, called into question by the two complaints raised by the applicant.
- 93 Concerning the first complaint (see paragraph 73 above), it should be stated, first of all, that the relevant comparison is that not between the three cans, which are admittedly of differing sizes (that is to say, capacities), represented in the contested design, but that between those three cans and the cans represented in the earlier designs. Moreover, it should be noted that that comparison is between the overall impression produced by the three cans represented in the contested design and the overall impression produced by the cans represented in the earlier designs and not between isolated characteristics. It should moreover be noted that neither the actual dimensions nor the capacity could be deduced from the representation of the cans in the contested design, as is furthermore correctly stated by the Board of Appeal in paragraph 37 of the contested decision.
- 94 In that context, the applicant's first complaint is ineffective since, even assuming that the height/width ratio is not approximately identical in the designs being compared, as the Board of Appeal maintained in paragraph 34 of the contested decision, that does not show a difference in the overall impression produced on the informed user. The Board of Appeal itself noted that that argument was ineffective by stating, in paragraph 34 of the contested decision, that, even if the informed user noticed differences between the proportions (namely, the height/width ratio), they had no effect on the overall impression. That finding must be upheld in the light, in particular, of the Board of Appeal's conclusions in paragraphs 32 and 33 of the contested decision, which are not vitiated by error.
- 95 The applicant's second complaint (see paragraph 74 above) must also be rejected.
- 96 Paragraph 34 of the contested decision, in which the Board of Appeal states that the informed user knew the usual capacities for beverage cans and does not attach importance to the differences in sizes thereof in the overall impression, must be read in conjunction with paragraph 27 of that decision, in which the Board of Appeal maintains, without it being contested, that the capacity of beverage cans, which determines their size, does not normally exceed 500 ml and corresponds to normal quantities used in business for the sale of drinks. Moreover, it should be noted that the conclusive criterion for assessing the individual character of the contested design is the overall visual impression produced on the informed user compared with the overall visual impression produced on him by the earlier designs and that that overall impression results from a set of characteristics of the design and not from an isolated characteristic.
- 97 In that context, in the light of the Board of Appeal's explanations in paragraph 27 of the contested decision, but also of its explanations in paragraphs 32 and 33 of that decision, the applicant's second complaint must be rejected. Although, admittedly, the bottler, who is the informed user in the present case, takes into account the size, that is to say the capacity, of a can in the course of his activity, that fact does not affect, in the present case, the comparison of overall impressions produced by the designs being compared, in light of the fact that all the cans present similar characteristics, as is apparent from paragraphs 32 and 33 of that decision, and that the capacities of cans (which affects their size) are, to a certain extent, standardised, as is apparent from paragraph 27 of that decision.
- 98 For the purposes of contesting the Board of Appeal's findings in paragraph 34 of the contested decision, the applicant relies essentially on an article in a specialised journal. According to the applicant, that article shows that, before the introduction of the 'sleek can' represented in the contested

design, there existed only ‘standard cans’ and ‘slim cans’ and that, therefore, the introduction of those cans constituted an innovation. That article also shows that the size and shape of a can are of particular importance for an informed user.

- 99 The article at issue describes the creation of the ‘sleek’ can and refers to the difference between the diameter of that can and that of cans which already existed on the market, namely ‘standard’ and ‘slim’ cans. Nevertheless, that article does not call into question the Board of Appeal’s finding, in paragraph 34 of the contested decision, that the informed user knew the usual sizes of cans used for beverages and does not attach importance to the different sizes thereof in the overall impression. Moreover, in so far as that article emphasises the difference in diameter which characterises the ‘sleek’ can in relation to ‘standard’ and ‘slim’ cans, it is necessary to note the ineffective nature of the applicant’s first complaint relating to the differences between the proportions of the cans being compared (see paragraph 94 above). Even assuming that those cans have different diameters, which, moreover, cannot be deduced from their appearance, that fact does not demonstrate a difference in the overall impression produced on the informed user. Finally, in so far as the applicant emphasises, in its arguments, the ‘sleek’ character of the cans represented in the contested design, that character cannot be deduced from the appearance of those cans and corresponds rather to a marketing concept, as is apparent from the article at issue. It follows that that ‘sleek’ character also does not constitute a characteristic liable to contribute to the creation of an overall impression on the part of the informed user.
- 100 In the light of the foregoing, it is necessary to reject the second part of the present plea in law and, therefore, the plea in law in its entirety. The action must therefore be dismissed.

Costs

- 101 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. Since the applicant has been unsuccessful and EUIPO and the intervener have applied for costs, the applicant must be ordered to pay the costs.
- 102 In addition, the intervener has submitted that the applicant should be ordered to pay the costs which it incurred in respect of proceedings before the Cancellation Division and the proceedings before the Board of Appeal. In that regard, it should be noted that, under 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 does not apply to costs incurred for the purposes of the proceedings before the Cancellation Division (see, to that effect, judgment of 25 April 2013, *Wristwatch case*, T-80/10, not published, EU:T:2013:214, paragraph 164). Therefore, the intervener’s application relating to the costs incurred during the procedure before EUIPO may be granted only with respect to costs necessarily incurred for the purposes of the proceedings before the Board of Appeal.

On those grounds,

THE GENERAL COURT (First Chamber)

hereby:

- 1. Grants Ball Beverage Packaging Europe Ltd leave to substitute itself for Ball Europe GmbH as applicant;**
- 2. Dismisses the action;**

3. Orders Ball Beverage Packaging Europe to pay the costs, including the costs necessarily incurred by Crown Hellas Can SA for the purposes of the proceedings before the Board of Appeal of the European Union Intellectual Property Office (EUIPO).

Kanninen

Buttigieg

Calvo-SoteloIbáñez-Martín

Delivered in open court in Luxembourg on 13 June 2017.

[Signatures]