



## Reports of Cases

JUDGMENT OF THE GENERAL COURT (Third Chamber)

6 June 2019\*

(Community design – Invalidation proceedings – Registered Community design representing a motor vehicle – Earlier Community design – Ground for invalidity – No individual character – Article 6 and Article 25(1)(b) of Regulation (EC) No 6/2002)

In Case T-209/18,

**Dr. Ing. h.c. F. Porsche AG**, established in Stuttgart (Germany), represented by C. Klawitter, lawyer,  
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, and intervener before the General Court, being

**Autec AG**, established in Nuremberg (Germany), represented by M. Krogmann, lawyer,

ACTION brought against the decision of the Third Board of Appeal of EUIPO of 19 January 2018 (Case R 945/2016-3), relating to invalidity proceedings between Autec AG and Dr. Ing. h.c. F. Porsche AG,

THE GENERAL COURT (Third Chamber),

composed of S. Frimodt Nielsen, President, N. Póltorak and E. Perillo (Rapporteur), Judges,

Registrar: R. Ūkelytė, Administrator,

having regard to the application lodged at the Court Registry on 22 March 2018,

having regard to EUIPO's response lodged at the Court Registry on 13 July 2018,

having regard to the intervener's response lodged at the Court Registry on 4 July 2018,

having regard to the decision of 7 August 2018 declining to include the applicant's letter of 23 July 2018 in the case file,

\* Language of the case: German.

having regard to the decision of 23 August 2018 declining to include the applicant's letter of 13 August 2018 in the case file,

having regard to the decision of 20 September 2018 declining to join Cases T-43/18, T-191/18, T-192/18, T-209/18 and T-210/18,

having regard to the appointment of another judge to complete the Chamber after one of its members was prevented from acting,

having regard to the decision of 14 January 2019 declining to join Cases T-209/18 and T-210/18 for the purposes of the oral stage of the procedure,

further to the hearing on 12 February 2019,

gives the following

## Judgment

### Background to the dispute

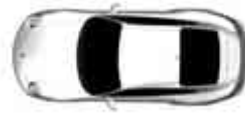
- 1 On 20 August 2010, the applicant, Dr. Ing. h.c. F. Porsche AG, filed an application for registration of a Community design with the European Union Intellectual Property Office (EUIPO), pursuant to Council Regulation (EC) No 6/2002 of 12 December 2001 on Community designs (OJ 2002 L 3, p. 1).
- 2 The Community design in respect of which registration was sought ('the contested design' or 'the design of the 991 series "Porsche 911"') is represented as follows:





- 3 The products to which the contested design is intended to be applied are in Class 12-08 of the Locarno Agreement of 8 October 1968 establishing an International Classification for Industrial Designs, as amended, and correspond to the following description: ‘motor vehicles’.
- 4 The contested design was published in *Community Designs Bulletin* No 2010/200 of 6 September 2010, with a priority date of 27 April 2010, and the views of that design were published in *Community Designs Bulletin* No 2012/172 of 7 September 2012.
- 5 On 8 July 2014, the intervener, Autec AG, filed an application with EUIPO for a declaration of invalidity in respect of the contested design. That application was made pursuant to Article 25(1)(b) of Regulation No 6/2002, read in conjunction with Article 4(1) and Articles 5 and 6 of that regulation.
- 6 The intervener argued in substance that the design of the 991 series ‘Porsche 911’ was neither new nor had individual character, and was therefore prevented from being protected. In support of its application, the intervener claimed, in essence, that the contested design did not differ perceptibly from the other designs of the ‘Porsche 911’ placed on the market since the original 1963 version.
- 7 The intervener relied in that respect, in particular, on the following Community designs:
  - Community design No 735428-0001 (‘the earlier design’ or ‘the design of the 997 series “Porsche 911”’), registered for ‘motor vehicles’ and published on 23 June 2008, which is reproduced as follows:





- Community design No 633748-0001, (registered for ‘cars’ and published on 9 January 2007, which is reproduced as follows:





- 8 The intervener also annexed to its application for a declaration of invalidity various press articles on the design of the ‘Porsche 911’.
- 9 By decision of 10 May 2016, the EUIPO Invalidity Division upheld the application for a declaration of invalidity and declared the contested design invalid for the reason that it lacked individual character.
- 10 On 23 May 2016, the applicant filed a notice of appeal with EUIPO, pursuant to Articles 55 to 60 of Regulation No 6/2002, against the decision of the Invalidity Division.
- 11 By decision of 19 January 2018 (‘the contested decision’), the Third Board of Appeal of EUIPO dismissed the appeal on the ground of lack of individual character within the meaning of Article 6(1) of Regulation No 6/2002.
- 12 The Board of Appeal found, first, that in the case of motor cars the designer’s degree of freedom was constrained by the technical characteristics of the product at issue, such as the fact that it possesses bodywork and wheels, and by the legal requirements, in particular those relating to road safety, such as, for example, the requirement to have headlights, rear-view mirrors and rear lights.
- 13 The Board of Appeal then found, in contrast, that the designer’s degree of freedom when designing those features imposed by technical functions or statutory requirements was not, as such, subject to any constraint. It also noted that the user of the products at issue was an informed user of motor cars in general, that is to say, a person who drove, used and was familiar with the designs of cars available on the market.
- 14 In that context, the Board of Appeal took the view that the designs at issue were, ultimately, the same, by reason of their essential characteristics, such as the shape or silhouette of their bodywork, doors and windows.
- 15 The Board of Appeal therefore found that the existence of the design of the 997 series ‘Porsche 911’ was sufficient to prevent the design of the 991 series of that same car from having individual character and that it was therefore not necessary then to examine Community design No 633748-0001, relied upon by the intervener, nor to inquire into the novelty of the contested design.

### **Forms of order sought**

- 16 The applicant claims that the Court should:
- annul the contested decision;
  - dismiss the application for a declaration of invalidity ‘of ... design No 198387-0001’.
- 17 EUIPO and the intervener claim that the Court should:
- dismiss the action;
  - order the applicant to pay the costs.

## Law

- 18 In support of its action, the applicant relies, in substance, on a single plea in law, alleging infringement of Article 25(1)(b) of Regulation No 6/2002 read in conjunction with Articles 5 and 6 of that regulation.
- 19 In that context, it asserts, in essence, that the overall impression that the contested design produces on an informed user of this kind of car is different from that produced by the earlier design, on which the intervener relies in support of its application for a declaration of invalidity. Indeed, according to the applicant, the ‘external appearance’ of the two designs at issue distinguishes them ‘considerably’ and ‘so clearly’ that the Board of Appeal could not, without making an error of assessment, find that the contested design lacked individual character.
- 20 Having summarised that plea in law, the Court would recall that, under Article 25(1)(b) of Regulation No 6/2002, a Community design is declared invalid if it does not fulfil the requirements of Articles 4 to 9 of that regulation.
- 21 Article 4(1) of Regulation No 6/2002 specifies in that respect that a design is to be protected by a Community design to the extent that it is new and has individual character.

### ***The first part of the single plea in law, alleging infringement of Article 25(1)(b) of Regulation No 6/2002 read in conjunction with Article 6 of the same regulation***

- 22 It is apparent from the wording of Article 6(1)(b) of Regulation No 6/2002 that the individual character of a registered Community design must be assessed initially in the light of the overall impression that it produces on the informed user concerned (see judgment of 25 October 2013, *Merlin and Others v OHIM – Dusyma (Games)*, T-231/10, not published, EU:T:2013:560, paragraph 28 and the case-law cited). That overall impression must also differ from that produced by any design made available to the public before the date on which the application for registration was filed or, if a priority is claimed, the date of priority.
- 23 Furthermore, Article 6(2) of Regulation No 6/2002 states that, in that assessment of individual character, the degree of freedom of the designer in developing the design should be taken into consideration.
- 24 Having summarised those statutory requirements, the Court notes that the relevant case-law states, in that regard, that the individual character of a design must be apparent from an overall impression of difference or lack of any sense of ‘déjà vu’ in relation to any earlier design, from the perspective of an informed user. Accordingly, differences that are insufficiently marked to affect that overall impression cannot be taken into account, and only differences that are sufficiently marked to create dissimilar overall impressions can be decisive (see judgment of 7 November 2013, *Budziewska v OHIM – Puma (Bounding feline)*, T-666/11, not published, EU:T:2013:584, paragraph 29 and the case-law cited).
- 25 In the light of the foregoing, it is therefore necessary to examine whether, from the standpoint of an informed user and having regard for the degree of freedom available to the designer in the present case, the overall impression produced by the contested design differs from that produced by the earlier design.

*The informed user*

- 26 As regards interpreting the notion of the informed user, it should be found first of all that being an ‘informed user’ implies that the person concerned uses the product in which the design is incorporated in accordance with that product’s intended use. The qualifier ‘informed’ also suggests that, without necessarily being a technical expert, the user in question 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 (judgments of 20 October 2011, *PepsiCo v Grupo Promer Mon Graphic*, C-281/10 P, EU:C:2011:679, paragraph 59, and of 28 September 2017, *Rüchland v EUIPO – 8 seasons design (Lamp in the form of a star)*, T-779/16, not published, EU:T:2017:674, paragraph 19).
- 27 The concept of the ‘informed user’ must therefore be understood as lying somewhere between that of the average consumer, applicable in trade mark matters, who need not have any specific knowledge and who, as a rule, makes no direct comparison between the trade marks at issue, and the sectoral expert, that is to say, an expert with certain technical expertise. Thus, the concept of the informed user may be understood as referring, not to a user of average attention, but to a particularly observant one in relation to the products concerned, either because of his personal experience or his extensive knowledge of the sector in question (see, to that effect, judgment of 20 October 2011, *PepsiCo v Grupo Promer Mon Graphic*, C-281/10 P, EU:C:2011:679, paragraph 53).
- 28 In the present case, the Board of Appeal found, in paragraphs 19 to 21 of the contested decision, that the informed user of the products to which the designs at issue relate was not the user of the ‘Porsche 911’, but the user of motor cars in general, who knew the designs available on the market and demonstrated a high degree of attention and interest. Moreover, according to the Board of Appeal, such an informed user was aware, in general, as a result of his or her knowledge of the market in question, that motor manufacturers were not constantly developing new designs but, given the high cost of design, confined themselves, initially at least, to updating existing designs.
- 29 Nevertheless, in order to challenge the Board of Appeal’s assessment, the applicant argued, both in its application and at the hearing, that in the present case the informed user would have shown a higher degree of attention than that taken into consideration by the Board of Appeal and would have had greater than average knowledge which would have made that user particularly attentive to the different variations in the designs of the ‘Porsche 911’.
- 30 That is so, according to the applicant, because users have a particularly high level of interest in the vehicles for which the designs at issue are intended to be applied and a particularly high level of knowledge of the commercial sector concerned because these are ‘luxury cars’ or ‘high end sports cars’, which is precisely what occurs, in the present case, with the design, which has been present on the market for decades, of the ‘Porsche 911’. Contrary to what the Board of Appeal appears to have found, the informed user therefore cannot be a ‘hypothetical person’ or an indeterminate individual but must, according to the applicant, be identified ‘empirically in relation to the specific product in question’.
- 31 EUIPO and the intervener dispute the applicant’s arguments.
- 32 Having summarised the complaints advanced by the applicant, the Court notes first of all that the applicant argued, several times, that the products to which the designs at issue relate cover only ‘sports cars’ or only ‘luxury cars’, or even the ‘Porsche 911’ alone, and not ‘motor cars’ in general or ‘motor vehicles’, as the Board of Appeal chose to find.



- 33 In that respect, it should nevertheless be recalled, first, that in order to ascertain the products in which a design is intended to be incorporated or to which it is intended to be applied, the relevant indication in the application for registration should be taken into account (judgment of 18 July 2017, *Chanel v EUIPO – Jing Zhou and Golden Rose 999 (Ornamentation)*, T-57/16, EU:T:2017:517, paragraph 41).
- 34 Secondly, where necessary, the design itself, in so far as it makes clear the nature of the product, its intended purpose or its function, should also be taken into account. Taking into account the design itself may, indeed, enable the product to be placed within a broader category of goods, such as that indicated at the time of registration (see, to that effect, 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 56).
- 35 However, although it is common ground that the contested design is intended to be applied to motor vehicles, the mere fact that the applicant describes the products to which the contested design is intended to be applied as ‘sports cars’ or ‘luxury cars’ is not sufficient, without further clarification, to establish that such a design, which represents the design of the 991 series ‘Porsche 911’, makes it possible to identify a particular category of motor car distinguishable from motor cars in general by their nature, intended purpose or function.
- 36 Indeed, on the one hand, there is no such specific category in the existing international classification for industrial designs (see paragraph 3 above) and, on the other, the applicant itself applied for and obtained registration of the contested design for products in Class 12-08 corresponding to the following description: ‘Motor cars, buses and lorries’.
- 37 Under those circumstances, nor can the applicant profitably criticise the Board of Appeal for finding that the notion of informed user related to a ‘hypothetical person’, since that legal concept, created precisely for the purposes of analysing whether a design has individual character under Article 6 of Regulation No 6/2002, can only be defined in general terms, as a reference to a person with standard characteristics, and not on a case by case basis in relation to a particular design (see, to that effect, judgment of 7 November 2013, *Bounding feline*, T-666/11, not published, EU:T:2013:584, paragraph 32).
- 38 In that respect, in order to refute the applicant’s arguments alleging that it had not specifically analysed the informed user (see paragraph 30 above), the Board of Appeal did indeed confine itself to the definition given by the case-law referred to above, and therefore did not explain why the fact that certain designs have been present on the market for decades means that users of those designs, as in the case of the ‘Porsche 911’, cannot be regarded as paying particular attention and, as the applicant contends, having above-average knowledge.
- 39 Nevertheless, that circumstance cannot cause the contested decision to be vitiated by an insufficient statement of reasons, since, in paragraph 20 of the contested decision, the Board of Appeal stated precisely that, according to the case-law already cited, in the present case it was necessary to look at the category of product rather than the specific products in question, and that it was therefore appropriate to have regard to the informed user of motor cars in general, instead of the informed user of a ‘Porsche 911’.
- 40 Even if the applicant does not concur with that view, the fact is nevertheless that, on that point, the Board of Appeal presented its reasoning clearly and unambiguously, informing the applicant, to the requisite legal standard, of the grounds for the measure taken.
- 41 The Board of Appeal was therefore also entitled, without thereby erring in law or procedure, when assessing the notion of the informed user of the products for which the designs at issue were intended, not to take into account opinion surveys carried out of the target public for sports cars, assuming that the applicant actually intended to rely on such surveys in support of its thesis. In any



event, if the applicant did intend to criticise the Board of Appeal for not having such surveys carried out, such a complaint would be irrelevant, since the level of attention of the average user, defined in general terms, cannot be verified empirically.

- 42 Furthermore, even on the supposition that the applicant had also intended to argue that its rights of the defence were infringed because it was unable to ‘produce evidence to the contrary’, the mere fact that it referred in the application to ‘opinion surveys’ and to newspaper articles relating to the ‘Golf VIII’ is clearly insufficient to substantiate the applicant’s claims that the level of attention and knowledge of the informed user of sports cars is higher than that of a user of cars in general, and the applicant confined itself, in that respect, to stating that the ‘Porsche 911’ ‘of course’ attracted ‘considerably greater’ attention than ‘normal vehicles’, which have no special characteristics and are ‘more or less interchangeable’.
- 43 In the light of the foregoing, the complaint alleging that the Board of Appeal erred when defining the notion of the informed user must, accordingly, be rejected.

#### *The designer’s degree of freedom*

- 44 It is apparent from the applicable case-law that the designer’s degree of freedom is established, inter alia, by the constraints associated with the characteristics imposed by the technical function of the product in question or by statutory requirements applicable to that product. Those constraints in fact result in, and even require, a form of standardisation of certain features of the products in question, which will thus become common, and even indispensable, to the designs applied to the product concerned (judgment of 10 September 2015, *H&M Hennes & Mauritz v OHIM – Yves Saint Laurent (Handbags)*, T-525/13, EU:T:2015:617, paragraph 28; see, also, judgment of 15 October 2015, *Promarc Technics v OHIM – PIS (Part of door)*, T 251/14, not published, EU:T:2015:780, paragraph 51 and the case-law cited).
- 45 Therefore, the greater the designer’s freedom in developing a design, the less likely it is that minor differences between the designs at issue will be sufficient to produce different overall impressions on an informed user. Conversely, the more limited the designer’s freedom in developing a design, in particular by the constraints referred to above, the more likely it is that minor differences between the designs at issue will be sufficient to produce different overall impressions on that category of user.
- 46 Therefore, if the designer enjoys a high degree of freedom in developing a design, that reinforces the conclusion that the designs which do not display significant differences will produce the same overall impression on an informed user (see judgment of 15 October 2015, *Part of door*, T-251/14, not published, EU:T:2015:780, paragraph 52 and the case-law cited).
- 47 However, it must be borne in mind that the factor relating to the freedom of the designer cannot on its own determine the assessment of the individual character of a design, although it is, in contrast, a factor which has to be taken into consideration in that assessment.
- 48 The designer’s degree of freedom is, in that context, a factor which makes it possible to moderate the assessment of the individual character of the contested design, rather than an independent factor which determines how different two designs have to be for one of them to be able to rely on individual character. In other words, the factor relating to the designer’s degree of freedom may reinforce or, *a contrario*, moderate the conclusion as regards the overall impression produced by each design at issue (see, to that effect, judgment of 10 September 2015, *H&M Hennes & Mauritz v OHIM— Yves Saint Laurent (Handbags)*, T-526/13, not published, EU:T:2015:614, paragraphs 33 and 35).

- 49 Ultimately, the design must not be regarded, as such, as a reproduction of an earlier design or merely a figurative development of the original idea which was reproduced for the first time in that earlier design (see judgment of 18 July 2017, *Ornamentation*, T-57/16, EU:T:2017:517, paragraph 32 and the case-law cited).
- 50 In the present case, the Board of Appeal found that, in the case of motor cars, the designer's degree of freedom was limited by the technical function of those vehicles, used as they are to transport people and loads, which necessarily involves, for example, the presence of wheels and bodywork. It also found that the designer's degree of freedom was constrained by the statutory requirements, including road safety requirements, such as, for example, the mandatory presence of headlights, rear lights and lateral rear-view mirrors. The Board of Appeal found, in contrast, that as regards the design of those components, which are imposed by the purpose of those means of transport and the statutory safety provisions that must be complied with, the designer's degree of freedom was not subject to any restriction.
- 51 Seeking to refute that assessment, the applicant argues, nevertheless, that in the present case the designer's degree of freedom is limited by market expectations, since, it claims, consumers expect the 'creative idea' or original prototype 'Porsche 911', perceived as 'iconic', to be preserved in the later designs and that it should therefore only be developed within certain limits. The Board of Appeal should therefore, in its legal analysis, have 'recognised and given weight to', the small differences between the successive series of the 'Porsche 911'.
- 52 EUIPO and the intervener dispute the applicant's arguments.
- 53 It should be stated first of all in that regard that the applicant's thesis is based on the premiss that for the purposes of assessing the individual character of the contested design the designer's degree of freedom must take into account the specific characteristics of that design itself and not the characteristics of the products to which it is intended to be applied.
- 54 However, as already stated in paragraph 34 above, it can only do so to the extent that the contested design specifies the nature, purpose or function of the product in which that design is intended to be applied, which it does not do in the present case, for precisely the reasons set out in paragraph 35 above. Accordingly, on the basis of the case-law cited in paragraphs 45 and 46 above, it is not a question, in the present case, of assessing the degree of freedom of the designer of the 991 series 'Porsche 911', but that of a designer of motor cars in general.
- 55 The Board of Appeal could therefore correctly find the applicant's argument to be irrelevant and, accordingly, decline to take it into account when assessing the designer's degree of freedom as part of its examination of the individual character of the contested design.
- 56 In any event, the designer's degree of freedom, within the meaning of Article 6 of Regulation No 6/2002, is defined, according to the case-law referred to in paragraph 44 above, on the basis of constraints likely to lead to the standardisation of certain components of the products to which the design concerned is intended to be applied, that is to say, fundamentally statutory constraints that apply objectively, and as a matter of law, to all the developers of designs intended to be applied to the products concerned.
- 57 Consumer expectations such as those the applicant claims, namely that they will find the 'creative idea' or the prototype of the original design of the 'Porsche 911' in subsequent series, cannot constitute a statutory constraint that necessarily limits the degree of freedom of a car designer, since those expectations relate to neither the nature nor the purpose of such a product, in which the contested design is incorporated, nor to the industrial sector to which that product belongs.

- 58 In contrast, to use the applicant's own words, those expectations relate only to the fact that the design of the 'Porsche 911' is 'iconic', that is to say, to consumers' supposed wish to remain loyal to it over time, which does not mean that, independently of aesthetic or commercial considerations, its designer is necessarily obliged to meet those expectations in order to ensure the functioning of the product to which the design in question is intended to be applied.
- 59 It has accordingly been held that a general design trend, capable of meeting the expectations of relevant consumers, could not be regarded as a factor which restricts the designer's freedom, (see, to that effect, judgment of 17 November 2017, *Ciarko spółka z ograniczoną odpowiedzialnością v EUIPO – Maan (Cooke hood)*, T-684/16, not published, EU:T:2017:819, paragraphs 29 and 30 and the case-law cited), since that freedom enables the designer to discover new shapes and new lines or even to innovate in the context of an existing figurative trend (judgment of 13 November 2012, *Antrax It v OHIM – THC (Radiators for heating)*, T-83/11 and T-84/11, EU:T:2012:592, paragraph 95).
- 60 In that respect, contrary to the applicant's assertions, the Board of Appeal could therefore validly rely on that case-law as a basis for rejecting the applicant's complaint and, when analysing the designer's degree of freedom in developing the contested design, for declining to take into account the specific features of the 'Porsche 911'.
- 61 Under those circumstances, the Board of Appeal correctly found that it was not necessary to take potential market expectations into account in order to identify the designer's degree of freedom in the present case.
- 62 Furthermore, the applicant cannot challenge that finding by referring to a judgment of the Oberlandesgericht Stuttgart (Higher Regional Court, Stuttgart, Germany). Indeed, the legality of decisions of the Boards of Appeal must be evaluated solely on the basis of Regulation No 6/2002, as interpreted by the EU Courts, and not on the basis of national case-law, even where the latter is based on provisions analogous to those of that regulation (see, to that effect, judgment of 4 July 2017, *Murphy v EUIPO – Nike Innovate (Electronic wristband)*, T-90/16, not published, EU:T:2017:464, paragraph 72 and the case-law cited).
- 63 For the same reason, nor can the applicant require EUIPO to follow the stipulations of the Commission's Green Paper on the Legal protection of industrial designs, even supposing that such a document could be legally binding.

*The comparison of the overall impressions produced by the designs at issue*

- 64 The Board of Appeal found that the contested design did not produce an overall impression different from that produced by the earlier design in the mind of the informed user. It in fact found that the views of both those designs were the same in terms of their shape and the bodywork silhouette, in particular in terms of dimensions and proportions, the shape and arrangement of their windows and doors, the shape of the rear hood, the rear spoiler and the shape and arrangement of the front headlights. It concluded from this that the slight differences apparent on the front and rear views of those two designs, in particular in the convexity of the bonnet, the shape of the external rear-view mirrors, the shape and arrangement of the rear lights, and the arrangement of the rear bumpers and the shape of the exhaust, cannot be regarded as sufficiently marked characteristics to have a significant effect on the overall impression produced on the informed user.
- 65 The applicant for its part, seeking to challenge that assessment by the Board of Appeal, argues, as a preliminary point, that the Board of Appeal made a number of errors of law or procedure when examining the individual character of the contested design.

- 66 It asserts that the Board of Appeal should have taken account of how the product is presented in advertising and in the photographic reproductions included in the case file, which according to the applicant illustrate not only the views submitted in support of the applications for registration and for a declaration of invalidity, but specific situations in which the product is used. That evidence, the applicant claims, demonstrates that the product is used in accordance with its purpose, a factor which the Board of Appeal should have taken into account in a direct comparison between the designs at issue.
- 67 The applicant then criticised the Board of Appeal for failing to take into account the specific features of the purchasing behaviour of informed users and in particular the fact that, as potential buyers, those users necessarily pay attention to even very slight differences between the series of a single design, to the extent that advertising and the media inform them about what is on offer on the market and about trends in fashion, and accordingly about what distinguishes the design of a newly arrived car from earlier designs. According to the applicant, since similar products are being compared in the present case, the individual character of the contested design should therefore be assessed having regard for the requirements of the market.
- 68 Furthermore, it contends that the Board of Appeal erred in law because it laid down ‘substantially higher requirements’ for finding a design to have individual character than those required by the case-law when assessing the novelty of a design. Such novelty is in fact found to exist even where the differences between the contested design and the earlier design, whilst not insignificant, can be regarded as slight.
- 69 Lastly, according to the applicant, the Board of Appeal failed to carry out an overall analysis, and took a ‘rather technical and piecemeal’ approach, confining itself to establishing the similarities and differences between the designs at issue without, ultimately, comparing the resulting overall impressions.
- 70 EUIPO and the intervener dispute all those arguments.
- 71 It must be borne in mind, as a preliminary point, that it is apparent from the applicable case-law that 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 (judgment of 29 October 2015, *Roca Sanitario v OHIM – Villeroy & Boch (Single control handle faucet)*, T-334/14, not published, EU:T:2015:817, paragraph 58).
- 72 For the purposes of examining the individual character of a design, a comparison should therefore be made between, on the one hand, the overall impression produced by the contested Community design and, on the other, the overall impression produced by each of the earlier designs legitimately relied on by the party seeking a declaration of invalidity (judgment of 22 June 2010, *Shenzhen Taiden v OHIM – Bosch Security Systems (Communications Equipment)*, T-153/08, EU:T:2010:248, paragraph 24).
- 73 Furthermore, that comparison must relate solely to the elements actually protected, without taking account of the features excluded from the protection. Accordingly, that comparison must relate to the designs as registered, and the applicant for a declaration of invalidity cannot be required to provide a graphic representation of the design relied upon that is comparable to the representation in the application for registration of the contested design (see judgment of 7 November 2013, *Bounding feline*, T-666/11, not published, EU:T:2013:584, paragraph 30 and the case-law cited).
- 74 The obligation to make a comparison between the overall impressions produced by the designs at issue does not however preclude the possibility of taking into consideration features which were made available to the public in different ways, in particular by the presentation to the public of a product incorporating the registered design.



- 75 The purpose of registering a design is to obtain an exclusive right in particular to make and market the product incorporating it, which means that the representations in the application for registration are, as a general rule, closely related to the appearance of the product placed on the market (judgment of 22 June 2010, *Communications Equipment*, T-153/08, EU:T:2010:248, paragraph 25).
- 76 In that context, it is however only appropriate to take into account the goods actually marketed, even for illustrative purposes when making that comparison, to the extent that the goods correspond to the designs as registered (see, to that effect, judgment of 20 October 2011, *PepsiCo v Grupo Promer Mon Graphic*, C-281/10 P, EU:C:2011:679, paragraphs 73 and 74).
- 77 Having set out that case-law, the Court notes, first, that, as apparent from paragraph 30 of the contested decision, the Board of Appeal found that the views of the contested design included in the case file did not confirm the overall impression produced by that design as represented in the specialist press on which the applicant had relied.
- 78 Furthermore, contrary to what the applicant suggests, the Board of Appeal did make a direct comparison between the overall impression produced by the contested design and that produced by the earlier design, as can be seen from paragraph 23 of the contested decision. In that respect, it likewise cannot be argued that the Board of Appeal carried out that comparison without having regard to the use of the product in question in accordance with its purpose, since the Board of Appeal expressly stated, in paragraph 21 of the contested decision, that the informed user was one who drove and used motor cars.
- 79 Nor can the applicant plausibly argue that the Board of Appeal failed to take into account the specific circumstances of the market concerned. In actual fact the Board of Appeal also stated, likewise in paragraph 21 of the contested decision, that it was necessary to find that such a user would inevitably be aware of the fact that manufacturers were not constantly developing new designs, given their high cost, but, for preference, regularly updated existing designs, in particular where those designs had been well received on the relevant market by informed users, since design management of that kind made it possible to follow the general trends of fashion whilst not thereby abandoning the characterising features of each car design in question.
- 80 Next, as regards the Board of Appeal's supposed error in law in prescribing 'substantially higher requirements' for determining whether the contested design has individual character than those required in order to find that it has 'novelty', it should be noted that, even if the requirement of novelty laid down in Article 5 of Regulation No 6/2002 and that of individual character defined in Article 6 of the same regulation may, to a certain extent, overlap, as the applicant correctly noted at the hearing, those two requirements cannot however, in legal terms, be treated as being the same, since whether or not they are met determines two different reasons for invalidity, which therefore correspond to legally different criteria.
- 81 As apparent from Article 5(2) of Regulation No 6/2002, two designs are to be deemed to be identical if their features differ only in immaterial details, that is to say, details that do not produce differences, even slight, between those designs. *A contrario*, for the purposes of assessing the novelty of a design, it is necessary to assess whether there are any, even slight, non-immaterial differences between the old and the new designs (judgment of 6 June 2013, *Kastenholz v OHIM – Qwatchme (Watch dials)*, T-68/11, EU:T:2013:298, paragraph 37).
- 82 Accordingly, the wording and scope of Article 6, as recalled in paragraph 22 above, are not the same as those of Article 5 of Regulation No 6/2002, as the applicant nevertheless seeks to argue, thereby, moreover, misinterpreting the judgment of 6 June 2013, *Watch dials* (T-68/11, EU:T:2013:298). A design can therefore be found to be new within the meaning of Article 5 of Regulation No 6/2002

whilst not having individual character within the meaning of Article 6 of that regulation (see, to that effect, judgment of 14 March 2018, *Gift Diffusion v EUIPO – Crocs (Footwear)*, T-424/16, not published, EU:T:2018:136, paragraph 48).

- 83 It is apparent from the foregoing that the fact that the Board of Appeal rejected as ‘insufficient’ differences that, even if they were considered to be slight, could not be regarded as insignificant, cannot be criticised as an error of law.
- 84 Accordingly, since the applicant has failed to specify the ‘substantially higher requirements’ which, according to the applicant, the Board of Appeal applied, this complaint cannot succeed.
- 85 In short, contrary to the applicant’s assertions, the Board of Appeal did, in an appropriate manner, examine all the differences and similarities between the designs at issue when it compared the overall impression produced by the contested design and that produced on the informed user by the earlier design.
- 86 The Board of Appeal in fact not only analysed the front and rear views of the two designs at issue, ‘considered individually’, but also analysed them ‘in combination’, as can be seen from paragraph 29 of the contested decision, and concluded that the differences apparent in those representations were not such as significantly to influence the overall impression produced on the informed user. This complaint therefore also fails on the facts.
- 87 Furthermore, a comparison of the lateral views of the contested design, as registered and as have been produced in support of the application for a declaration of invalidity, likewise does not confirm the applicant’s position that the main headlights of the contested design ‘bulge outwards’ and are ‘clearly’ different from the main headlights of the earlier design, or that the door handles had been ‘completely remodelled’. Indeed, the lateral views, which show the silhouette of each design as a whole, do not allow the designs at issue to be seen either precisely or ‘clearly’ at that level of detail.
- 88 Even assuming that the informed user could detect such differences, they cannot in any event be sufficiently marked to cast doubt, by themselves, on the Board of Appeal’s assessment. Indeed, according to the Board of Appeal, all the views of the designs in question, not only the lateral views, show that those designs are the same as regards their shape and bodywork silhouette, both in terms of dimensions and proportions and in terms of the shape and arrangement of the windows and doors.
- 89 The same applies to the argument that the fog lights also differ between the two designs and that, in the contested design, the rear-view mirror has been moved back and is now attached directly to the doors. Furthermore, contrary to the applicant’s contention, the wheels on the contested design are not so much bigger that they modify the lateral views of the designs at issue. Lastly, the shape and siting of the direction indicators are highly comparable between the two designs.
- 90 Furthermore, as regards, first, comparison of the rear views, admittedly, as EUIPO acknowledged at the hearing and as the Board of Appeal stated in paragraph 28 of the contested decision, those views show a number of differences, in particular as regards the shape and the arrangement of the rear lights, the bumpers, the exhaust and, as the applicant correctly observes, the spoiler and the rear hood.
- 91 Secondly, in respect of the comparison of the front views, it is indeed also true that the convexity of the bonnet is more pronounced in the design of the 991 series than in that of the 997 series ‘Porsche 911’, ‘with the effect that the front seems flatter and wider overall’, as the Board of Appeal moreover noted in paragraph 27 of the contested decision.



- 92 Although all those differences, and further differences highlighted by the applicant, may reinforce the impression that details have been updated, they do not, however, seem sufficiently marked to cast doubt on the impression of overall similarity between the views of those designs, in the light in particular of the very similar overall structure of the designs at issue, which are broadly the same in terms of their shape and silhouette.
- 93 Lastly, for the reasons already mentioned in paragraphs 62 and 63 above, the applicant cannot profitably rely in support of its thesis on case-law of the Bundesgerichtshof (Federal Court of Justice, Germany) or of the Oberlandesgericht Düsseldorf (Higher Regional Court, Düsseldorf, Germany) or the Commission Green Paper on the Legal protection of industrial designs.
- 94 Under those circumstances, and since, in contrast to the applicant's claims, the Board of Appeal objectively took into account all the differences between the designs at issue, as can be seen from paragraphs 26 to 28 of the contested decision, the Board was entitled, without thereby making an error of assessment, to find, in paragraph 29 of the contested decision, that, taken individually or in combination, all the differences between the various views of the designs at issue were too slight to have a significant influence on the overall impression produced on the informed user, because that impression was dominated by the fundamental features of those designs, that is to say, the shape of the bodywork, doors and windows.
- 95 In that respect, the applicant cannot profitably rely on articles in the specialist press or the opinions of design award juries to challenge that finding, given that it is necessary here to assess the overall impression from the perspective of informed users who, although they are aware of various designs in the commercial sector in question and have particular knowledge enabling them to pay a relatively high level of attention, are neither technical experts nor design specialists.
- 96 Accordingly, the applicant cannot profitably rely on the fact, in particular, that the jury of the 'red dot award: product design 2012' stated that the shape of the contested design was 'completely new' and that the 'proportions [had been] broadly modified' in order to dispute the Board of Appeal's assessment of the individual character of that design in the light of the requirements of Article 6 of Regulation No 6/2002. In actual fact, the intervener has adduced press articles that reach the opposite conclusion from that on which the applicant seeks to rely, according to which, in particular, the former president of the applicant's board of directors stated that the applicant intended to capitalise on the 'silhouette, which still remains the same, whilst adapting it to keep up with the times'.
- 97 Having regard to the foregoing, the first part of the single plea in law must be rejected.

***The second part of the single plea in law, alleging infringement of Article 25(1)(b) of Regulation No 6/2002 read in conjunction with Article 5 of the same regulation***

- 98 The applicant contends that the contested design should be regarded as new within the meaning of Article 5 of Regulation No 6/2002.
- 99 It has to be said, nevertheless that such a thesis is, in any event, irrelevant in the present proceedings, since the Board of Appeal did not apply that article, having correctly found that it was not necessary to examine the novelty of the contested design, because its lack of individual character was sufficient to prevent it from being protected under Article 4(1) of Regulation No 6/2002.
- 100 Having regard to the foregoing, the second part of the single plea in law must be rejected and, therefore, the action as a whole must be dismissed.

## Costs

- 101 Under Article 134(1) of the Rules of Procedure of the General Court, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings.
- 102 Since the applicant has been unsuccessful, it must be ordered to pay the costs in accordance with the forms of order sought by EUIPO and the intervener.

On those grounds,

THE GENERAL COURT (Third Chamber)

hereby:

- 1. Dismisses the action;**
- 2. Orders Dr. Ing. h.c. F. Porsche AG to pay the costs.**

Frimodt Nielsen

Póltorak

Perillo

Delivered in open court in Luxembourg on 6 June 2019.

[Signatures]