



Reports of Cases

JUDGMENT OF THE GENERAL COURT (Fourth Chamber)

27 February 2018 *

(Community design — Invalidity proceedings — Registered Community design representing a case for a mobile telephone — Disclosure of the design — Article 7(1) of Regulation (EC) No 6/2002 — Evidence submitted for the first time before the General Court)

In Case T-166/15,

Claus Gramberg, residing in Essen (Germany), represented initially by S. Kettler, and subsequently by F. Klopmeier and G. Becker, lawyers,

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 being

Sorouch Mahdavi Sabet, residing in Paris (France),

ACTION brought against the decision of the Third Board of Appeal of EUIPO of 13 January 2015 (Case R 460/2013-3), relating to invalidity proceedings between Mr Gramberg and Mr Mahdavi Sabet,

THE GENERAL COURT (Fourth Chamber),

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

Registrar: E. Coulon,

having regard to the application lodged at the Court Registry on 2 April 2015,

having regard to the response lodged at the Court Registry on 24 August 2015,

having regard to the reply lodged at the Court Registry on 1 December 2015,

having regard to the written questions put by the Court to the parties and their answers to those questions lodged at the Court Registry on 10 and 11 May 2017,

having regard to the observations of the parties lodged at the Court Registry on 29 May 2017 on their responses to the measures of organisation of procedure,

* Language of the case: German.

having regard to the fact that no application for a hearing was submitted by the parties within the period of three weeks from notification of the closure of the written part of the procedure and having decided, pursuant to Article 106(3) of the Rules of Procedure of the General Court, to rule on the action without an oral part of the procedure,

gives the following

Judgment

I. Background to the dispute

1 On 25 December 2011, Mr Sorouch Mahdavi Sabet 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). He claimed the priority of an application filed in France on 30 June 2011.

2 The design for which registration was sought ('the contested design') is the following design:



3 According to the application for registration, the contested design is intended to be used for 'covers for telephones, laptop bags, cases (mobile telephones), cases for computers, mobile telephone cases' in Class 03.01 of the Locarno Agreement Establishing an International Classification for Industrial Designs of 8 October 1968, as amended.

4 EUIPO registered the contested design on 25 December 2011 under number 001968496-0002 with the priority date of 30 June 2011. The design was published in *Community Designs Bulletin* No 35/2012 of 17 February 2012.

5 On 4 May 2012, the applicant, Claus Gramberg, submitted to EUIPO, pursuant to Article 52 of Regulation No 6/2002, an application for a declaration that the contested design was invalid on the ground of lack of novelty. According to the applicant, he sells accessories for mobile telephones, including cases for such devices, under the mumbi trade mark, primarily on the 'amazon.de' online sales portal, with the seller name HandyNow.

6 In support of his application for a declaration of invalidity, the applicant asserted that the contested design had been disclosed before the priority date of 30 June 2011 in the following circumstances:

- on 23 May 2011, first of all, he purchased cases corresponding to the contested design from a wholesaler (invoice, Annex D 1 of the application for a declaration of invalidity); second, on 26 May 2011, he posted those cases, without an illustration, on the 'amazon.de' online sales website (screenshot of the 'amazon.de' website, Annex D 2 of the application for a declaration of invalidity); lastly, on 30 May 2011, he sold the first case (invoice, Annex D 3 of the application for a declaration of invalidity);

- on 15 June 2011, the offer for sale on the ‘amazon.de’ website was accompanied by an image of the case in question (screenshot of the ‘amazon.de’ website, Annex D 4a of the application for a declaration of invalidity);
 - on 27 June 2011, the image of the case in question was again published on Amazon (screenshot of the ‘amazon.de’ website, Annex D 4b of the application for a declaration of invalidity); in order to publish that image, a photograph had been taken on 26 May 2011 (digital photograph, Annex D 5 of the application for a declaration of invalidity).
- 7 The applicant stated that the documents annexed to his application for a declaration of invalidity which are mentioned in paragraph 6 above proved disclosure of the contested design before the priority date of 30 June 2011 and that this was confirmed by the following documents:
- a sworn statement in which a supplier attests that on 31 May 2011 the applicant ‘purchased’ from him a case like the one reproduced in that statement (Annex D 6 of the application for a declaration of invalidity);
 - three newsletters sent to him by an online sales website between 15 and 29 June 2011 which contain the image of the case in question (Annexes D 7 to D 9 of the application for a declaration of invalidity);
 - a brochure sent to him by a supplier on 9 June 2011 which reproduces the case in question (Annex D 10 of the application for a declaration of invalidity);
 - the image on the ‘amazon.de’ website of a case offered for sale since 31 December 2010 (Annex D 11 of the application for a declaration of invalidity);
 - an online sales confirmation for a case (Annex D 12 of the application for a declaration of invalidity);
 - screenshots of the eBay.com website in Hungarian (Annex D 13 of the application for a declaration of invalidity).
- 8 On 22 January 2013, the Cancellation Division declared the contested design invalid on the ground that it lacked individual character, in accordance with Article 6 of Regulation No 6/2002 and Article 25(1)(b) of that regulation. With regard to disclosure, the Cancellation Division held that Annexes D 1 to D 11 of the application for a declaration of invalidity constituted valid evidence of disclosure, given that they dated from before the priority date of 30 June 2011, and that Mr Mahdavi Sabet had not proved that disclosure had taken place in accordance with the conditions mentioned in Article 7(2) of Regulation No 6/2002.
- 9 On 8 March 2013, Mr Mahdavi Sabet filed a notice of appeal with EUIPO pursuant to Articles 55 to 60 of Regulation No 6/2002 against the decision of the Cancellation Division.
- 10 In his observations on that appeal, submitted on 30 October 2013, in addition to the evidence provided during the administrative procedure before the Cancellation Division (Annexes D 1 to D 13 of the application for a declaration of invalidity), the applicant produced the following three new items of evidence:
- a French version of Annex D 6 of the application for a declaration of invalidity (Annex D 6b of the applicant’s observations);
 - a sworn statement by the applicant attesting that the website screenshots have not been altered in respect of either the date or components of the image (Annex D 14 of the applicant’s observations);

- a sworn statement by a third party attesting that the newsletters in Annexes D 7 and D 8 of the application for a declaration of invalidity were actually sent to the applicant (Annex D 15 of the applicant's observations).
- 11 By decision of 13 January 2015 ('the contested decision'), the Third Board of Appeal of EUIPO annulled the decision of the Cancellation Division and dismissed the application for a declaration of invalidity. It considered, in essence, that there was insufficient evidence to prove disclosure of the contested design before 30 June 2011.

II. Forms of order sought

- 12 The applicant claims that the Court should:
- annul the contested decision and declare the contested design invalid;
 - in the alternative, annul the contested decision and refer the case back to the Board of Appeal for a new decision on the invalidity of the contested design;
 - order EUIPO to pay the costs incurred before the Board of Appeal and before the Court.
- 13 EUIPO contends that the Court should:
- dismiss the application;
 - order the applicant to pay the costs.

III. Law

A. Admissibility of the evidence produced for the first time before the General Court

- 14 EUIPO disputes the admissibility of the evidence produced by the applicant for the first time before the General Court. It asserts that, in his application, the applicant gave a new more detailed account of the facts and produced a number of new items of evidence (Annexes A 2 to A 27 of the application) which had not been mentioned in the procedure before EUIPO. Referring to the settled case-law of the General Court, EUIPO maintains that this new account of the facts and the corresponding evidence cannot be taken into consideration because they alter the subject-matter of the dispute.
- 15 The applicant argues that the Court is obliged to take the contested evidence into consideration in so far as it does not alter the subject-matter of the dispute, but simply clarifies and develops his previous account of the facts.
- 16 It should be noted that the applicant does not dispute that the evidence contained in Annexes A 2 to A 27 of the application was produced for the first time before the Court. Those documents do therefore constitute new evidence which was not available to the Board of Appeal when it made the contested decision.
- 17 The annexes in question, which were produced for the first time before the Court, and their description in the new account of the facts contained in the application cannot therefore be taken into consideration. The purpose of actions brought before the General Court is to review the legality of decisions of the Boards of Appeal of EUIPO, as referred to in Article 61 of Regulation No 6/2002, with the result that it is not the Court's function to review the facts in the light of documents which have been produced for the first time before it (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 28). Accordingly, Annexes A 2 to A 27 of the application and the new account of the facts contained in the application, which describes those annexes, must be rejected as inadmissible.

B. Substance

1. The claim seeking annulment of the contested decision and the referral of the case back to the Board of Appeal

- 18 In support of his appeal, the applicant relies on three pleas in law. The first plea in law alleges infringement of Article 5(1)(b) of Regulation No 6/2002 and of Article 7(1) of that regulation. The second plea in law alleges infringement of ‘essential procedural requirements’. The third plea in law complains that the Board of Appeal failed to take account of the fact that Mr Mahdavi Sabet could not legitimately claim priority of the contested design.
- 19 In the first plea in law, which alleges an infringement of Article 5(1)(b) of Regulation No 6/2002 and of Article 7(1) of that regulation, the applicant asserts that the Board of Appeal was incorrect to find that the contested design had not been the subject of prior disclosure such as to frustrate its novelty. In particular, the Board of Appeal incorrectly assessed the evidence produced by the applicant, denying that it had any probative value. In fact, the documents produced reliably showed that the contested design had already been disclosed prior to its registration for the purposes of Article 7(1) of Regulation No 6/2002.
- 20 EUIPO disputes the applicant’s arguments. It submits, in essence, that the applicant condenses the lengthy explanations given by the Board of Appeal and is not able to refute them.
- 21 Under Article 7(1) of Regulation No 6/2002, a design is deemed to have been made available to the public if it has been published following registration or otherwise, or exhibited, used in trade or otherwise disclosed, before the date on which the design for which protection is claimed has first been made available to the public, except where these events could not reasonably have become known in the normal course of business to specialist circles in the sector concerned operating within the European Union.
- 22 According to case-law, a design is therefore deemed to have been made available once the party relying thereon has proven the events constituting disclosure. In order to rebut that presumption, the party disputing disclosure must establish to the requisite legal standard that, in the circumstances of the case, it cannot reasonably be assumed that those events have become known in the normal course of business to the specialist circles in the sector concerned (judgment of 21 May 2015, *Senz Technologies v OHIM — Impliva (Umbrellas)*, T-22/13 and T-23/13, EU:T:2015:310, paragraph 26).
- 23 The disclosure of an earlier design cannot be proven by means of probabilities or suppositions, but has to be demonstrated by solid and objective evidence of actual disclosure of the earlier design on the market (see judgment of 9 March 2012, *Coverpla v OHIM — Heinz-Glas (Flacon)*, T-450/08, not published, EU:T:2012:117, paragraph 24 and the case-law cited).
- 24 It is also clear from case-law that the evidence provided by the applicant for a declaration of invalidity must be considered in its entirety. Although some of that evidence may be insufficient in itself to prove disclosure of an earlier design, when combined or read in conjunction with other documents or information, it may nevertheless contribute to establishing disclosure (judgment of 9 March 2012, *Flacon*, T-450/08, not published, EU:T:2012:117, paragraph 25).

- 25 In addition, in order to assess the evidential value of a document, it is necessary to verify the plausibility and the accuracy of the information which that document contains. It is necessary to take account of, inter alia, the origin of the document, the circumstances in which it came into being, the person to whom it was addressed and whether, on its face, the document appears to be sound and reliable (see judgment of 9 March 2012, *Flacon*, T-450/08, not published, EU:T:2012:117, paragraph 26 and the case-law cited).
- 26 It follows from the EU legislation in force which is applicable to Community designs that, first, the applicant for a declaration of invalidity is free to choose the evidence which it considers useful to submit to EUIPO in support of its application for a declaration of invalidity and, second, EUIPO is required to examine all evidence submitted in order to establish whether it actually proves disclosure of the earlier design (see, to that effect, judgments of 9 March 2012, *Flacon*, T-450/08, not published, EU:T:2012:117, paragraphs 21 to 23; and of 14 July 2016, *Thun 1794 v EUIPO — Adekor (Decorative graphical symbols)*, T-420/15, not published, EU:T:2016:410, paragraph 26).
- 27 Before the General Court, in order to prove that the contested design had already been disclosed to the public before its registration by EUIPO with the priority date of 30 June 2011, the applicant has referred, among the evidence produced before the Board of Appeal, to Annexes D 2, D 3, D 4a, D 4b, D 5, D 6, D 7 to D 9 and D 11 of his application for a declaration of invalidity and to Annexes D 6b and D 14 of his observations before the Board of Appeal.
- 28 That evidence comprises screenshots of the ‘amazon.de’ website (Annexes D 2, D 4a, D 4b and D 11), an invoice (Annex D 3), a computer file with a photograph of a case (Annex D 5), three emails containing newsletters (Annexes D 7 to D 9), two statements by a third party (Annexes D 6 and D 6b) and statement by the applicant himself (Annex D 14).
- 29 It is having regard to that evidence and in the light of the case-law cited in paragraphs 22 to 26 above that it must be assessed whether the Board of Appeal was right to find that the contested design had not been the subject of disclosure before 30 June 2011, in such a way as to frustrate its novelty.
- 30 It is clear from the contested decision that the Board of Appeal did not accept that all the evidence produced by the applicant had probative value.
- 31 According to the Board of Appeal, the screenshots of the ‘amazon.de’ website (Annexes D 2, D 4a, D 4b and D 11) had no probative value, principally on the ground that they were not reliable and had to be viewed with scepticism, given that each of those screenshots, which were dated 26 May, 15 and 27 June 2011 respectively, includes a header with a large amount of additional information that is not usually contained in website screenshots. The applicant has failed to explain the process by which he had been able to print out the content of a website a year old (Annexes D 2, D 4a and D 4b). Nor did he respond to Mr Mahdavi Sabet’s argument that, when he had made an internet search for the case model with the descriptive terms used in the offer for sale at Annex D 4b, a completely different case appeared. In addition, as far as the website screenshot in Annex D 11 was concerned, the Board of Appeal stated that the date on which a case was placed on sale on the internet did not correspond to the actual sale date of the product for which that case was intended (Annex D 11). The website screenshots in question also could not constitute proof of disclosure as they did not contain an image (Annex D 2) or contained only a blurred image (Annexes D 4a and D 11).
- 32 The invoice of 30 May 2011 sent by the applicant’s company, HandyNow, to its customer (Annex D 3), which was supposed to prove the sale of one of the cases shown, inter alia, in Annex D 2, was also not considered by the Board of Appeal to have probative value, on the ground that the description of a product in words is not sufficient to prove its disclosure.

- 33 The Board of Appeal also rejected the computer file with a photograph of a case dated 26 May 2011 (Annex D 5), purportedly used in Annex D 4a, as proof of disclosure, because the applicant had not explained how that file had been created, what linked it to Annex D 4a or how it was capable of proving the disclosure of the case in question.
- 34 The emails of 15, 22 and 29 June 2011, containing newsletters which the applicant received from the online retailer Alibaba.com (Annexes D 7 to D 9), were rejected by the Board of Appeal because, first, the images were too blurred and did not therefore enable a link to be made with the contested design, second, the three emails were not reliable on account of unusual information contained in their headers and, third, those emails reflected, at most, the existence of private correspondence between two individuals.
- 35 The Board of Appeal considered that the two third-party statements confirming the purchase by the applicant of the case for the Samsung i9100 mobile telephone (Annex D 6 and Annex D 6b) could not corroborate the applicant's claims either. According to the Board of Appeal, the image reproduced in the two annexes in question was blurred, the statement was insufficient in itself to prove disclosure of the contested design and demonstrated, at most, the existence of a commercial transaction between two individuals. As regards Annex D 6b in particular, the Board of Appeal found that it was not the French version of Annex D 6, as the applicant had claimed, but a newly drafted and signed document. Furthermore, that document was not dated and did not mention the name of the purchaser.
- 36 The applicant's statement certifying that the website screenshots, whose reliability had been called into question by Mr Mahdavi Sabet, had 'not been altered in respect of either the date or components of the image' (Annex D 14), was considered by the Board of Appeal to be insufficient evidence, given the presence of lines of technical information in the header of those screenshots and also given the existence of different case models with the same reference.
- 37 The Court considers it appropriate in the present case, in view of the nature of the evidence produced by the applicant to prove disclosure of the contested design before 30 June 2011, to examine the Board of Appeal's assessment of the probative value of, first, the screenshots of the 'amazon.de' website (Annexes D 2, D 4a, D 4b and D 11) and, second, the emails of 15, 22 and 29 June 2011, containing newsletters from the Alibaba.com online sales portal (Annexes D 7 to D 9).

(a) The Board of Appeal's assessment of the probative value of the screenshots of the 'amazon.de' website

- 38 The Court notes that, in essence, the applicant's arguments regarding the Board of Appeal's assessment of the probative value of the screenshots of the 'amazon.de' website in Annexes D 2, D 4a, D 4b and D 11 revolve around three complaints, alleging, first, that the Board of Appeal denied that those annexes had probative value on account of an apparently unusual header and ignored the applicant's explanation regarding that header, second, that the Board of Appeal failed to take account of offers for sale on the 'amazon.de' website which give precise dates and, lastly, that the Board of Appeal was wrong to reject the screenshot showing an offer on the 'amazon.de' website produced in Annex D 11.

(1) The first complaint, alleging that the Board of Appeal denied that Annexes D 2, D 4a and D 4b had probative value on account of an apparently unusual header and ignored the applicant's explanation regarding that header

- 39 The applicant asserts that the Board of Appeal was wrong to reject the offers for sale on the 'amazon.de' website in Annexes D 2, D 4a and D 4b on account of its suspicions as to the accuracy of the content of those offers, in particular on account of the presence of an apparently unusual header in

the annexes concerned, which included a large amount of additional information, and the failure by the applicant to explain the process by which he had been able to print out the content of a webpage a year old.

- 40 In this regard, the applicant reiterates the argument he raised previously before EUIPO that ‘all the information contained in the header is added during archiving’. He maintains that the use of the archiving system by traders, like himself, that offer products en masse on the internet, is public knowledge and should have been taken into consideration by the Board of Appeal on its own initiative.
- 41 EUIPO disputes the applicant’s arguments. It asserts that the Board of Appeal did not accept that documents taken from the ‘amazon.de’ website in Annexes D 2, D 4a and D 4b had sufficient probative value, not only on account of the headers of those documents, but also for other reasons, such as the poor quality of the visual reproduction of the case in question and the possibility of manipulating internet content at any time.
- 42 It should be noted that, in the present case, the Board of Appeal rejected Annexes D 2, D 4a and D 4b on account of the presence of an apparently unusual header and the failure by the applicant to provide an explanation concerning that header, taking the view that website screenshots could be altered at any time or were difficult to verify, such that a mere printout of a webpage cannot automatically attest to its content.
- 43 Even though it might seem reasonable to consider, as the Board of Appeal argues, that the content of a website can be altered at any time and that that content can be difficult to verify *a posteriori*, such considerations cannot be applied to the offers for sale in Annexes D 4a and D 4b.
- 44 It is clear, first, that, in challenging the Board of Appeal’s response to the suspicions raised by Mr Mahdavi Sabet as to the reliability of Annex D 4b, the applicant refers to ‘a specific reference number corresponding to a single offer’ and, second, that that annex actually contains such a number, namely ASIN number B0058COLXM, immediately before the reference to the availability date for the offer on the ‘amazon.de’ online sales website.
- 45 As the applicant stated in his response to the measures of organisation of procedure, the ASIN number is a unique reference assigned to each item in the catalogue which enables the item on the Amazon online sales platform to be identified. According to the Amazon Help webpage, the ASIN number assigned to a product is created when the product is first offered in the Amazon catalogue and it is not permitted to create a new ASIN number for a product already offered on Amazon. To this end, according to that webpage, if a seller sends information about a product to Amazon, it is automatically verified whether there is already a product page or an offer page with an ASIN number for the product which the seller wishes to offer for sale.
- 46 Since the information provided by the applicant in response to the measures of organisation of procedure has not been disputed by EUIPO, the Court cannot see any reason why it should not also be applied to Annex D 4a, in which the product in question is also designated by its ASIN number. Accordingly, because the unique ASIN number has been specifically created to designate each product in the Amazon catalogue, the Board of Appeal was not entitled to maintain that the information in Annexes D 4a and D 4b relating to the cases in question, including their description, their image and the time they were placed on sale, could be altered at any time or was difficult to verify.
- 47 This conclusion cannot be called into question by EUIPO’s arguments.
- 48 First, EUIPO asserts that, in mentioning specific reference numbers which are assigned to a single offer for sale, the applicant did not specify that those numbers were ASIN numbers. That argument must be rejected.

- 49 There is no reason to consider that there is another specific reference number for offers for sale made on the ‘amazon.de’ website. In addition, EUIPO itself does not claim that there are no ASIN numbers to designate products sold on the Amazon online sales website or that there is any other number that should be considered as a specific reference number assigned to products sold on the website.
- 50 Second, according to EUIPO, the meaning of ASIN numbers cannot be considered to be well known, with the result that the applicant should have given additional explanations about those numbers. This argument cannot be accepted.
- 51 It should be pointed out that, in his observations of 30 October 2013 on the appeal filed by Mr Mahdavi Sabet before the Board of Appeal, the applicant mentioned two annexes containing ASIN numbers, namely B0052TD 5OM and B005RFUT 72, ‘to get a picture of the accuracy of the information’.
- 52 By giving such details, the applicant admittedly did not explain either how ASIN numbers are composed or the arrangements by which they are assigned by the Amazon online sales website, but he did underline the importance to be attached to the annexes containing those ASIN numbers, thereby demonstrating their credibility.
- 53 Third, EUIPO states that it cannot see how ASIN numbers could call into question the Board of Appeal’s arguments on the lack of probative value, in particular of Annexes D 4a and D 4b.
- 54 For the reasons given in paragraph 46 above, the presence in Annexes D 4a and D 4b of a unique number assigned to a single offer necessarily attests to the reliability of those annexes for the purposes of demonstrating disclosure of the contested design before 30 June 2011.
- 55 In the light of the above considerations, it must be concluded that the Board of Appeal made an error of assessment in rejecting Annexes D 4a and D 4b on account of its suspicions as to their reliability, without there being any need to examine the applicant’s complaints that the Board of Appeal ignored his explanation regarding the apparently unusual header of those annexes. As regards Annex D 2, the Court concludes that, because it does not include an ASIN number and the applicant has not adduced any other evidence to demonstrate its reliability, the Board of Appeal was right not to accept that the annex has probative value.

(2) The second complaint, alleging that the Board of Appeal failed to take account of offers on the ‘amazon.de’ website which mention precise dates

- 56 The applicant asserts that, in expressing doubts as to the authenticity of the documents in Annexes D 2, D 4a and D 4b, the Board of Appeal failed to take account of the fact that the offers for sale on the ‘amazon.de’ website shown in Annexes D 4a and D 4b included the words ‘Date first available at amazon.de’, giving the dates 26 May 2011 (Annex D 4a) and 27 June 2011 (Annex D 4b) for the offers in question.
- 57 The applicant also submits that Mr Mahdavi Sabet’s argument that, when he searched on the internet for the case model with the descriptive terms used in the offer contained in Annex D 4b, a completely different case appeared, is incorrect, as those search terms constitute a general item description and not a specific reference number corresponding to a single offer.
- 58 EUIPO disputes the applicant’s arguments. It maintains that the Board of Appeal did not ignore the dates mentioned in the documents in Annexes D 2, D 4a and D 4b. According to EUIPO, those dates do not prove disclosure of the contested design, as the appearance of a case may change at any time and still remain on the Amazon sales platform as a permanent offer for sale.

(i) *The failure to take account of the date of 26 May 2011 mentioned in Annex D 4a*

- 59 As far as the date of 26 May 2011 mentioned in Annex D 4a is concerned, the Board of Appeal did not, in fact, as the applicant states, take into account the words ‘Date first available at amazon.de: 26 May 2011’ on the third page of Annex D 4a. The Board of Appeal did not examine the image shown in the document or any other information contained in that annex, solely because there were suspicions as to the accuracy of the content of the document in question and, in general, as to the possibility of altering the content of a webpage before printing it from the internet.
- 60 The Court has already concluded, in paragraph 55 above, that the Board of Appeal erred in rejecting Annexes D 4a and D 4b on account of suspicions as to their reliability.
- 61 In addition, as Annex D 4a must be assessed in the context of the other evidence produced by the applicant, it should be noted that Annexes D 3 and D 5 corroborate the claim that the contested design was disclosed from 26 May 2011.
- 62 The invoice sent by the applicant to a customer (Annex D 3) contains a description of the case in question similar to the description given on the ‘amazon.de’ website (mumbi Silikon Case HTC Desire HD Silicon Tasche Hülle — DesireHD Schutzhülle). Likewise, it mentions the same price (EUR 6.99) as the product with ASIN number B0052TD 5OM, which had been available on that website since 26 May 2011. In addition, the purchase order for that case is dated 27 May 2011, the day after 26 May 2011. In the light of this evidence, it can only be concluded that the invoice contains sufficiently precise information, thereby corroborating the information contained in the other evidence produced by the applicant, in particular in Annex D 4a.
- 63 However, the Board of Appeal denied that that annex had any probative value simply because there were no images. It should be pointed out in this regard that it is usual for an invoice not to include images, as a general rule. It mentions the product name, which is one of the most important features of invoices in general (see, to that effect, judgment of 16 September 2013, *Avery Dennison v OHIM — Dennison-Hesperia (AVERY DENNISON)*, T-200/10, not published, EU:T:2013:467, paragraph 43). Furthermore, an invoice includes, in principle, a reference to the relevant details of the undertaking issuing the invoice, as is also demonstrated by the invoice in Annex D 3, which, among other things, mentions the unique fiscal identification number of the applicant’s undertaking, HandyNow.
- 64 Consequently, in order to be able to call into question the probative value of a financial document proving the existence of a commercial relationship between an undertaking and its customer and to reject it as invalid evidence, the Board of Appeal had to have serious doubts and to give reasons for those doubts, which is not clear from the contested decision.
- 65 As regards the computer file with a photograph of a case at Annex D 5, the Court finds that the photograph of the case in question is in a similar form, *prima facie*, to that of the contested design, and that the file makes reference to the author of that photograph, namely the applicant’s undertaking, HandyNow, to the date of 26 May 2011, and to the applicant’s trade mark, mumbi, which also appears in the description of the cases offered on the ‘amazon.de’ website and mentioned in Annexes D 2, D 4a and D 4b. It is thus clear that Annex D 5 is linked to Annex D 4a.
- 66 The evidence contained in Annexes D 3 and D 5, taken together with the reference in Annex D 4a to the availability date for the offer for sale, namely ‘from 26 May 2011’, corroborates the claim that the contested design was available to the public from 26 May 2011. Consequently, the Board of Appeal was wrong to deny that the evidence contained in Annexes D 3 and D 5 had any probative value.
- 67 In the light of the above considerations, it must be concluded that the Board of Appeal made an error of assessment by failing to take account of the availability date for the offer for sale, namely 26 May 2011, mentioned in Annex D 4a.

(ii) The failure to take account of the date of 27 June 2011 mentioned in Annex D 4b

- 68 As regards the date of 27 June 2011 mentioned in Annex D 4b, it should be observed, on the other hand, that the Board of Appeal did not ignore the reference to the fact that the case model, which is purportedly identical to the contested design, had been present on the ‘amazon.de’ website since ‘27 June 2011’. Indeed, it did consider the reference along with Annex D 4b as a whole, in paragraph 33 of the contested decision, concluding that the annex lacked probative value. Aside from the point that the screenshot in question contained an unusual header, the Board of Appeal found that, even if the offers concerned appeared *prima facie* to be relevant evidence of disclosure of the contested design, they had to be viewed with scepticism, in the light of the online search made by Mr Mahdavi Sabet for the applicant’s case model with the description used in the offers on the ‘amazon.de’ website. The results of that search revealed a completely different case from the applicant’s case which appears in the offers on the ‘amazon.de’ website.
- 69 The Court considers that, in the light of the conclusions set out in paragraph 55 above regarding the reliability of Annexes D 4a and D 4b, the Board of Appeal was wrong to conclude that Annex D 4b could not be relied on as evidence, that annex sharing, as the Board of Appeal stated in paragraph 33 of the contested decision, characteristics with the contested design.
- 70 As regards the results of the internet search made by Mr Mahdavi Sabet, it is clear from paragraph 33 of the contested decision that the keywords used for the search were ‘mumbi Silikon TPU Tasche Samsung Galaxy i9100 S II Silicon Case Hülle-Galaxy S 2 S 2 SII Schutzhülle’, that is to say, the applicant’s trade mark, mumbi, a reference to the device and, presumably, the designation of the model of mobile telephone for which the case was intended, and not a specific reference number. The applicant is thus correct in asserting that the search in question did not relate to the precise designation of a specific model of mobile telephone case, but to its description.
- 71 Consequently, in view of the findings made in paragraphs 45 to 55 above concerning the specific ASIN reference number given to each item in the Amazon website catalogue, it must be concluded that the Board of Appeal was not entitled to endorse the doubts raised by Mr Mahdavi Sabet through his internet search.
- 72 Therefore, as the results of that search could not in themselves call into question the probative value of the reference on the ‘amazon.de’ website to the availability date for the product, ‘from 27 June 2011’ (Annex D 4b), it must be concluded that the Board of Appeal made an incorrect assessment of the probative value of Annex D 4b.

(3) The third complaint, alleging that the Board of Appeal was wrong to reject the screenshot showing an offer on the ‘amazon.de’ website, produced in Annex D 11

- 73 The applicant asserts that the Board of Appeal was wrong to reject the screenshot produced in Annex D 11, which shows an offer available on the ‘amazon.de’ website since 31 December 2010.
- 74 With regard to the fact that the date given on websites for the placing on sale of a case did not correspond to the actual sale date of the product for which the case was intended, the applicant states that the case in question is suitable for two mobile telephones, namely the iPhone 4S and the iPhone 4, the latter of which had been available as of 24 June 2010. According to the applicant, as a result of the more recent mobile telephone, the iPhone 4S, entering the market, the name for the product designated on Amazon by ASIN number B005RFUT 72 was changed.

- 75 As far as the quality of the images in the abovementioned screenshots is concerned, the applicant states that Annex D 11 contains a perfectly clear photograph of a mobile telephone with all the characteristics of the contested design. In addition, the applicant submits that the good quality of the photograph in that annex can also be seen in the case-file on which the decision of the Cancellation Division is based.
- 76 EUIPO disputes the applicant's arguments. It asserts that the applicant's explanations regarding the doubts expressed by Mr Mahdavi Sabet over Annex D 11 are irrelevant because they have been given for the first time before the Court. In any event, the offers shown on the Amazon sales platform, including the visual reproduction of the products, could be altered by the person responsible at any time.
- 77 First, as regards the assertion in paragraph 34 of the contested decision that Mr Mahdavi Sabet had proved that the date for the placing on sale of a case shown on the screenshot of the 'amazon.de' website produced in Annex D 11 did not correspond to the actual sale date of one of the products for which the case was intended, in this instance the iPhone 4S, the applicant is correct to state that the description of the case in Annex D 11 refers not only to the iPhone 4S, which was placed on the market after the date of 31 December 2010 mentioned in that annex, but also to the iPhone 4, which was already on the market before 31 December 2010.
- 78 Second, it should be noted that Annex D 11 refers to a product placed on sale on the 'amazon.de' website with the ASIN number B005RFUT 72. In the light of the uniqueness of that number, as stated in paragraph 46 above, the Board of Appeal was not entitled to conclude that Annex D 11 did not have sufficient probative value in respect of disclosure.
- 79 In addition, even assuming that the Board of Appeal was entitled to consider that the document in Annex D 11 could be altered at any time, the contested decision does not contain any statement of reasons justifying the conclusion that there was any such alteration.
- 80 This conclusion cannot be called into question by the fact, adduced by the Board of Appeal in paragraph 34 of the contested decision, that the applicant failed to provide an explanation during the administrative procedure concerning the time discrepancy between the date on which a case was placed on sale and the actual marketing date of the product for which the case was intended. It is sufficient to note in this regard that the information contained in Annex D 11 includes a reference both to the iPhone 4 and to the iPhone 4S and that it is well known that the placing on the market of the iPhone 4 was followed by the placing on the market of the iPhone 4S.
- 81 It should be pointed out that EUIPO's argument that the applicant's explanations regarding the doubts expressed by Mr Mahdavi Sabet over that time discrepancy, given for the first time before the Court, are irrelevant has no bearing on the above findings.
- 82 Lastly, with regard to the quality of the image in Annex D 11, the Court finds that the applicant was correct in asserting that the image is perfectly clear in the decision of the Cancellation Division. In addition, the case reproduced in that image has, *prima facie*, similar characteristics to the contested design. That image cannot therefore be described as blurred.
- 83 In the light of the above considerations, it must be concluded that the Board of Appeal made an incorrect assessment of the document in Annex D 11 by denying that it had any probative value.

(b) The Board of Appeal's assessment of the probative value of the emails containing newsletters from the Alibaba.com online sales portal

- 84 The applicant asserts that the Board of Appeal was not entitled to decline to take into consideration the newsletters from the Alibaba.com online sales portal received by the applicant on 15, 22 and 29 June 2011 and produced in Annexes D 7, D 8 and D 9. He maintains that the photographs contained in those annexes are sufficiently clear and show all the inherent characteristics of the contested design. In this regard, he refers to the decision of the Cancellation Division to demonstrate that those photographs are of sufficient quality.
- 85 As far as the header of Annexes D 7 to D 9 is concerned, the applicant submits that the header reproduces additional information stored by his archiving system.
- 86 In addition, the applicant maintains that the Board of Appeal was wrong to regard Annexes D 7, D 8 and D 9 as private correspondence between two individuals and to infer that they did not justify the conclusion that the content of that correspondence could become known, in the normal course of business, to specialist circles in the sector concerned operating within the European Union. He asserts that, as a recipient of the newsletters from the Alibaba.com online sales portal, he forms part of the specialist circles in the sector concerned operating within the European Union and that the fact that those newsletters were sent to the applicant on 15, 22 and 29 June 2011 thus proves in itself that the model in question became known to specialist circles in the sector concerned operating within the European Union.
- 87 EUIPO disputes the applicant's arguments. First, it asserts that the quality of the visual reproduction of the case in Annexes D 7 to D 9 is not sufficient and that, as the new documents annexed to the application, which are said to be of better quality, were produced for the first time before the Court, they are irrelevant. Second, EUIPO reiterates that the headers of the emails in question raised doubts as to their probative value. Lastly, EUIPO maintains that the Board of Appeal presumed the emails to be private correspondence, given that the applicant had simply asserted that all the newsletters came from a single supplier.
- 88 With regard to the Board of Appeal's finding in paragraph 40 of the contested decision that the images in Annexes D 7 to D 9 were too blurred and did not therefore permit a link to be made with the contested design, it is sufficient to note that, as far as the image in Annex D 7 is concerned, the characteristics of the case reproduced in that image are, as the applicant states, perfectly visible in the decision of the Cancellation Division and that they are sufficiently similar to those of the contested design. The image reproduced in Annex D 7 cannot therefore be rejected on grounds of lack of clarity.
- 89 As regards the allegedly unusual header of the email produced in Annex D 7, it should be noted that, in paragraph 40 of the contested decision, the Board of Appeal reiterates its very general remarks regarding the reliability of evidence taken from the internet, without substantiating its suspicions that the email in question and the two other emails concerned could have been altered at any time. In this regard, it relies only on the presumption that information and images posted online and accessible only by computer can be altered at any time.
- 90 It is true that it cannot be ruled out, as the Board of Appeal stated in paragraph 30 of the contested decision, that the content of a website or of any other electronic document can be altered at any time. However, to apply this presumption automatically, in the absence of serious and substantiated doubts that the evidence was altered in a specific case, would deprive of all effect the principle established in EU case-law, cited in paragraph 24 above, that the evidence provided by the applicant for a declaration of invalidity must be considered in its entirety (see, to that effect, judgment of 9 March 2012, *Flacon*, T-450/08, not published, EU:T:2012:117, paragraph 26 and the case-law cited).

- 91 Consequently, in the light of the conclusion in paragraph 55 above, the Board of Appeal was wrong to deny that the email in Annex D 7 had any probative value.
- 92 That conclusion cannot be called into question by the Board of Appeal's statement that the emails in Annexes D 7 to D 9 prove, at the most, the existence of private correspondence between two individuals.
- 93 It should be noted that the document in Annex D 7 does not consist only of an email between two individuals, but also includes a newsletter sent to the applicant by the online retailer Alibaba.com. In order to establish disclosure of the case in question, regard should be had to the content of the email, not to its form. A newsletter cannot be regarded as 'private correspondence'. A newsletter is, by its nature, sent to many subscribers and its purpose is to market products. As the applicant has stated, without this being disputed by EUIPO, the Alibaba.com online sales portal sends its newsletters to thousands of recipients, not only to the applicant. In addition, it is well known that the Alibaba.com website is a major global sales platform for goods. In the light of these considerations, the criteria relied on by the Board of Appeal in asserting that the email in Annex D 7 proved, at the most, the existence of private correspondence between two individuals are not apparent from the contested decision.
- 94 In these circumstances, it must be concluded that the Board of Appeal made an error of assessment in denying that the email in Annex D 7 had any probative value.
- 95 In the light of all the above considerations, the Court considers that as a result of the errors made by the Board of Appeal in assessing the evidence, the contested decision must be annulled. As the Board of Appeal did not properly assess certain evidence which could have a bearing on the outcome of the dispute, its assessment of the disclosure of the contested design was not complete and, in accordance with the principle of the division of powers between EUIPO and the General Court, it will now be for the EUIPO's bodies to adopt a new position.
- 96 Consequently, the first plea in law must be upheld and the contested decision annulled, without there being any need to rule on the second and third pleas in law. Nor is there any need to rule on the applicant's claims seeking the referral of the case back to the Board of Appeal. EUIPO is required by Article 61(6) of Regulation No 6/2002 to take the measures necessary to comply with the judgment of the General Court. It follows from that provision that the Court is not entitled to issue directions to EUIPO, which must draw the appropriate conclusions from the operative part and grounds of the Court's judgment (see, by analogy, judgment of the General Court of 15 March 2006, *Athinaiki Oikogeniaki Artopoia v OHIM — Ferrero (FERRÓ)*, T-35/04, EU:T:2006:82, paragraph 15 and the case-law cited).

2. The claim seeking a declaration that the contested design is invalid

- 97 As his principal claim, in addition to the annulment of the contested decision, the applicant claims that the Court should declare the contested design invalid. EUIPO maintains that this claim is inadmissible because, according to settled case-law, the power of the General Court to alter decisions does not have the effect of conferring on that Court the power to substitute its own reasoning for that of a Board of Appeal or to carry out an assessment on which that Board of Appeal has not yet adopted a position.
- 98 It should be noted that the review carried out by the General Court under Article 61 of Regulation No 6/2002 is a review of the legality of the decisions of the EUIPO Boards of Appeal. It may annul or alter a decision against which an action has been brought only if, at the time the decision was adopted, it was vitiated by one of the grounds for annulment or alteration set out in Article 61(2) of that regulation. It follows that the power of the General Court to alter decisions does not have the effect of conferring on that Court the power to substitute its own reasoning for that of a Board of Appeal or

to carry out an assessment on which that Board of Appeal has not yet adopted a position. Exercise of the power to alter decisions must therefore, in principle, be limited to situations in which the General Court, after reviewing the assessment made by the Board of Appeal, is in a position to determine, on the basis of the matters of fact and of law as established, what decision the Board of Appeal was required to take (see, by analogy, judgment of 13 May 2015, *Group Nivelles v OHIM — Easy Sanitary Solutions (Shower drainage channel)*, T-15/13, EU:T:2015:281, paragraph 89 and the case-law cited).

- 99 It is sufficient to note that in the present case, as the contested decision is to be annulled by reason of the error of assessment made by the Board of Appeal regarding the probative value of the evidence produced by the applicant to demonstrate disclosure of the contested design and as the Board of Appeal is required to give a new decision on the probative value of that evidence and, subsequently, on whether the contested design is invalid, it is not for the Court to rule at this stage on whether the contested design is invalid.
- 100 Consequently, the applicant's claim that the Court should order EUIPO to declare the contested design invalid is inadmissible.

IV. 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. In the present case, the applicant has claimed that EUIPO should be ordered to pay the costs, including those incurred in the appeal proceedings.
- 102 Since EUIPO has been unsuccessful, it must be ordered to bear its own costs and to pay those incurred by the applicant in accordance with the forms of order sought by him. Pursuant to Article 190(2) of the Rules of Procedure, those costs also include the expenses necessarily incurred by the applicant for the purposes of the proceedings before the Board of Appeal.

On those grounds,

THE GENERAL COURT (Fourth Chamber)

hereby:

- 1. Annuls the decision of the Third Board of Appeal of the European Union Intellectual Property Office (EUIPO) of 13 January 2015 (Case R 460/2013-3);**
- 2. Dismisses the action as to the remainder;**
- 3. Orders EUIPO to bear its own costs and to pay those incurred by Claus Gramberg, including the expenses necessarily incurred for the purposes of the proceedings before the Board of Appeal of EUIPO.**

Kanninen

Calvo-Sotelo Ibáñez-Martín

Reine

Delivered in open court in Luxembourg on 27 February 2018.

[Signatures]

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