



## Reports of Cases

### JUDGMENT OF THE GENERAL COURT (Eighth Chamber)

9 February 2017\*

(Community design — Application for Community designs representing beakers — ‘Representation suitable for reproduction’ — Lack of precision of the representation with regard to the scope of the protection sought — Refusal to remedy the deficiencies — Refusal to attribute a date of filing — Articles 36 and 46 of Regulation (EC) No 6/2002 — Articles 4(1)(e) and 10(1) and (2) of Regulation (EC) No 2245/2002)

In Case T-16/16,

**Mast-Jägermeister SE**, established in Wolfenbüttel (Germany), represented by H.-P. Schrammek, C. Drzymalla, S. Risthaus and J. Engberding, lawyers,

applicant,

v

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

defendant,

ACTION brought against the decision of the Third Board of Appeal of EUIPO of 17 November 2015 (Case R 1842/2015-3), concerning applications for the registration of beakers as Community designs,

THE GENERAL COURT (Eighth Chamber),

composed of A.M. Collins, President, R. Barents (Rapporteur) and J. Passer, Judges,

Registrar: E. Coulon,

having regard to the application lodged at the Court Registry on 19 January 2016,

having regard to the response lodged at the Court Registry on 4 April 2016,

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

gives the following

\* Language of the case: German.

## Judgment

### Legal framework

- 1 Article 36 of Council Regulation (EC) No 6/2002 of 12 December 2001 on Community designs (OJ 2002 L 3, p. 1), as amended, entitled ‘Conditions with which applications must comply’, provides:
- ‘1. An application for a registered Community design shall contain:
- (a) a request for registration;
  - (b) information identifying the applicant;
  - (c) a representation of the design suitable for reproduction[;] [h]owever, if the object of the application is a two-dimensional design and the application contains a request for deferment of publication in accordance with Article 50, the representation of the design may be replaced by a specimen.
2. The application shall further contain an indication of the products in which the design is intended to be incorporated or to which it is intended to be applied.
3. In addition, the application may contain:
- (a) a description explaining the representation or the specimen;
  - (b) a request for deferment of publication of the registration in accordance with Article 50;
  - (c) information identifying the representative if the applicant has appointed one;
  - (d) the classification of the products in which the design is intended to be incorporated or to which it is intended to be applied according to class;
  - (e) the citation of the designer or of the team of designers or a statement under the applicant’s responsibility that the designer or the team of designers has waived the right to be cited.
4. The application shall be subject to the payment of the registration fee and the publication fee. Where a request for deferment under paragraph 3(b) is filed, the publication fee shall be replaced by the fee for deferment of publication.
5. The application shall comply with the conditions laid down in the implementing regulation.
6. The information contained in the elements mentioned in paragraph 2 and in paragraph 3(a) and (d) shall not affect the scope of protection of the design as such.’
- 2 Title V of Regulation No 6/2002, entitled ‘Registration procedure’, comprises Articles 45 to 50.
- 3 Article 45 of that regulation, entitled ‘Examination as to formal requirements for filing’, provides:
- ‘1. [EUIPO] shall examine whether the application complies with the requirements laid down in Article 36(1) for the accordance of a date of filing.

2. [EUIPO] shall examine whether:

- (a) the application complies with the other requirements laid down in Article 36(2), (3), (4) and (5) and, in the case of a multiple application, Article 37(1) and (2);
- (b) the application meets the formal requirements laid down in the implementing regulation for the implementation of Articles 36 and 37;
- (c) the requirements of Article 77(2) are satisfied;
- (d) the requirements concerning the claim to priority are satisfied, if a priority is claimed.

3. The conditions for the examination as to the formal requirements for filing shall be laid down in the implementing regulation.'

4 Article 46 of Regulation No 6/2002, entitled 'Remediable deficiencies', provides:

'1. Where, in carrying out the examination under Article 45, [EUIPO] notes that there are deficiencies which may be corrected, [it] shall request the applicant to remedy them within the prescribed period.

2. If the deficiencies concern the requirements referred to in Article 36(1) and the applicant complies with [EUIPO's] request within the prescribed period, [EUIPO] shall accord as the date of filing the date on which the deficiencies are remedied. If the deficiencies are not remedied within the prescribed period, the application shall not be dealt with as an application for a registered Community design.

3. If the deficiencies concern the requirements, including the payment of fees, as referred to in Article 45(2)(a), (b) and (c) and the applicant complies with [EUIPO's] request within the prescribed period, [EUIPO] shall accord as the date of filing the date on which the application was originally filed. If the deficiencies or the default in payment are not remedied within the prescribed period, [EUIPO] shall refuse the application.

4. If the deficiencies concern the requirements referred to in Article 45(2)(d), failure to remedy them within the prescribed period shall result in the loss of the right of priority for the application.'

5 Article 47 of Regulation No 6/2002, entitled 'Grounds for non-registrability', states:

'1. If [EUIPO], in carrying out the examination pursuant to Article 45, notices that the design for which protection is sought:

- (a) does not correspond to the definition under Article 3(a); or
- (b) is contrary to public policy or to accepted principles of morality,

it shall refuse the application.

2. The application shall not be refused before the applicant has been allowed the opportunity of withdrawing or amending the application or of submitting his observations.'

- 6 Article 4 of Commission Regulation (EC) No 2245/2002 of 21 October 2002 implementing Regulation No 6/2002 (OJ 2002 L 341, p. 28), entitled ‘Representation of the design’, provides, in its paragraph 1(e):

‘1. The representation of the design shall consist in a graphic or photographic reproduction of the design, either in black and white or in colour. It shall meet the following requirements:

...

(e) the design shall be reproduced on a neutral background and shall not be retouched with ink or correcting fluid[;] [i]t shall be of a quality permitting all the details of the matter for which protection is sought to be clearly distinguished and permitting it to be reduced or enlarged to a size no greater than 8 cm by 16 cm per view for entry in the Register of Community Designs ...’

- 7 Article 10 of Regulation No 2245/2002, entitled ‘Examination of requirements for a filing date and of formal requirements’, states, in its paragraphs 1 and 2:

‘1. [EUIPO] shall notify the applicant that a date of filing cannot be granted if the application does not contain:

- (a) a request for registration of the design as a registered Community design;
- (b) information identifying the applicant;
- (c) a representation of the design pursuant to Article 4(1)(d) and (e) or, where applicable, a specimen.

2. If the deficiencies indicated in paragraph 1 are remedied within two months of receipt of the notification, the date on which all the deficiencies are remedied shall determine the date of filing.

If the deficiencies are not remedied before the time limit expires, the application shall not be dealt with as a Community design application. Any fees paid shall be refunded.’

### **Background to the dispute**

- 8 On 17 April 2015, the applicant, Mast-Jägermeister SE, filed applications for the registration of Community designs with the European Union Intellectual Property Office (EUIPO) pursuant to Regulation No 6/2002.
- 9 The designs in respect of which registration was sought are the following:
- Community design No 2683615-0001: [confidential];<sup>1</sup>
  - Community design No 2683615-0002: [confidential].
- 10 The goods in respect of which the applications for registration were made are ‘beakers’ in Class 07.01 of the Locarno Agreement of 8 October 1968 establishing an international classification for industrial designs, as amended.
- 11 By an initial examination report drawn up on 17 April 2015, the examiner informed the applicant that, with regard to the designs referred to in paragraph 9 above, the indication of the product, namely the ‘beakers’ in respect of which protection was sought, did not correspond to the representations filed, on

<sup>1</sup> — Confidential data removed.

the ground that those representations also showed bottles. It therefore suggested that the applicant add the indication of 'Bottles' in Class 09.01 of the Locarno Agreement to the two designs. The examiner added that, in so far as 'Beakers' and 'Bottles' belonged to different classes, the multiple application had to be divided. It stated that, unless the deficiencies were remedied within the prescribed period, the application would be refused.

- 12 By letter of 21 April 2015, the applicant replied that no protection was sought for the bottles reproduced in the representation, and it accordingly proposed to set out the indication of the goods as follows: 'Drinking beakers as receptacles for a bottle which is part of those beakers'. It added that Class 07.01 of the Locarno Agreement also appeared to be the appropriate class for that indication.
- 13 By a second examination report of 25 June 2015, the examiner replied that, following the letter of 21 April 2015 and the telephone conversation which it had had with the applicant, it was clear that the latter was not seeking any protection for the bottles. However, according to the examiner, those bottles appeared clearly on the representations and a further examination revealed that the applications for registration did not contain representations consistent with Article 4(1)(e) of Regulation No 2245/2002. It therefore considered that, because of the presence of the bottles, the characteristics for which protection was sought were not clearly visible. It added that this could be remedied by the filing of new views in which the required characteristics would be outlined by dotted lines or coloured borders. It stated that no date of filing could be attributed to the applications while the defects remained unremedied. It concluded by indicating that, if the defects were remedied within the prescribed periods, the date on which the new views were submitted would be recognised as the date of filing, but that, failing this, the applications for registration would be regarded as not having been filed.
- 14 By letter of 14 July 2015, the applicant replied that the conditions for the attribution of a date of filing had been satisfied, since the representations filed showed the designs against a neutral background. It stated that Article 4(1)(e) of Regulation No 2245/2002 related to the quality of representations and not to their content. Accordingly, it did not file new views.
- 15 By a third examination report of 16 July 2015, the examiner stated that it was maintaining its examination report of 25 June 2015, since the representations showed a beaker and a bottle.
- 16 By letter of 21 August 2015, the applicant, with reference to a telephone conversation which it had had with the examiner, replied that it did not understand why the date of filing could be maintained in the event of the addition of a product indication or in the event of the division of the multiple application, but not for the views originally filed. The applicant requested the adoption of a decision against which an appeal might be brought in the event that the examination decision was not annulled.
- 17 By a fourth examination report of 24 August 2015, the examiner informed the applicant that the defects in the applications could be remedied either by the filing of new views or by the addition of the indication 'Bottles' and the division of the multiple application.
- 18 By letter of 28 August 2015, the applicant requested the adoption of a decision against which an appeal might be brought.
- 19 By decision of 31 August 2015, the examiner noted that the applicant had not remedied the defects in the applications for registration, as it did not approve of the examination report. The examiner took the view, pursuant to Article 46(2) of Regulation No 6/2002 and Article 10(2) of Regulation No 2245/2002, that the design applications referred to in paragraph 9 above were not to be regarded as applications for Community designs, with the result that no date of filing could be attributed. In addition, it ordered a refund of the amount of the fee paid.

- 20 On 15 September 2015, the applicant filed a notice of appeal with EUIPO, pursuant to Articles 55 to 60 of Regulation No 6/2002, against the examiner's decision.
- 21 By decision of 17 November 2015 ('the contested decision'), the Third Board of Appeal of EUIPO confirmed, in paragraph 15 of that decision, that it was not possible to determine from the two designs referred to in paragraph 9 above whether protection was being sought for the beaker, for the bottle, or for a combination of the two. It stated in paragraph 16 of the contested decision that the representation to be filed with the application pursuant to Article 36(1)(c) of Regulation No 6/2002 served to identify the design for which protection was sought and was the condition for the attribution of a date of filing, in accordance with Article 38(1) of that regulation. The date of filing determines the priority in time of the registered design: the novelty and the characteristicness are determined using earlier designs disclosed before the date of filing. The Board of Appeal added that, pursuant to Article 4(1)(e) of Regulation No 2245/2002, the representation had to permit all the details for which protection was sought to be distinguished clearly.
- 22 The Board of Appeal added, in paragraphs 17 and 18 of the contested decision, that the assertion that the subject of the protection of the applications filed was clearly evident from the representations was at variance with the applicant's own account and that the latter's proposal for indicating the goods concerned was not capable of remedying the defects in the representation of the designs, because it could not be used to determine the scope of protection.
- 23 Lastly, the Board of Appeal took the view in paragraph 22 of the contested decision that the examiner had failed in its duty to provide a statement of reasons, which is enshrined in Article 62 of Regulation No 6/2002. According to the Board of Appeal, the grounds for the finding that the applications were not to be regarded as applications for the registration of a Community design were the defects in the representations filed, under Article 46(2) of Regulation No 6/2002, read in conjunction with Article 36(1)(c) of that regulation and Article 4(1)(e) of Regulation No 2245/2002, and not the applicant's failure to agree with the examiner's examination reports.

### **Forms of order sought**

- 24 The applicant claims that the Court should:
- annul the contested decision;
  - fix 17 April 2015 as the date of filing for designs No 2683615-0001 and No 2683615-0002;
  - order EUIPO to pay the costs, including those incurred in the appeal proceedings.
- 25 EUIPO contends that the Court should:
- dismiss the action;
  - order the applicant to pay the costs.

### **Law**

#### ***Admissibility of the applicant's second head of claim***

- 26 EUIPO contends that the applicant's second head of claim, namely the head of claim seeking to have 17 April 2015 fixed as the date of filing of the contested designs, is inadmissible on the ground that it is a direction and that the General Court cannot issue directions.



- 27 In that regard, it should be borne in mind that, according to settled case-law, in an action brought before the Courts of the European Union against the decision of a Board of Appeal of EUIPO, the latter is, under Article 61(6) of Regulation No 6/2002, required to take the measures necessary to comply with that judgment. Accordingly, the Court is not entitled to issue directions to EUIPO (see, by analogy, judgment of 20 January 2010, *Nokia v OHIM — Medion (LIFE BLOG)*, T-460/07, EU:T:2010:18, paragraph 18 and the case-law cited).
- 28 It follows from the foregoing that the second head of claim is inadmissible.

### ***Substance***

- 29 The applicant puts forward two pleas in law. The first plea in law alleges infringement of Articles 45 and 46 of Regulation No 6/2002, read in conjunction with Article 36 of that regulation, and the second plea in law alleges infringement of the rights of defence.

### ***First plea in law: infringement of Articles 45 and 46 of Regulation No 6/2002, read in conjunction with Article 36 of that regulation***

- 30 The applicant argues that the representations of the designs were of a quality which made it possible to enable a reproduction to be made. In accordance with Article 4(1)(d) and (e) of Regulation No 2245/2002, they were on a neutral background, were not retouched with ink or correcting fluid and were of a quality permitting all the details of the matter for which protection was sought to be clearly distinguished and permitting it to be reduced or enlarged. Those, the applicant submits, are the only requirements laid down by the EU legislation. The Board of Appeal's refusal to fix a date of filing on the ground that it was not possible to determine from the representations whether protection was being sought for the beaker, for the bottle, or for a combination of the two is incorrect, in so far as that question would arise only in the context of infringement proceedings; it is not an impediment to the fixing of a date of filing. Furthermore, the Board of Appeal's reasoning could be taken into account concerning the registrability of a design. According to the applicant, Article 36(1)(c) of Regulation No 6/2002 and Article 10(1)(c) of Regulation No 2245/2002, read in conjunction with Article 4(1)(e) of the latter regulation, lay down requirements only as regards the quality of the representation of the design, and not as regards its content. The general scheme of Articles 45 and 46 of Regulation No 6/2002 suggests that a date of filing should have been attributed to its applications for registration.
- 31 In that regard, according to settled case-law, in interpreting a provision of EU law, it is necessary to consider not only its wording, but also the objective pursued by the rules of which it is part (judgments of 29 January 2009, *Petrosian*, C-19/08, EU:C:2009:41, paragraph 34, and of 3 October 2013, *Lundberg*, C-317/12, EU:C:2013:631, paragraph 19).
- 32 It should be borne in mind that Article 36(1) of Regulation No 6/2002, to which reference is made in Article 45(1) and Article 46(2) of that regulation, states that the application for registration must contain 'a representation of the design suitable for reproduction'. However, that provision does not specify the conditions that must be satisfied in order for such a representation to be regarded as 'suitable for reproduction'. Nevertheless, Article 36(5) of Regulation No 6/2002 adds that the application must comply with the conditions laid down in the implementing regulation, that is, Regulation No 2245/2002.
- 33 In that context, Article 10 of Regulation No 2245/2002 establishes the conditions for fixing a date of filing by providing that EUIPO is to notify the applicant that a date of filing cannot be granted if the application does not contain, inter alia, a representation of the design pursuant to Article 4(1)(e) of that regulation.

- 34 The latter provision states that the representation of the design must consist in a graphic or photographic reproduction of the design, either in black and white or in colour. That design must be reproduced on a neutral background and must not be retouched with ink or correcting fluid. The design must be of a quality permitting all the details of the matter for which protection is sought to be clearly distinguished. Article 10 of Regulation No 2245/2002 states the periods within which deficiencies must be remedied.
- 35 It is apparent from the structure of Regulation No 6/2002 that the procedure for examining designs has two components: firstly, EUIPO must determine whether or not the subject of the application corresponds to the definition of a design (Article 3(a) and Article 47(1)(a) of Regulation No 6/2002) and whether the design is contrary to public policy or to accepted principles of morality (Article 47(1)(b) of Regulation No 6/2002). Such an application, unless it is withdrawn or amended, can be refused only after the applicant has been allowed the opportunity of submitting his observations (Article 47(2) of Regulation No 6/2002).
- 36 Secondly, after having found that the object of the application for registration is a design and that it is contrary neither to public policy nor to accepted principles of morality, EUIPO must verify, pursuant to Article 45 of Regulation No 6/2002, in particular, that that application for registration satisfies the mandatory conditions established by Article 36(1) of Regulation No 6/2002 (request for registration, information identifying the applicant, representation of the design suitable for reproduction) and Article 36(2) of that regulation (indication of the goods), and, where appropriate, the optional conditions established by Article 36(3) (description explaining the representation or the specimen, request for deferment of publication of the registration, information identifying the representative if the applicant has appointed one, classification of the products according to class, citation of the designer or of the team of designers).
- 37 Concerning compliance with the conditions set out in paragraph 36 above, deficiencies may be remedied pursuant to Article 46 of Regulation No 6/2002, it being noted that, with regard to the conditions set out in Article 36(1) of Regulation No 6/2002, the date of filing of the application is to be fixed as the date on which the applicant remedied the deficiencies, whereas, regarding the other conditions, the original date of filing of the application is to be maintained following the remedying of the deficiencies. In the case where the deficiencies are not remedied, in the first situation, the application is not to be dealt with as an application for registration, whereas, in the second situation, the application is to be refused.
- 38 Therefore, a representation of the design which is not suitable for reproduction comes solely under Article 46(2) of Regulation No 6/2002, in that the applicant may remedy the deficiencies, but the date of filing is to be postponed until the date on which those deficiencies are remedied. If those deficiencies are not remedied within the prescribed period, the application is not to be dealt with as an application for a registered design.
- 39 Accordingly, it is in the light of those findings that it is necessary to determine whether, in view of its wording and context, Article 36(1) of Regulation No 6/2002 applies — as the applicant argues — only to situations where the representation of the contested design is ‘physically’ muddled or vague, as a result of, *inter alia*, poor print quality, or whether the scope of that provision also covers — as EUIPO contends — a lack of precision, certainty or clarity regarding the matter to be protected by the design for which registration is sought.
- 40 It must be pointed out that the applicant’s interpretation of Article 36(1)(c) of Regulation No 6/2002 and of Article 10(1)(c) of Regulation No 2245/2002, read in conjunction with Article 4(1)(e) of the latter regulation, pursuant to which that provision applies solely to designs where only the quality of the representation is mediocre, is manifestly contrary to the system in which the registration of designs was conceived, as recalled above.



- 41 Article 36 of Regulation No 6/2002, which provides in its paragraph 1(c) that an application for a registered Community design must contain a representation of that design suitable for reproduction, specifies in its paragraph 5 that such an application must comply with the conditions laid down in Regulation No 2245/2002.
- 42 The latter regulation states in its Article 4(1)(e), to which reference is made in Article 10(1)(c) of that regulation, that the design must, inter alia, be ‘of a quality permitting all the details of the matter for which protection is sought to be clearly distinguished’.
- 43 In asserting that only the quality of the ‘physical’ or ‘material’ representation is provided for by that provision, the applicant engages in an incomplete, and therefore incorrect, reading of that provision, retaining only the expression ‘quality permitting’.
- 44 However, that provision specifies that the representation must permit all the details of ‘the matter for which protection is sought’ to be clearly distinguished.
- 45 That phrase refers to the requirement inherent in any registration, that is, to enable third parties to determine with clarity and precision all the details of the design for which protection is sought (see, to that effect and by analogy, judgments of 12 December 2002, *Sieckmann*, C-273/00, EU:C:2002:748, paragraphs 48 to 52, and of 19 June 2012, *Chartered Institute of Patent Attorneys*, C-307/10, EU:C:2012:361, paragraphs 46 to 48).
- 46 Thus, imprecise representations would not enable third parties to determine unequivocally the matter to be protected by the design under consideration.
- 47 Accordingly, it must be found that, even if the representations concern more than one design, clarification is necessary not only for the purposes of ensuring legal certainty for third parties, who need to know precisely what the subject of the protection conferred on the design is, but also for accounting purposes, in so far as the amount of fees collected by EUIPO varies according to the number of classes of goods to which the design concerned relates.
- 48 The applicant also claims that the potential deficiency consisting in the fact that the representations do not show the appearance of a single design, but of two, should have been dealt with in the context of Article 47(1)(a) of Regulation No 6/2002, read in conjunction with Article 3(a) of that regulation, and could not have constituted a ground for refusing to fix a date of filing.
- 49 That line of argument must be rejected in so far as Article 3(a) of Regulation No 6/2002, to which reference is made in Article 47(1)(a) of that regulation, concerns a situation where the representation in respect of which registration has been sought cannot be regarded as a design within the meaning of that regulation because it does not have the appearance of the whole or the part of a product, which is clearly not the situation in the present case.
- 50 It is not disputed that the representation in question corresponds to the definition of a design — with the result that the situation is not covered by Article 47(1)(a) of Regulation No 6/2002 — but is not suitable for reproduction for the purposes of Article 36(1) of that regulation in view of its deficiencies, which are covered by Article 46(2) of Regulation No 6/2002. The latter provision states clearly that, if the deficiencies are not remedied within the prescribed period, the application is not to be dealt with as an application for a registered design.
- 51 As was correctly noted by EUIPO, Article 45(2)(a) of Regulation No 6/2002, read in conjunction with Article 36(5) of that regulation, must necessarily be construed narrowly in order to avoid inconsistent and contradictory interpretations of the provisions of the regulation, with the result that those provisions do not refer to the requirements of Article 4(1)(e) of Regulation No 2245/2002, as the applicant claims. The reference to Article 45(2)(a) of Regulation No 6/2002 provided in Article 46(3)

of that regulation does not have the consequence that Article 4(1)(e) of Regulation No 2245/2002 is applicable exclusively in the context of Article 46(3) of Regulation No 6/2002. On the contrary, it was necessary to examine that situation in the context of Article 46(2) of Regulation No 6/2002, read in conjunction with Article 36(1)(c) of that regulation and Article 4(1)(e) of Regulation No 2245/2002, which is what the Board of Appeal properly did.

52 Article 36(5) of Regulation No 6/2002 is therefore a provision which, in the context of an implementing regulation, has enabled the competent authorities to specify, in particular, the conditions of Article 36(1)(c) of that regulation as regards the representation of a design, which are precisely set out in Article 4(1)(e) of Regulation No 2245/2002.

53 Regarding, lastly, the applicant's argument based on the different approach adopted by German case-law, that argument is not capable of undermining the Board of Appeal's assessment either. It must be noted that the EU design regime is an autonomous system with its own set of objectives and rules peculiar to it; it applies independently of any national system (see, by analogy, judgment of 16 January 2014, *Message Management v OHIM — Absacker (ABSACKER of Germany)*, T-304/12, not published, EU:T:2014:5, paragraph 58 and the case-law cited).

54 It follows from the foregoing that the first plea in law must be rejected.

### ***Second plea in law: infringement of the rights of defence***

55 The applicant claims that the Board of Appeal has infringed its rights of defence, on the ground that it substituted its own reasoning for that of the examiner without providing the applicant with an opportunity to set out its comments.

56 It should be noted that the Board of Appeal expressed the view, in paragraph 22 of the contested decision, that the examiner had failed in its duty to provide a statement of reasons, on the ground that it had referred, in order to find that the applications were not applications for registered designs, not to Article 46(2) of Regulation No 6/2002, read in conjunction with Article 36(1)(c) of that regulation and Article 4(1)(e) of Regulation No 2245/2002, but to the applicant's failure to agree with the examination report drawn up by the examiner. In addition, the Board of Appeal took the view that the examiner's decision did not contain any analysis of the applicant's arguments.

57 In that regard, it should be borne in mind that, according to Article 62 of Regulation No 6/2002, decisions of EUIPO may be based only on reasons or evidence on which the parties concerned have had an opportunity to present their comments. The general principle of protection of the right to defend oneself is enshrined in the law of EU designs by that provision. According to that general principle of EU law, a person whose interests are significantly affected by a decision addressed to him and taken by a public authority must be given the opportunity to make his point of view known. The right to be heard extends to all the matters of fact or of law which form the basis of the decision, but not to the final position which the authority intends to adopt (see judgment of 27 June 2013, *Beifa Group v OHIM — Schwan-Stabilo Schwanhäußler (Instruments for writing)*, T-608/11, not published, EU:T:2013:334, paragraph 42 and the case-law cited).

58 Moreover, under Article 62 of Regulation No 6/2002, decisions of EUIPO are required to state the reasons on which they are based. That duty has the same scope as that established by Article 296 TFEU. In that regard, it is apparent from settled case-law that the duty to provide a statement of reasons for individual decisions has two purposes: to allow the interested party to know the justification for the measure taken so as to enable him to protect his rights, and to enable the Courts of the European Union to exercise their power to review the legality of the decision. The question whether the statement of reasons for a decision satisfies those requirements must be assessed with

reference not only to its wording but also to its context and the entire body of legal rules governing the matter in question (see, to that effect, judgment of 25 April 2013, *Bell & Ross v OHIM — KIN (Wristwatch case)*, T-80/10, not published, EU:T:2013:214, paragraph 37).

- 59 In the present case, it should be noted that it is common ground that the examiner drew up four examination reports on 17 April, 25 June, 16 July and 24 August 2015.
- 60 From those various reports, in particular the second and fourth reports, it is sufficiently and clearly evident that the examiner took the view that the applications for registration did not comply with Article 36(1) of Regulation No 6/2002 or Article 4(1)(e) of Regulation No 2245/2002, owing to the presence of bottles in the representations, with the result that the characteristics for which protection was sought were not clearly visible.
- 61 Moreover, in its various reports, the examiner set out, in a precise and detailed manner, the reasons why it could not accept the applicant's applications for registration, namely the simultaneous presence of a bottle and a beaker, responding specifically to the applicant's arguments.
- 62 It follows that, contrary to the view taken by the Board of Appeal, the examiner's contested decision, read in the light of the examiner's various reports, of which the applicant was specifically aware, did contain an adequate statement of reasons (see, by analogy, judgment of 24 November 2005, *Germany v Commission*, C-506/03, not published, EU:C:2005:715, paragraph 38).
- 63 The Board of Appeal therefore erred in concluding that there had been a failure to provide a statement of reasons and in substituting its own reasoning for that of the examiner, even though what took place was not a substitution of grounds but a reproduction in full of the same reasoning as that which had precisely been given by the examiner in its four reports.
- 64 Accordingly, in any event, the applicant cannot claim that its rights of defence were infringed by the Board of Appeal, in so far as, contrary to its assertions, the statement of reasons set out in the contested decision reproduces in full the statement of reasons which had been communicated to the applicant by the examiner during the examination procedure.
- 65 It follows that the second plea in law must be rejected and that the action must be dismissed in its entirety.

### **Costs**

- 66 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. Since the applicant has been unsuccessful, it must be ordered to pay the costs, in accordance with the form of order sought by EUIPO.

On those grounds,

THE GENERAL COURT (Eighth Chamber)

hereby:

1. **Dismisses the action;**
2. **Orders Mast-Jägermeister SE to pay the costs.**

Collins

Barents

Passer

Delivered in open court in Luxembourg on 9 February 2017.

[Signatures]