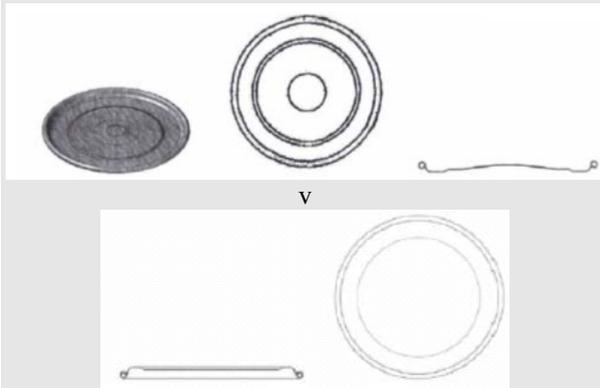


Court of Justice EU, 20 October 2011, PepsiCo & Grupo v OHIM



DESIGN LAW

Design law: informed user

- It should be noted, first, that Regulation No 6/2002 does not define the concept of the ‘informed user’. However, as the Advocate General correctly observed in points 43 and 44 of his Opinion, that concept must 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 in conflict, and the sectoral expert, who is an expert with detailed 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, either because of his personal experience or his extensive knowledge of the sector in question.

Informed user: from a five year old to a marketing Director

- It must be held that it is indeed that intermediate formulation that was adopted by the General Court in paragraph 62 of the judgment under appeal. This is, moreover, illustrated by the conclusion drawn from that formulation by the General Court in paragraph 64 of the judgment under appeal, in identifying the informed user relevant in the present case as capable of being a child in the approximate age range of 5 to 10 or a marketing manager in a company that makes goods which are promoted by giving away ‘pogs’, ‘rappers’ or ‘tazos’.

When possible a direct comparison, but can be impracticable and may be indirect

- Second, as the Advocate General observed in points 51 and 52 of his Opinion, it is true that the very nature of the informed user as defined above means that, when possible, he will make a direct comparison between the designs at issue. However, it cannot be ruled out that such a comparison may be impracticable or uncommon in the sector concerned, in particular because of specific circum-

stances or the characteristics of the devices which the designs at issue represent.

- its reasoning on an indirect method of comparison based on an imperfect recollection, it does not reveal any error on the General Court’s part.

Overall impression: account can be taken of goods as actually marketed

- However, since in design matters the person making the comparison is an informed user who – as noted in paragraphs 53 and 59 above – is different from the ordinary average consumer, it is not mistaken, in the assessment of the overall impression of the designs at issue, to take account of the goods actually marketed which correspond to those designs.

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Court of Justice EU, 20 October 2011

(J.-C. Bonichot, K. Schiemann, L. Bay Larsen, C. Toade, E. Jarašiūnas)

Judgment of the Court (Fourth Chamber)

20 October 2011 (*)

(Appeal – Regulation (EC) No 6/2002 – Articles 5, 6, 10 and 25(1)(d) – Community design – Registered Community design representing a circular promotional item – Prior Community design – Different overall impression – Degree of freedom of the designer – Informed user – Scope of review by the Courts – Distortion of the facts)

In Case C-281/10 P,

APPEAL under Article 56 of the Statute of the Court of Justice of the European Union, brought on 3 June 2010,

PepsiCo, Inc., established in New York (United States), represented by E. Armijo Chávarri, abogado, and V. von Bomhard, Rechtsanwältin, appellant,

the other parties to the proceedings being:

Grupo Promer Mon Graphic SA, established in Sabadell (Spain), represented by R. Almaraz Palmero, abogada,

applicant at first instance,

Office for Harmonisation in the Internal Market (Trade Marks and Designs) (OHIM),

represented by A. Folliard-Monguiral, acting as Agent, defendant at first instance,

THE COURT (Fourth Chamber),

composed of J.-C. Bonichot, President of the Chamber, K. Schiemann, L. Bay Larsen, C. Toader

(Rapporteur) and E. Jarašiūnas, Judges,

Advocate General: P. Mengozzi,

Registrar: A. Impellizzeri, Administrator,

having regard to the written procedure and further to the hearing on 10 March 2011,

after hearing the Opinion of the Advocate General at the sitting on 12 May 2011,

gives the following

Judgment

1 By its appeal, PepsiCo Inc. ('PepsiCo') seeks to have set aside the judgment of the General Court of the European Union of 18 March 2010 in Case T-9/07 Grupo Promer Mon Graphic v OHIM – PepsiCo (Representation of a circular promotional item) [2010] ECR II-0000 ('the judgment under appeal'), allowing the action brought by Grupo Promer Mon Graphic SA ('Grupo Promer') seeking annulment of the decision of the Third Board of Appeal of the Office for Harmonisation in the Internal Market (Trade Marks and Designs) ('OHIM') of 27 October 2006 (Case R 1001/2005-3) relating to invalidity proceedings between Grupo Promer and PepsiCo ('the contested decision').

Legal context

2 Article 4 of Council Regulation (EC) No 6/2002 of 12 December 2001 on Community designs (OJ 2002 L 3, p. 1) provides:

'1. A design shall be protected by a Community design to the extent that it is new and has individual character. ...'

3 Article 5 of Regulation No 6/2002 provides:

'1. A design shall be considered to be new if no identical design has been made available to the public:

(a) in the case of an unregistered Community design, before the date on which the design for which protection is claimed has first been made available to the public;

(b) in the case of a registered Community design, before the date of filing of the application for registration of the design for which protection is claimed, or, if priority is claimed, the date of priority.

2. Designs shall be deemed to be identical if their features differ only in immaterial details.'

4 Article 6 of that regulation reads as follows:

'1. A design shall be considered to have individual character if the overall impression it produces on the informed user differs from the overall impression produced on such a user by any design which has been made available to the public:

(a) in the case of an unregistered Community design, before the date on which the design for which protection is claimed has first been made available to the public;

(b) in the case of a registered Community design, before the date of filing the application for registration or, if a priority is claimed, the date of priority.

2. In assessing individual character, the degree of freedom of the designer in developing the design shall be taken into consideration.'

5 Article 10 of Regulation No 6/2002 provides:

'1. The scope of the protection conferred by a Community design shall include any design which does not produce on the informed user a different overall impression.

2. In assessing the scope of protection, the degree of freedom of the designer in developing his design shall be taken into consideration.'

6 Article 25 of that regulation provides:

'1. A Community design may be declared invalid only in the following cases:

...

(b) if it does not fulfil the requirements of Articles 4 to 9;

...

(d) if the Community design is in conflict with a prior design which has been made available to the public after the date of filing of the application or, if a priority is claimed, the date of priority of the Community design, and which is protected from a date prior to the said date by a registered Community design or an application for such a design, or by a registered design right of a Member State, or by an application for such a right;

...

3. The grounds provided for in paragraph (1)(d), (e) and (f) may be invoked solely by the applicant for or holder of the earlier right.

...

7 Article 52(1) of Regulation No 6/2002 provides that *'[s]ubject to Article 25(2), (3), (4) and (5), any natural or legal person, as well as a public authority empowered to do so, may submit to [OHIM] an application for a declaration of invalidity of a registered Community design'.*

8 Under Article 61(1) to (3) of Regulation No 6/2002:

'1. Actions may be brought before the Court of Justice against decisions of the Boards of Appeal on appeals.

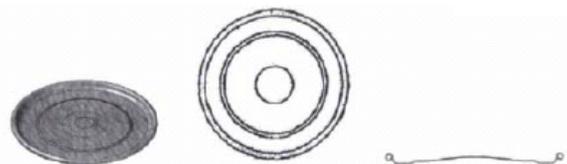
2. The action may be brought on grounds of lack of competence, infringement of an essential procedural requirement, infringement of the Treaty, of this Regulation or of any rule of law relating to their application or misuse of power.

3. The Court of Justice has jurisdiction to annul or to alter the contested decision.'

Background to the dispute and the contested decision

9 On 9 September 2003, PepsiCo filed an application for registration of a Community design at OHIM, based on Regulation No 6/2002. When the registration was applied for, priority was claimed for Spanish design No 157156, which had been filed on 23 July 2003 and the application for registration of which was published on 16 November 2003.

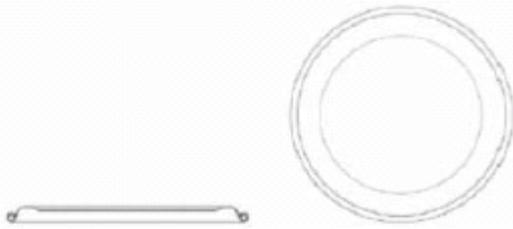
10 The Community design was registered by OHIM under number 74463-0001 for the following goods: 'promotional item[s] for games'. It is represented as follows:



11 On 4 February 2004, Grupo Promer filed an application for a declaration of invalidity against design No 74463-0001 ('the contested design') pursuant to Article 52 of Regulation No 6/2002.

12 The application for a declaration of invalidity was based on registered Community design No 53186-0001 ('the prior design'), which has a filing date of 17 July 2003 and in respect of which priority is claimed for

Spanish design No 157098, which was filed on 8 July 2003 and the application for registration of which was published on 1 November 2003. The prior design is registered for ‘metal plate[s] for games’. It is represented as follows:



13 The grounds relied on in support of the application for a declaration of invalidity related to the lack of novelty and individual character of the contested design for the purposes of Article 25(1)(b) of Regulation No 6/2002 and to the existence of a prior right within the meaning of Article 25(1)(d) thereof.

14 By decision of 20 June 2005, the Invalidity Division of OHIM upheld the application for a declaration of invalidity of the contested design on the basis of Article 25(1)(d) of Regulation No 6/2002.

15 On 18 August 2005, PepsiCo filed a notice of appeal with OHIM against that decision of the Invalidity Division, pursuant to Articles 55 to 60 of Regulation No 6/2002.

16 By the contested decision, the Third Board of Appeal of OHIM (‘the Board of Appeal’) annulled that decision of the Invalidity Division and dismissed the application for a declaration of invalidity. After rejecting Grupo Promer’s argument alleging bad faith on the part of PepsiCo, the Board of Appeal held, in essence, that the contested design was not in conflict with Grupo Promer’s prior right and that the conditions set out in Article 25(1)(d) of Regulation No 6/2002 had not therefore been fulfilled.

17 In that connection, the Board of Appeal held that the goods covered by the designs at issue concerned a particular category of promotional items, namely ‘tazos’ or ‘rappers’, and that, consequently, the freedom of the designer of those promotional items was ‘severely constricted’. The Board of Appeal concluded that the difference in the profile of the designs at issue was sufficient for a finding that they produced a different overall impression on the informed user.

The proceedings before the General Court and the judgment under appeal

18 By application lodged at the Registry of the General Court on 9 January 2007, Grupo Promer brought an action against the contested decision, claiming that the decision should be annulled and OHIM and PepsiCo ordered to pay the costs.

19 In support of its action, Grupo Promer put forward three pleas in law, alleging, first, bad faith on the part of PepsiCo and a restrictive interpretation of Regulation No 6/2002, second, lack of novelty of the contested design and, third, breach of Article 25(1)(d) of Regulation No 6/2002.

20 By the judgment under appeal, the General Court rejected the first plea in law, upheld the third plea in

law and therefore found that there was no need to consider the second plea in law.

21 The third plea in law was divided into four parts.

22 First, Grupo Promer contested the definition of the category of goods identified by the designs at issue as being that of ‘pogs’, ‘rappers’ or ‘tazos’, arguing that these were different goods. According to Grupo Promer, the Board of Appeal ought to have taken into consideration the general category of promotional items for games.

23 In this respect, at paragraph 60 of the judgment under appeal, the General Court concluded that the Board of Appeal had properly found that the product in question belonged, within the broad category of promotional items for games, to the particular category of game pieces known as ‘pogs’, ‘rappers’ or ‘tazos.’

24 Second, proceeding on the basis that the contested design relates to the general category of promotional items for games, Grupo Promer challenged the assessment made in the contested decision, according to which the freedom of the designer in developing the contested design had been ‘severely constricted’.

25 The General Court held, at paragraph 70 of the judgment under appeal, that the Board of Appeal had been correct to find that, on the date of priority claimed for the contested design, the designer’s freedom had been ‘severely restricted’, inter alia since he had to incorporate the common features of the goods in question in his design.

26 Third, according to Grupo Promer, the informed user was a child in the approximate age range of 5 to 10, and not a marketing manager as was stated in the contested decision. Such a marketing manager working in the food industry is not an end user and has a higher degree of expertise than a simple user.

27 In that respect, the General Court defined the concept of an informed user at paragraph 62 of the judgment under appeal and, at paragraphs 64 and 65 of that judgment, found that the Board of Appeal had been correct to find that, in the present case, it makes little difference whether the informed user is a child in the approximate age range of 5 to 10 or the marketing manager in a company that makes goods which are promoted by giving away ‘pogs’, ‘rappers’ or ‘tazos’, the important point being that both those categories of person are familiar with the phenomenon of ‘rappers’.

28 Fourth, according to Grupo Promer, the designs at issue produced the same overall impression, since, contrary to the analysis carried out by the Board of Appeal in the contested decision, the differences in the profile of the designs at issue are not obvious, particular attention and careful observation of the disc being required in order to discover them.

29 On this issue, at paragraph 72 of the judgment under appeal, the General Court, taking into account the designer’s degree of freedom in developing the contested design, found – in a similar way to the Board of Appeal – that, in so far as similarities between the designs at issue relate to common features, those similarities have only minor importance in the overall impression produced by those designs on the informed user. In addi-

tion, the more the designer's freedom in developing the contested design is restricted, the more likely it is that minor differences between the designs at issue will be sufficient to produce a different overall impression on the informed user.

30 The General Court then went on, at paragraphs 77 to 82 of the judgment under appeal, to identify five similarities between the two designs in conflict. The two designs were discs that are almost flat, with a concentric circle very close to the edge and a concentric circle approximately one third of the way from the edge to the centre; the rounded edge of the disc is raised in relation to the intermediate area of the disc between the edge and the raised central area; and the respective dimensions of the raised central part and the intermediate area of the disc, between the edge and the raised central part, are similar.

31 Having found that the first similarity was a feature common to the designs for the goods of the type of product at issue and that the second similarity might constitute a constraint linked to the safety requirements to which the designer is subject, the General Court held that those similarities would not be remembered by the informed user in the overall impression of the designs at issue.

32 By contrast, with regard to the last three similarities, the General Court found that these related to elements in respect of which the designer was free to develop the contested design, and that they would, therefore, attract the informed user's attention, all the more so because the upper surfaces are, in the present case, the most visible surfaces for that user.

33 As regards the differences between the designs at issue, the General Court, at paragraph 83 of the judgment under appeal, found that, when viewed from above, the contested design has two additional concentric circles compared with the prior design and that, in profile, the two designs differ in that the contested design is more curved, though that curvature is still very slight.

34 However, the General Court held that the differences observed by the Board of Appeal were insufficient for the contested design to produce an overall impression on the informed user that differed from that produced by the prior design. Consequently, the General Court annulled the contested decision.

Forms of order sought by the parties before the Court of Justice

35 PepsiCo claims that the Court should:

- set aside the judgment under appeal;
- give final judgment on the dispute by rejecting the order sought at first instance or, in the alternative, refer the case back to the General Court; and
- order Grupo Promer to pay the costs.

36 OHIM requests the Court to uphold the appeal and to order Grupo Promer to pay the costs.

37 Grupo Promer contends that the Court should:

- dismiss the appeal as inadmissible and unfounded;
- order PepsiCo to pay the costs of the present appeal;
- order PepsiCo and OHIM to pay the costs incurred by Grupo Promer before the General Court; and

- order PepsiCo to pay the costs of the proceedings before OHIM.

The appeal

38 In support of its appeal, PepsiCo relies on a single ground of appeal, alleging breach of Article 25 (1)(d) of Regulation No 6/2002. This ground of appeal consists of five parts, the first four of which concern various errors allegedly committed by the General Court in relation to (i) the constraints on the designer's freedom, (ii) the concept of the informed user and his attention level, (iii) the scope of the General Court's power of review, and (iv) whether it was possible to compare the goods rather than the contested designs, while the last part of the ground concerns (v) an alleged distortion of the facts.

The first part of the single ground of appeal, concerning the constraints on the designer's freedom

Arguments of the parties

39 PepsiCo submits that the three similarities observed by the General Court (central circular shape, raised edge, dimensions) are all due to the functions of and common to the products at issue, thereby limiting the designer's freedom. The General Court, however, failed to take into account those constraints when comparing the designs at issue. Finding the designs at issue similar on account of those precise common features means nothing less than granting exclusive rights to Grupo Promer for those common features, which does not correspond to the objective pursued by Article 25(1)(d) of Regulation No 6/2002.

40 OHIM submits that, even if features such as the shape of the flat disc or the curved central area are not dictated by a function or by statutory requirements, they are, however, dictated by market constraints, thereby limiting the designer's freedom.

41 The evidence on the file illustrates that the great majority – if not all – of the pogs existing on the date of priority of the contested design had a circular central bulge. The reason for this is that pogs with central bulges which are not circular could not be stacked with the vast majority of those having such a feature.

42 Grupo Promer contends that this part of the single ground of appeal is inadmissible in that it seeks to call into question findings of a factual nature made in the judgment under appeal.

Findings of the Court

43 It should be observed that, by the first part of its single ground of appeal, PepsiCo objects, essentially, that the General Court found that the central circular shape, the raised edge and the similar dimensions of the designs at issue were not the result of a constraint on the designer's freedom, whereas in actual fact those elements of similarity are necessary if the goods at issue are to fulfil their function. According to PepsiCo, that led the General Court to assess incorrectly the overall impression produced by each of the designs in conflict.

44 PepsiCo thus seeks to call into question findings of a factual nature made by the General Court, without proving that those facts were distorted, and without disputing either the relevance of the criteria for estab-

lishing the designer's degree of freedom in developing a design, as identified by the General Court in paragraph 67 of the judgment under appeal – namely, inter alia, the constraints of the features imposed by the technical function of the product or an element thereof or by statutory requirements applicable to the product – or the inferences drawn from them by the General Court in paragraph 72 of that judgment.

45 It is, however, settled case-law that the General Court has exclusive jurisdiction to find the facts, save where a substantive inaccuracy in its findings is attributable to the documents submitted to it, and to appraise those facts. That appraisal of the facts thus does not, save where the clear sense of the evidence has been distorted, constitute a point of law which is subject, as such, to review by the Court of Justice in an appeal (Case C-470/00 P Parliament v Ripa di Meana and Others [2004] ECR I-4167, paragraph 40 and case-law cited).

46 It must therefore be held that the first part of the single ground of appeal is inadmissible.

The second part of the single ground of appeal, concerning the concept of the 'informed user' and his level of attention

Arguments of the parties

47 PepsiCo submits that the General Court applied incorrect criteria when denying that the designs at issue conveyed a different overall impression on the 'informed user'. The 'informed user', it is argued, does not correspond to the average consumer who is reasonably well informed and reasonably observant and circumspect, as defined by trade mark law, or solely to the end user of the goods at issue.

48 In addition, the informed user must be assumed to be in a position to compare the designs side by side and, in contrast to the position in trade mark law, does not have to rely on an 'imperfect recollection'.

49 Had the General Court applied the correct criteria, it would have found that the informed user easily distinguished the designs at issue by reason of the two most significant differences between them, that is to say, first, the two additional concentric circles clearly visible on the surface of the contested design, and, second, the curved shape of the contested design as opposed to the complete flatness (apart from the brim) of the prior design.

50 In addition, PepsiCo submits that the informed user will not only consider the 'most visible surfaces' of a design and focus on 'easily perceived' elements (paragraph 83 of the judgment under appeal), but will have a chance to consider the design as a whole in more detail, and compare it to earlier designs, taking into account the designer's freedom.

51 OHIM also submits that the comparison should be based, not on the informed user's imperfect recollection, but on a direct comparison of the designs.

52 Grupo Promer contends that this part of the single ground of appeal also concerns a question of fact. It further contends that the General Court did not apply criteria concerning trade mark law such as the likeli-

hood of confusion between the two conflicting designs at issue.

Findings of the Court

53 It should be noted, first, that Regulation No 6/2002 does not define the concept of the 'informed user'. However, as the Advocate General correctly observed in points 43 and 44 of his Opinion, that concept must 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 in conflict, and the sectoral expert, who is an expert with detailed 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, either because of his personal experience or his extensive knowledge of the sector in question.

54 It must be held that it is indeed that intermediate formulation that was adopted by the General Court in paragraph 62 of the judgment under appeal. This is, moreover, illustrated by the conclusion drawn from that formulation by the General Court in paragraph 64 of the judgment under appeal, in identifying the informed user relevant in the present case as capable of being a child in the approximate age range of 5 to 10 or a marketing manager in a company that makes goods which are promoted by giving away 'pogs', 'rappers' or 'tazos'.

55 Second, as the Advocate General observed in points 51 and 52 of his Opinion, it is true that the very nature of the informed user as defined above means that, when possible, he will make a direct comparison between the designs at issue. However, it cannot be ruled out that such a comparison may be impracticable or uncommon in the sector concerned, in particular because of specific circumstances or the characteristics of the devices which the designs at issue represent.

56 Therefore, the General Court cannot reasonably be criticised as having erred in law on the ground that it assessed the overall impression produced by the designs in conflict without starting from the premiss that an informed user would in all likelihood make a direct comparison of those designs.

57 That is true all the more so since, in the absence of any precise indications to that effect in the context of Regulation No 6/2002, the European Union legislature cannot be regarded as having intended to limit the assessment of potential designs to a direct comparison.

58 It follows that, even if the General Court's formulation – in paragraph 77 of the judgment under appeal – that 'that similarity would not be remembered by the informed user in the overall impression of the designs at issue' might indicate, when taken out of context, that the General Court based its reasoning on an indirect method of comparison based on an imperfect recollection, it does not reveal any error on the General Court's part.

59 Third, as regards the informed user's level of attention, it should be noted that, although the informed user is not the well-informed and reasonably observant and

circumspect average consumer who normally perceives a design as a whole and does not proceed to analyse its various details ([see, by analogy, Case C-342/97 Lloyd Schuhfabrik Meyer \[1999\] ECR I-3819, paragraphs 25 and 26](#)), he is also not an expert or specialist capable of observing in detail the minimal differences that may exist between the designs in conflict. Thus, the qualifier ‘informed’ suggests that, without being a designer or a technical expert, the user knows the various designs which exist in the sector concerned, possesses a certain degree of knowledge with regard to the features which those designs normally include, and, as a result of his interest in the products concerned, shows a relatively high degree of attention when he uses them.

60 Thus, the use of the words ‘easily perceived’ in paragraph 83 of the judgment under appeal must be understood in a broader context as simply providing clarification as to the greater degree of curvature displayed by the contested design. Since the General Court adopted a correct approach in defining the informed user, it cannot be inferred that the words used in paragraph 83 of the judgment under appeal, by themselves, mean that the informed user’s level of attention had been incorrectly assessed by the General Court.

61 In the light of the foregoing considerations, the second part of the single ground of appeal must be rejected as unfounded.

The third part of the single ground of appeal, concerning the scope of review by the Courts

Arguments of the parties

62 PepsiCo, referring to a recent judgment of the Court concerning plant varieties ([Case C-38/09 P Schröder v CPVO \[2010\] ECR I-3209, paragraph 77](#)), submits that the General Court’s minute examination of the differences and similarities between the designs at issue went beyond its task under Article 61(2) of Regulation No 6/2002. PepsiCo accordingly submits that the determination of whether or not there is a similar overall impression must be left to the Board of Appeal’s assessment.

63 OHIM also submits that, in refusing to restrict itself to a review of manifest errors of assessment, the General Court went beyond what Article 61 of Regulation No 6/2002 allows in Community design matters.

64 Grupo Promer contends that PepsiCo’s argument is unfounded. The Court’s findings in [Schröder v CPVO](#), it argues, arose from the fact that that case concerned a complex technical examination, whereas the present case concerns the simple examination of designs in order to determine whether the contested design lacks individual character.

Findings of the Court

65 In the present case, it is common ground that the General Court carried out an in-depth examination of the designs at issue before annulling the Board of Appeal’s decision.

66 In that context, it should be recalled that the General Court has jurisdiction to conduct a full review of the legality of OHIM’s assessment of the particulars submitted by an applicant ([see Case C-263/09 P Edwin v OHIM \[2011\] ECR I-0000, paragraph 52](#)).

67 Admittedly, by analogy with the judgment in [Schröder v CPVO](#), the General Court may afford OHIM some latitude, in particular where OHIM is called upon to perform highly technical assessments, and restrict itself, in terms of the scope of its review of the Board of Appeal’s decisions in industrial design matters, to an examination of manifest errors of assessment.

68 However, it must be observed that, in the specific circumstances of the present case, the General Court did not carry out a review of the contested decision which went beyond its power to alter decisions under Article 61 of Regulation No 6/2002.

69 Therefore, the third part of the single ground of appeal must be rejected as being unfounded. The fourth part of the single ground of appeal, alleging that the review focused on the goods rather than on the designs at issue

Arguments of the parties

70 PepsiCo submits that it is mistaken to base the assessment of the designs in conflict on a comparison of samples of actual products submitted by the parties for illustration purposes. In particular, there is no need for OHIM, in such invalidity proceedings, to anticipate any potential parallel or future infringement actions based on the same earlier design and the more recent design as used in the marketplace.

71 Grupo Promer notes that the sample products were also examined by the Invalidity Division and by the Board of Appeal. Consequently, the General Court’s assessment of all the evidence already on the file is a question of fact which cannot be advanced as a ground of appeal before the Court of Justice.

Findings of the Court

72 It should be observed that, in paragraph 83 of the judgment under appeal, the General Court stated that its assessment of the degree of curvature of the designs at issue is ‘borne out by the goods actually marketed, as contained in OHIM’s file forwarded to the Court’.

73 However, since in design matters the person making the comparison is an informed user who – as noted in paragraphs 53 and 59 above – is different from the ordinary average consumer, it is not mistaken, in the assessment of the overall impression of the designs at issue, to take account of the goods actually marketed which correspond to those designs.

74 In any event, it follows from the use of the verb ‘to bear out’ in paragraph 83 of the judgment under appeal that the General Court did indeed base its assessments on the designs in conflict as described and reproduced in the respective applications for registration, with the result that the comparison of the actual goods was used only for illustrative purposes in order to confirm the conclusions already drawn and cannot be regarded as forming the basis of the statement of reasons given in the judgment under appeal.

75 Accordingly, the fourth part of the single ground of appeal must be rejected as unfounded. The fifth part of the single ground of appeal, alleging distortion of the facts

Arguments of the parties

76 PepsiCo, supported by OHIM, submits that there has been distortion of the facts by the General Court, since, in particular, it is unrealistic and contrary to general experience to assume that the informed user would limit his perceptions of the device at hand to the 'view from above'. In addition, even when the designs at issue are examined flat from above, the differences between them are, it is submitted, immediately perceptible.

77 Grupo Promer contends that alleging distortion of the facts without mentioning distortion of the assessment of evidence is not admissible as an argument justifying an appeal to the Court of Justice. That assessment of the facts and the evidence does not, save where they have been distorted, constitute a point of law which is subject, as such, to review by the Court of Justice on appeal.

Findings of the Court

78 The Court has already held that, given the exceptional nature of a complaint that there has been a distortion of the facts, Article 256 TFEU, Article 58, first paragraph, of the Statute of the Court of Justice of the European Union and Article 112(1)(c) of the Rules of Procedure of the Court provide, in particular, that an appellant must indicate precisely the evidence alleged to have been distorted by the General Court and show the errors of appraisal which, in its view, led to that distortion (see, to that effect, Joined Cases C-204/00 P, C-205/00 P, C-211/00 P, C-213/00 P, C-217/00 P and C-219/00 P *Aalborg Portland and Others v Commission* [2004] ECR I-123, paragraph 50).

79 Such distortion must be obvious from the documents on the Court's file, without there being any need to carry out a new assessment of the facts and evidence ([Case C-16/06 P *Les Éditions Albert René v OHIM* \[2008\] ECR I-10053, paragraph 69 and the case-law cited](#)).

80 In the present case, PepsiCo complains, essentially, that the General Court distorted the facts by comparing the designs at issue only with regard to their view 'from above', thereby overlooking the differences which are obvious when those designs are viewed in profile. In so doing, PepsiCo fails to indicate precisely which evidence was distorted by the General Court or to demonstrate the errors in analysis which, in its view, led to such distortion.

81 In those circumstances, it must be held that the arguments put forward by PepsiCo on this point do not satisfy the requirements laid down by the case-law referred to. The fifth part of the single ground of appeal must for that reason be rejected as being inadmissible.

82 Since PepsiCo has been unsuccessful in all the parts of its single ground of appeal, the appeal must be dismissed in its entirety.

Costs

83 Under Article 69(2) of the Rules of Procedure, applicable to the procedure on appeal pursuant to Article 118 of those Rules, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since Grupo Promer

has applied for costs and PepsiCo has been unsuccessful, the latter must be ordered to pay the costs.

On those grounds, the Court (Fourth Chamber) hereby:

1. Dismisses the appeal;
2. Orders PepsiCo Inc. to pay the costs.

[Signatures]

* Language of the case: English.

Opinion of Advocate General

Mengozi

delivered on 12 May 2011 (1)

Case C-281/10 P

PepsiCo, Inc.

(Appeal – Community designs – Scope of the review of the legality of OHIM decisions relating to designs – The degree of freedom of the designer – Concept of 'informed user')

1. This is the first case in which the Court is called upon to give a ruling on Regulation No 6/2002 (2) in the context of an appeal against a judgment handed down by the General Court. (3) Beyond the practical matter of determining how the dispute should be resolved, this case offers the first opportunity to clarify a number of points which are crucial for the purposes of defining the limits and conditions attaching to review by the European Union judicature of decisions taken by the Office for Harmonisation in the Internal Market ('OHIM') in relation to Community designs.

I – Legislative context

2. Regulation No 6/2002 (also 'the Regulation') was the product of a lengthy and tortuous legislative process, which need not be summarised here but which actually dates back to the late 1950s. (4) Article 3 of the Regulation defines 'design' (5) as 'the appearance of the whole or a part of a product resulting from the features of, in particular, the lines, contours, colours, shape, texture and/or materials of the product itself and/or its ornamentation'.

3. Article 4 of the Regulation, which is entitled 'Requirements for protection', provides: '*1. A design shall be protected by a Community design to the extent that it is new and has individual character.*

...'

4. Articles 5 and 6 of the Regulation define the two criteria specified in Article 4: the novelty of the design and its individual character.

5. Article 5, which is entitled 'Novelty', provides:

'1. A design shall be considered to be new if no identical design has been made available to the public:

(a) in the case of an unregistered Community design, before the date on which the design for which protection is claimed has first been made available to the public;

(b) in the case of a registered Community design, before the date of filing of the application for registration of the design for which protection is claimed, or, if priority is claimed, the date of priority.

2. Designs shall be deemed to be identical if their features differ only in immaterial details'.

6. Article 6, which is entitled ‘Individual character’, provides:

‘1. A design shall be considered to have individual character if the overall impression it produces on the informed user differs from the overall impression produced on such a user by any design which has been made available to the public:

(a) in the case of an unregistered Community design, before the date on which the design for which protection is claimed has first been made available to the public;

(b) in the case of a registered Community design, before the date of filing the application for registration or, if a priority is claimed, the date of priority.

2. In assessing individual character, the degree of freedom of the designer in developing the design shall be taken into consideration’.

7. Reference to the ‘overall impression’ produced by the design and to the designer’s ‘degree of freedom’ are to be found, not only in Article 6 of the Regulation, but also in Article 10, which is entitled ‘Scope of protection’ and provides as follows:

‘1. The scope of the protection conferred by a Community design shall include any design which does not produce on the informed user a different overall impression.

2. In assessing the scope of protection, the degree of freedom of the designer in developing his design shall be taken into consideration’.

8. In the version applicable at the material time, Article 25 of the Regulation, concerning ‘Grounds for invalidity’, provided:

‘1. A Community design may be declared invalid only in the following cases:

(a) if the design does not correspond to the definition under Article 3(a);

(b) if it does not fulfil the requirements of Articles 4 to 9;

(c) if, by virtue of a court decision, the right holder is not entitled to the Community design under Article 14;

(d) if the Community design is in conflict with a prior design which has been made available to the public after the date of filing of the application or, if a priority is claimed, the date of priority of the Community design, and which is protected from a date prior to the said date by a registered Community design or an application for such a design, or by a registered design right of a Member State, or by an application for such a right;

...’

9. Review of the legality of OHIM decisions relating to designs is provided for in Article 61 of the Regulation, which is entitled ‘Actions before the Court of Justice’ and states:

‘1. Actions may be brought before the Court of Justice against decisions of the Boards of Appeal on appeals.

2. The action may be brought on grounds of lack of competence, infringement of an essential procedural requirement, infringement of the Treaty, of this Regulation or of any rule of law relating to their application or misuse of power.

3. The Court of Justice has jurisdiction to annul or to alter the contested decision.

...’

II – Facts and procedure before OHIM

10. On 17 July 2003, Grupo Promer Mon-Graphic SA (‘Promer’) filed an application with OHIM for registration of a Community design in respect of goods described as ‘metal plate[s] for games’. (6) The design was registered under No 53186-01. The design is represented as follows:

11. In the application, priority was claimed for Spanish design No 157098, for which the application for registration had been filed on 8 July 2003.

12. On 9 September 2003, PepsiCo Inc. (‘PepsiCo’) filed an application with OHIM for registration of a design in respect of goods identified as ‘promotional items for games’. In relation to that application also, priority was claimed for a Spanish design – No 157156 – for which the application for registration had been filed on 23 July 2003. That design is represented as follows:

13. Both designs relate to small collectable children’s toys which are often distributed as free gifts inside the packaging of other products and known as ‘pogs’ (in Spanish, generally called tazos).

14. On 4 February 2004, Promer filed an application with the Cancellation Division of OHIM, pursuant to Article 25(1)(d) of the Regulation, for a declaration of invalidity in respect of the design registered by PepsiCo, claiming a conflict with its own prior design. By decision of 20 June 2005, the Cancellation Division upheld the application and accordingly declared the design registered by PepsiCo to be invalid. According to the Cancellation Division, the two designs at issue bear similarities likely to produce the same overall impression on the informed user.

15. PepsiCo successfully appealed against the decision of the Cancellation Division before the Board of Appeal. The Board of Appeal noted, in particular, that, in assessing the overall impression conveyed by the designs at issue, it is necessary under the Regulation to take account of the degree of freedom available to the designer in developing the design. The Cancellation Division had taken the view that, in the case before it, the degree of freedom had been very extensive, because it had taken as a reference for comparison the entire range of possible promotional items, of which there are clearly a very great number. According to the Board of Appeal, on the other hand, reference should be made in the present case to the more limited category of ‘pogs’ (or tazos);

consequently, since features such as the circular shape are ‘a must’ for such products, being a standard feature, the degree of freedom actually available to the designer is far more restricted than that taken into account by the Cancellation Division. In the light of those considerations, the Board of Appeal found that the – albeit limited – differences between the two designs at issue were sufficient to rule out the possibility that the designs would produce the same overall impression on an informed user. The Board of Appeal therefore annulled

the decision of the Cancellation Division and confirmed the validity of the designed registered by PepsiCo.

III – The judgment under appeal

16. Promer brought an action against the decision of the Board of Appeal before the General Court, which handed down its ruling by judgment of 18 March 2010 in Case T-9/07 Grupo Promer Mon Graphic v OHIM – PepsiCo (the ‘judgment under appeal’). (7)

17. In the judgment under appeal, the General Court largely upheld the legal assessments made by the Board of Appeal. In particular, it confirmed that the concept of ‘conflict’ between designs, for the purposes of Article 25 of the Regulation, implies that the designs produce the same overall impression on the informed user. (8) It also confirmed that, for the purposes of ascertaining the designer’s degree of freedom, reference should be made, not to the entire category of promotional items, but to the particular category of ‘pogs’, (9) with the result that the actual freedom of the designer is somewhat constrained.

18. According to the General Court, however, even within the restricted confines of the creative scope available to the designer for developing new designs for ‘pogs’, it would have been possible for the design registered by PepsiCo to achieve a greater degree of distinctiveness as compared with the design registered by Promer. Specifically, in paragraphs 79 to 81 of the judgment under appeal, the General Court stated as follows (emphasis added):

‘79 ... the designs at issue both contain a concentric circle approximately one third of the way from the edge to the centre. At paragraph 22 of the contested decision, the Board of Appeal noted that similarity, stating that the circle was intended to convey the idea that the central part of the disc is raised slightly. However, the Court finds that the central part could have been delineated by a shape other than a circle. For it is apparent from the application for registration of the contested design, included in OHIM’s file forwarded to the Court, that the contested design claims the priority of a Spanish design No 157156 which comprises three variants, and that the raised central part is, depending on the variant, delineated by a circle, a triangle or a hexagon. In addition, that finding cannot be called into question by the argument put forward by OHIM, at the hearing, that the shape had to be elementary in order not to distort the image which may cover the disc, since a triangular, hexagonal, or even a square or oval shape instead of a circular one would not have distorted the image any more. Furthermore, that finding cannot be called into question by OHIM’s argument that a circle had to be used so that the raised central part might be curved, because, *inter alia*, an oval shape could have been used.

80 ... the designs at issue are similar in that the rounded edge of the disc is raised in relation to the intermediate area of the disc between the edge and the raised central area.

81 ... the respective dimensions of the raised central part and the intermediate area of the disc, between the

edge and the raised central part, are similar in the designs at issue’.

19. On the basis of the above findings, the General Court held the differences between the designs at issue to be insufficient to produce a different overall impression on the informed user (10) and accordingly annulled the decision of the Board of Appeal.

IV – Proceedings before the Court of Justice and forms of order sought

20. The present appeal was lodged at the Court Registry on 4 June 2010. By its appeal, the appellant – PepsiCo – claims that the Court should:

- set aside the judgment under appeal;
- give final judgment on the dispute by rejecting the order sought at first instance or, in the alternative, remit the case to the General Court;
- order Promer, the applicant at first instance, to pay the costs.

21. Promer contends that the Court should:

- dismiss the appeal;
- order PepsiCo to pay the costs.

22. OHIM has intervened in support of PepsiCo and contends that the appeal should be upheld.

23. The parties presented oral argument at the hearing on 10 March 2011.

V – The appeal

24. PepsiCo relies on a single ground of appeal divided into five parts, each of which I shall now consider in turn.

A – The first part of the single ground of appeal, concerning the constraints on the designer’s degree of freedom

1. Arguments of the parties

25. By the first part of the ground of appeal, PepsiCo claims that the General Court incorrectly applied the principle according to which it is necessary, when comparing two designs at issue, to take account of any constraints on the designer’s creative freedom. In particular, although the General Court correctly pointed out that, in this case, those constraints were rather severe, and the designer’s freedom curtailed, it went on to consider – as similarities capable of rendering the two designs excessively similar – features which are characteristic of all ‘pogs’ and which, PepsiCo argues, could not have been different. According to PepsiCo, those features consisted in the circular shape of the central part, the raised border and the respective proportions of the central and intermediate parts of the disc: three features which are characteristic of all items in the reference category and which the very function of the goods renders essential. Moreover, the central part has to be circular to enable ‘pogs’ to emit a sound when pressed with a finger. (11)

26. OHIM shares PepsiCo’s view, albeit slightly altered by some nuances. In particular, according to OHIM, although not essential from a functional perspective, the circular shape of the central part is a requisite of the market, on which it is universally used for this type of product. It therefore represents a constraint on the designer’s degree of freedom.

27. For its part, Promer asks the Court to reject PepsiCo's arguments, contending that they are really designed to call into question the findings made by the General Court as to the facts.

2. Analysis

28. The first part of the ground of appeal concerns one of the crucial aspects of the Community rules on designs, namely the role which must be accorded to the freedom which the designer is actually able to enjoy in terms of creativity. As we saw when setting out the legislative context, the Regulation refers to the constraints on creative freedom both in Article 6, in relation to the individual character of the design, and in Article 10, in relation to the scope of protection: in both cases, the Regulation states that 'the degree of freedom of the designer in developing the design shall be taken into consideration'.

29. The need to take account of the designer's creative freedom arises because some features of the product to which the design relates are, so to speak, 'compulsory': as a result, the designer is not free to change them, and the fact that they bear similarities to the features of another design cannot be regarded as significant. To give an example, the fact that two kitchen table designs both envisage a table with four legs will not usually be a significant factor, because the fact of having four legs is a feature of the vast majority of standard kitchen tables. Where designs are characterised by significant constraints on the designer's creative freedom, small differences may, generally, be sufficient to produce a different overall impression.

30. A point which requires clarification, and which is not resolved in the Regulation, concerns the type of constraint on the designer's degree of freedom which needs to be taken into consideration. As we saw when setting out the arguments of the parties, there are, in essence, two possible approaches. One possible view is that the sole constraints to be taken into account are those of a strictly functional nature: that is to say, the features which the goods to which the design relates must possess if they are to fulfil their function. That idea is implicitly espoused by the General Court, and is not disputed by PepsiCo, which has based its own arguments on that view. According to OHIM, however, it is also necessary to take into account those design features which, although not essential from a functional perspective, are essential in so far as the market expects the goods to have them: in the present case, such a feature would be the circular shape of the central part of 'pogs'. (12) Consequently, according to OHIM, that kind of constraint, too, must be taken into consideration.

31. Given that the General Court's interpretation of constraints on the designer's degree of freedom is not a matter of dispute, it is not essential for the Court to rule on that point. I would nevertheless point out that, in my view, the interpretation which should be accepted is that which hinges on function, which the General Court adopted in the judgment under appeal. In other words, the constraints on creative freedom to be taken into consideration in accordance with the Regulation are

exclusively those constraints which are dictated by the need for the goods to fulfil a certain function: in the case of 'pogs', for instance, the fact that they do not have sharp edges that could be dangerous for children.

32. On the other hand, any 'standard' features which the market expects, but which are not technically necessary, cannot be regarded as constraints on the designer's freedom. This is because of the purpose of the rules on designs. Those rules are, in fact, basically intended to reward the developers of innovative goods, by providing them with a system of protection. It is totally at odds with that aim to accept that mere market expectation can justify compulsory standardisation, certain features of a design being considered mandatory.

33. The considerations set out in the preceding point are borne out by the travaux préparatoires, although, according to the established case-law of the Court, (13) conclusive inferences cannot be drawn from that source. In the Commission's original proposal for a regulation, presented on 3 December 1993, (14) the comments on Article 11 – which corresponds to the current Article 10 – state '[h]ighly functional designs where the designer must respect given parameters are likely to be more similar than designs in respect of which the designer enjoys total freedom. Therefore, paragraph 2 also establishes the principle that the freedom of the designer must be taken into consideration when the similarity between an earlier and a later design is being assessed' (emphasis added). The reference is, as we see, to functional designs, and the other language versions of the proposal have the same connotation. (15)

34. That said, the fact remains that the assessment of the constraints on the designer's degree of freedom in each specific case is, as is clear, a finding of fact, with which the Court of Justice cannot concern itself in the context of an appeal against a judgment of the General Court, save in the case of distortion. 35. In the present case, it seems to me to be undeniable that the arguments adduced by PepsiCo are designed solely to call into question the findings of fact made by the General Court. In essence, what PepsiCo is claiming is that the General Court erred in regarding as capable of being modified by the designer certain aspects of the design which, according to PepsiCo, are mandatory and cannot be modified. Clearly, however, the assessment in the case of a specific design of the aspects which are outside the ambit of the designer's creative freedom is an assessment of fact, in relation to which the Court of Justice cannot, therefore, call into question the findings made by the General Court. The General Court found that it is possible for 'pogs' to retain their individuality even if, in particular, their central part were triangular, hexagonal or oval rather than circular, and it is not for the Court of Justice to reconsider that assessment. 36. I therefore consider that the first part of the single ground of appeal must be regarded as inadmissible.

B – The second part of the single ground of appeal, concerning the concept of 'informed user'
1. Arguments of the parties

37. According to PepsiCo, the General Court took, as the relevant public for the purposes of assessing the effect of the designs at issue, not the ‘informed user’ as provided under the Regulation, but the ‘average consumer’ who has to be used as the reference for the purposes of applying the Community trade mark regulation. According to PepsiCo, this emerges particularly clearly from paragraphs 82 and 83 of the judgment under appeal (emphasis added):

‘82 In the absence of any specific constraint imposed on the designer, the similarities ... relate to elements in respect of which the designer was free to develop the contested design. It follows that those similarities will attract the informed user’s attention, all the more so because, as the intervener itself stated, the upper surfaces are, in the present case, the most visible surfaces for that user.

83 ... However, it must be found that since the degree of curvature is slight, and the discs are thin, that curvature will not be easily perceived by the informed user, in particular when viewed from above, and this is borne out by the goods actually marketed, as contained in OHIM’s file forwarded to the Court.’

38. According to PepsiCo, even though the General Court mentioned the informed user, not the average consumer, in reality it used the latter as the point of reference. This, according to PepsiCo, is illustrated particularly by the italicised wording in the two paragraphs quoted above: through its use of that wording, the General Court reveals that it did not take account of the fact that the informed user is less ‘superficial’ than the average consumer. Because of that fact, in PepsiCo’s view, it is simplistic to take into account only the most easily visible aspects of the goods (in paragraph 82) and the easily perceptible differences between the designs at issue (in paragraph 83). On the contrary, the informed user would be perfectly capable of perceiving even differences which are faint and which relate to parts of the goods characterised by the designs at issue which are not immediately visible.

39. OHIM concurs with PepsiCo’s arguments and adds that the General Court incorrectly took the approach of a consumer who recollects the designs at issue rather than a consumer who compares them directly. A comparison based on recollection is typical in the case of trade marks, but in the case of designs it is necessary to think in terms of a direct comparison between the goods characterised by the designs at issue.

2. Analysis

40. In my view, the second part of the single ground of appeal is partly inadmissible and partly unfounded.

41. First, the General Court correctly took as the relevant public not the ‘average consumer’ but the ‘informed user’, as the Regulation requires. That is specifically stated in the judgment under appeal, and there is no evidence to show that that was not so.

42. The problem is that, as is well known, the Regulation does not define the term ‘informed user’: the result is that, since there have been no judicial decisions as yet which elucidate that concept, a number of uncertainties can still arise.

43. Obviously, the informed user to whom the Regulation refers is not the average consumer to whom reference must be made in order to apply the rules on trade marks, who needs to have no specific knowledge and who, as a rule, makes no direct comparison between the trade marks at issue; nor, however, is the informed user the sectoral expert referred to for the purposes of assessing a patent’s inventiveness. The informed user can be said to lie somewhere between the two. Accordingly, the informed user is not a general consumer who might, entirely by chance and with no specific knowledge, also come into contact with the goods characterised by a particular design. Nor yet is the informed user an expert with detailed technical expertise.

44. Perusal of the travaux préparatoires for the Regulation confirms that definition as lying somewhere ‘between the two’. In particular, in its comment on Article 6(1) of the original proposal, (16) the Commission stated the following: ‘The person on whom an overall impression of dissimilarity must be made is an “informed user”’.

This may be, but is not necessarily, the end consumer who may be totally unaware of the appearance of the product, for example if it is an internal part of a machine or a mechanical device replaced in the course of a repair. In such cases the “informed user” is the person replacing the part. A certain level of knowledge or design awareness is presupposed depending on the character of the design. But the term “informed user” should indicate also that the similarity is not to be assessed at the level of “design experts”’.

45. In that regard, the General Court correctly identified the informed user to serve as the point of reference for assessing the designs at issue in the present case. And it is worth emphasising that the General Court did so by adopting the identification made by the Board of Appeal, according to which the informed user of ‘pogs’ could be a child in the age range of between 5 and 10 (the final consumer of the goods) or a ‘marketing manager in a company that makes goods which are promoted by giving away “pogs” ... or “tazos”’. (17) The General Court enlarged on this point, stating that ‘[t]he informed user is particularly observant and has some awareness of the state of the prior art, that is to say, the previous designs relating to the product in question that had been disclosed on the date of filing of the contested design, or, as the case may be, on the date of the priority claimed’. (18)

46. The General Court’s findings regarding the nature and characteristics of the informed user in relation to designs are accordingly correct, since that user is properly distinguished and defined, both as compared with a general consumer and as compared with an expert in the sector. In my view, the very fact that, in the present case, the General Court accepted a dual notion of the informed user – covering both the child-final consumer and the marketing manager in a company that may have an interest in using ‘pogs’ for promotional purposes – confirms that it followed the correct line of legal reasoning and made a careful assessment.

47. In so far as it concerns the correct identification of the ‘informed user’, therefore, the single ground of appeal should be rejected as unfounded.

48. Just as the General Court made no errors in identifying the relevant public, its findings concerning the type of comparison which the informed user may make between the designs at issue are not open to criticism.

49. I would first observe – as does OHIM, moreover – that the Regulation is silent on this point. Accordingly, the comparison could, in principle, be either an indirect comparison, based on recollection, as generally happens in the field of trade marks, (19) or a direct comparison made by viewing the goods side by side.

50. In my view, both types of comparison are a legitimate possibility in the case of designs, and to require the systematic use of only one of them would unreasonably restrict OHIM’s powers and, in consequence, the actual protection accorded to the designs, and, in addition, would force the Regulation to say something which it does not actually say.

51. It must in fact be pointed out that, while it is doubtless possible in many cases for an informed user to make a direct comparison of the goods characterised by the designs at issue, it cannot be ruled out that in some situations this is, on the contrary, impracticable. I am thinking here, for example, of designs relating to goods which – because of their large size or because they have to be placed far apart – can never, generally speaking, be set alongside one another: an informed user will not always be in a position to make a direct comparison of, for instance, two boats or two large items of industrial equipment. In such circumstances, the informed user will perhaps have adequate documentation to make the comparison, but will seldom be able to make a ‘live’ comparison, and some time may elapse between that user’s assessment of one design and then the other.

52. The type of comparison which the informed user is able to make between two designs must not, therefore, be rigidly defined in advance; it will in fact need to be assessed case by case, on the basis of the circumstances and the features of the goods characterised by the designs at issue. The very nature of the informed user means that, when possible, he will make a direct comparison between the goods; however, in cases where that is impossible or not very realistic, it will be necessary to envisage a comparison which, although not based exclusively on vague recollection, as in the field of trade marks, may none the less be made over a period of time and at different locations, so far as is required in the specific case.

53. In the present case, there appears to be no doubt that it was possible to make a direct comparison of the ‘pogs’, as they are small products which are widely distributed. All the same, I would point out that, contrary to the assertions made by PepsiCo and OHIM, the judgment under appeal reveals no error of law on the part of the General Court in that regard.

54. Contrary to what is suggested by OHIM in particular, the General Court did not envisage a situation in which the relevant public compared the goods on the

basis of their recollection of the impression those goods conveyed. Quite the reverse, as paragraphs 82 and 83 of the judgment under appeal (quoted above) demonstrate, the General Court’s reasoning focused on the aspects capable of attracting ‘the informed user’s attention’.

55. Lastly, the use – in paragraph 77 of the judgment under appeal – of the words ‘that similarity would not be remembered by the informed user in the overall impression of the designs at issue’ is without significance. Aside from the fact that the General Court endorsed PepsiCo’s position by stating that certain aspects characteristic of the designs at issue need not be taken into consideration, since they are typical of all goods in that category, it should be pointed out that, in making that statement, the General Court summarised and confirmed the reasoning of the Board of Appeal. Moreover, the use of the words ‘would not be remembered’ – albeit a little infelicitous, perhaps – does not necessarily imply the idea that the comparison between the designs must be made on the basis of the ‘memory’ with which they leave the public. Reading those words in the context of the judgment actually demonstrates that, on the contrary, the General Court’s reasoning is based on identifying those aspects capable of attracting the informed user’s attention. Moreover, some language versions of the judgment under appeal actually contain, alongside or in place of the idea of ‘remembering’, the concept of ‘perceiving’ the similarities. (20) 56. It follows that, in that respect also, the reasoning of the General Court is correct, and PepsiCo’s arguments must be rejected.

57. Lastly, as regards the informed user’s specific perception of the designs, once that user has been properly identified and the manner of the comparison defined, I would point out that the assessments made by the General Court fall fully within its own jurisdiction to assess the facts, in respect of which it is not for the Court of Justice to make a ruling. The ground of appeal is therefore inadmissible in so far as it challenges the General Court’s assessments in that regard.

58. In conclusion, I therefore consider that the second part of the single ground of appeal should also be rejected.

C – The third part of the single ground of appeal, concerning the attention level of the informed user and the scope of review by the European Union judiciary

1. Arguments of the parties

59. By the third part of the ground of appeal, PepsiCo makes two separate complaints which must be considered individually.

60. PepsiCo claims first that, when determining the overall impression made on the informed user, the General Court erred in law by confining itself to an examination of those features of the designs at issue which that user would have easily perceived. According to PepsiCo, this emerges from paragraph 83 of the judgment under appeal in particular, according to which ‘it must be found that since the degree of curvature is slight, and the discs are thin, that curvature will

not be easily perceived by the informed user, in particular when viewed from above' (emphasis added).

61. PepsiCo argues that an informed user who observes the designs at issue will not confine himself to a superficial examination as envisaged by the General Court, but will undertake a much more detailed analysis. The judgment under appeal therefore contains an error of law, because the wrong criteria for comparing the designs were applied.

62. Secondly, PepsiCo claims that the General Court erred in law as regards the scope of the review which it has jurisdiction to undertake of decisions of the Board of Appeal concerning designs. Given the technical nature of designs, the General Court's review should be confined to establishing that the Board of Appeal has not made manifest errors. By contrast, in the present case, according to PepsiCo, the General Court substituted its own view for the assessment of the OHIM bodies.

63. OHIM concurs with PepsiCo's arguments, particularly in relation to the scope of review by the European Union judicature.

2. Analysis

64. In my view, this part of the ground of appeal, like the previous part, is partly inadmissible and partly unfounded.

a) The attention level of the informed user

65. PepsiCo's argument is, in the first place, inadmissible in so far as, although alleging that there has been an error of law, PepsiCo is really seeking to call into question the findings of fact made by the General Court regarding the way in which the informed user perceives the two designs at issue. As I pointed out above, there is no doubt that the General Court correctly defined the informed user and, in accordance with the Regulation, took such a user as the reference person for the purposes of assessing the designs. As regards the way in which, in the specific case, the informed user perceives the designs, and the impression that user gleanes from them, that is a matter for the General Court alone to decide, as it is simply a question of fact. PepsiCo has failed to demonstrate that the General Court applied the wrong legal criteria.

66. Nor is it relevant that, in paragraph 83 of the judgment under appeal, the words 'easily perceived' are used with reference to the relationship between the informed user and a design. Notwithstanding PepsiCo's arguments, that does not imply that the General Court envisaged a superficial and not particularly attentive user. It should be borne in mind that the informed user is not the same as the sectoral expert who is called upon in the field of patents. Nor, certainly, is that user the average 'inattentive' consumer to whom reference may be had in relation to trade marks: but, depending on the circumstances, there is no reason not to suppose that even the powers of observation of the informed user have their limitations and do not extend to carrying out a detailed and specialist appraisal. It should also be borne in mind that, in the present case, the goods characterised by the designs at issue are small toys intended for children aged between 5 and 10 and distributed free

of charge, as free gifts, inside other goods. Generally speaking, even careful observation of such goods will not extend beyond a certain level of examination and detail.

67. It should also be pointed out that the words quoted from paragraph 83 of the judgment under appeal need to be considered in context and not as an isolated statement. In that regard, the considerations which I have set out above, when discussing the second part of the ground of appeal, indicate that the General Court envisaged an informed user who was anything but superficial and inattentive, even if lacking the analytical acumen which, if anything, is the hallmark of an observer of patents.

b) The scope of the review of legality

68. The third part of the single ground of appeal must be regarded as unfounded in so far as it calls into question the scope of the review which the European Union judicature may undertake of the legality of decisions of the Board of Appeal relating to designs.

69. As we have seen, PepsiCo and OHIM suggest that the European Union judicature must confine its review to establishing the absence of manifest errors, thereby essentially adopting the approach of settled case-law in cases in which the legality of decisions which are highly technical or specialist in substance have to be considered. (21)

70. In my view, however, there is no reason to adopt, in relation to designs, an approach which is different from that adopted for trade marks.

71. I would first point out, in that regard, that the provision of the regulation on review by the European Union judicature – namely, Article 61 – is, in substance, identical to the provision laid down in the trade mark regulation, (22) which, in turn, refers to the Treaty provisions (currently Article 263 TFEU) on actions for annulment: the content of those provisions does not, therefore, allow them to be construed differently and an approach to be adopted, in relation to designs, which is different from that generally adopted in relation to trade marks. Moreover, as in the field of trade marks also, Article 61 of the Regulation acknowledges that the European Union judicature has jurisdiction not only to annul contested decisions, but also to vary them: that seems difficult to reconcile with the idea that the review of the legality of such decisions is 'limited'.

72. Secondly, the assessment of designs, as of trade marks, is a matter for OHIM, and not for some other organisation with more specific technical expertise.

73. Thirdly, it should be pointed out that, for the purposes of assessing whether there is any possibility of conflict between two designs, the protection of designs under the Regulation takes into account only the visual impression which the designs produce on the informed user, as the General Court convincingly demonstrated, without being challenged on that point, in paragraph 50 of the judgment under appeal. The fact is that, although a degree of experience on the part of the observer may be beneficial, a visual comparison does not, as a rule, require any specific skill or technical ability.

74. The only element which could be employed to argue for a more limited review of legality in relation to designs, as compared with trade marks, could be the fact that – as extensively discussed above – the point of reference is the informed user rather than the average consumer. But that difference is not sufficient to justify a difference in the scope of review jurisdiction. This is because, generally speaking, the informed user is not a ‘technician’ with special knowledge, but just a user who is a little more attentive and interested than the average consumer: in other words, a user of whose perceptions the General Court is able to form an adequate picture.

75. It is quite possible, of course, to envisage, in more general and abstract terms, an approach on the part of the European Union judicature whereby, in relation to OHIM decisions, it confines its intervention to something more restricted than at present, and does not merely rule out substituting its own assessments for that of OHIM, (23) but, more generally, attributes to all OHIM decisions the kind of ‘technical’ nature which restricts the scope of the review of legality. However, that kind of change of approach should encompass all of OHIM decisions, including decisions on trade marks, and could not, as we have seen, be limited solely to designs. It is clear, therefore, that this is not the place to change current practice in that manner.

76. In conclusion, therefore, the General Court did not, in determining the scope of its jurisdiction to review the Board of Appeal’s decision, err in law.

77. The third part of the single ground of appeal must, therefore, be rejected also.

D – The fourth part of the single ground of appeal, alleging that the review focused on the goods rather than on the designs at issue

1. Arguments of the parties

78. PepsiCo claims that the General Court erred in law by basing its assessments of the similarity between the two designs at issue on a physical examination of the goods characterised by the designs (the ‘pogs’), instead of simply comparing the designs as represented in the respective applications for registration.

79. In that connection, it is necessary to draw attention, more specifically, to paragraph 83 of the judgment under appeal, in which the General Court stated that ‘it must be found that since the degree of curvature is slight, and the discs are thin, that curvature will not be easily perceived by the informed user, in particular when viewed from above, and this is borne out by the goods actually marketed, as contained in OHIM’s file forwarded to the Court’ (emphasis added).

80. According to PepsiCo, if the General Court had taken account not of the actual products included by way of illustration in the case-file but of the graphic representation of the two designs at issue, the differences between them would have been quite obvious.

2. Analysis

81. In my view, the fourth part of the single ground of appeal is inadmissible. By this argument, PepsiCo is really seeking, once again, to call into question the findings of fact made by the General Court regarding

the way in which the informed user perceives the designs at issue.

82. In any event, even if, for the sake of argument, that submission were regarded as designed solely to challenge the fact that the General Court decided not merely to compare the graphic representations, but to take account also of the physical goods characterised by the designs at issue, PepsiCo’s position is unsound. It should be pointed out that the General Court based its assessments of the designs at issue as described and reproduced in the respective applications for registration. The comparison of the actual goods was used only to confirm the findings already made, as is absolutely clear from the extract from paragraph 83 of the judgment under appeal quoted above.

83. In any event, it seems to me that it is entirely proper – if, as in this case, it is physically possible – to take account of the actual goods characterised by a specific design. As we have in fact seen, the relevant public for assessing designs is made up of informed users, who are not experts, but simply individuals who are particularly interested in and attentive to such goods. In the present case, the informed users include children aged between 5 and 10 years. In those circumstances, it is quite right that the General Court should also have considered the goods in the form of the ‘real thing’, as seen and perceived by the informed users, who, it should be pointed out, do not usually ever see the registrations of the designs, but only their ‘practical application’, that is to say, the goods characterised by those designs. At the hearing, PepsiCo itself considered it appropriate to show the Court of Justice a number of ‘pogs’ to clarify some of the points contained in its observations.

E – The fifth part of the single ground of appeal, alleging distortion of the facts

1. Arguments of the parties

84. By the last part of its ground of appeal, PepsiCo claims that the General Court distorted the facts, thus giving rise, in consequence, to the circumstances in which, exceptionally, the Court of Justice may reconsider the General Court’s findings as to the facts.

85. According to PepsiCo, the distortion of the facts is apparent from all of its other observations and is confirmed by the decision of the General Court to confine itself to considering the designs at issue as viewed from above, neglecting adequately to consider their other profiles, particularly the side view.

2. Analysis

86. The complaint concerning a distortion of the facts is unfounded.

87. For one thing, as we have seen in the preceding points, the General Court made a thorough and comprehensive examination of the designs at issue, taking account of the way in which they are perceived by an informed user, as required under the Regulation.

88. Furthermore, far from being borne out, PepsiCo’s assertion that there has been a distortion of the facts seems to be the final argument in its ‘summing up’, designed yet again to challenge the findings of fact by the General Court with which it does not agree. However, it should be pointed out that, given the exception-

al nature of a complaint that there has been a distortion of the facts, that complaint must be underpinned by particularly solid evidence, by means of which an appellant must indicate precisely the evidence alleged to have been distorted and show the errors of appraisal which the General Court is alleged to have made. (24) The arguments advanced by PepsiCo in that regard fail totally to satisfy those requirements.

89. Accordingly, the last part of the ground of appeal must also be rejected.

VI – Conclusions

90. In the light of the above considerations, I therefore propose that the Court should:

– dismiss the appeal;

– order PepsiCo to pay the costs.

1 – Original language: Italian.

2 – Council Regulation (EC) No 6/2002 of 12 December 2001 on Community designs (OJ 2002 L 3, p. 1).

3 – To be more specific, until now, with the exception of two infringement actions brought by the Commission against two Member States, the Court has had occasion to give a ruling on Regulation No 6/2002 solely in the context of a reference for a preliminary ruling, which resulted in the judgment of 2 July 2009 in Case C-32/08 FEIA [2009] ECR I-5611.

4 – For a brief account of the legislative course which resulted in the approval of the Regulation, see points 3 to 5 of my Opinion in FEIA (cited in footnote 3).

5 – Footnote not relevant to the English-language version of the Opinion.

6 – In Spanish, the language in which the application was filed: ‘chapa metálica para juegos’.

7 – [2010] ECR II-0000.

8 – Judgment under appeal, paragraph 52.

9 – Judgment under appeal, paragraph 60.

10 – Judgment under appeal, paragraph 84.

11 – It would appear from the case-file (see, for example, paragraph 9, sixth indent, and paragraph 20 of the decision of the Board of Appeal) that both the pogs characterised by the PepsiCo design and the pogs characterised by the Promer design have this ‘sound’ feature, which, although not always present, is frequently a feature of the ‘pogs’ on the market.

12 – I would, moreover, point out that, according to OHIM, the circular shape is necessary so that the ‘pogs’ can be stacked with the others already present on the market. The question may arise, however, as to whether that need – assuming that such a need exists (the General Court took the view that it does not), as opposed to being a simple market requirement, as OHIM maintains – is not actually of a functional nature, since its purpose is to make goods compatible with goods already being marketed.

13 – See, for example, Case C-375/98 Epon Europe [2000] ECR I-4243, paragraph 26; Joined Cases C-49/98, C-50/98, C-52/98 to C-54/98 and C-68/98 to C-71/98 Finalarte and Others [2001] ECR I-7831, paragraph 40; and Case C-164/99 Portugaia Construções [2002] ECR I-787, paragraph 27.

14 – COM(93) 342 final (OJ 1994 C 29, p. 20).

15 – See, for example, the French ‘des dessins ou modèles extrêmement fonctionnels pour lesquels le créateur doit respecter des paramètres précis’, the Italian ‘i disegni o modelli con spiccate caratteristiche funzionali nei quali il disegnatore debba osservare parametri precostituiti’ and the German ‘hochfunktionelle Muster, bei denen der Entwerfer gegebene Parameter beachten muß’.

16 – See footnote 14 above.

17 – Judgment under appeal, paragraph 64.

18 – Judgment under appeal, paragraph 62.

19 – See Case C-342/97 Lloyd Schuhfabrik Meyer [1999] ECR I-3819, paragraph 26.

20 – See, for example, the French version: ‘cette similitude ne sera pas retenue par l’utilisateur averti dans l’impression globale des dessins ou modèles en cause’; the German: ‘wird der informierte Benutzer diese Ähnlichkeit im Rahmen des Gesamteindrucks, den er von den fraglichen Geschmacksmustern gewinnt, nicht wahrnehmen’; the Spanish: ‘el usuario informado no apreciará tal semejanza en la impresión general de los dibujos o modelos controvertidos’; and the Dutch: ‘de geïnformeerde gebruiker, wat de door deze modellen gewekte algemene indruk betreft, niet op deze gelijkennis zal letten’ (emphasis added).

21 – The case-law on this point is clear. Examples include cases in which the contested decision contains complex economic assessments: see, for example, Case C-290/07 P Commission v Scott [2010] ECR I-0000, paragraph 66 and the case-law cited. In the field of intellectual property rights, the Court has set out similar considerations in relation to plant varieties: see Case C-38/09 P Schröder v UCVV [2010] ECR I-0000, paragraph 77.

22 – Article 65 of Council Regulation (EC) No 207/2009 of 26 February 2009 on the Community trade mark (codified version) (OJ 2009 L 78, p. 1), corresponding to Article 63 of the earlier Council Regulation (EC) No 40/94 of 20 December 1993 on the Community trade mark (OJ 1994 L 11, p. 1).

23 – See, already to that effect, Case C-214/05 P Rossi v OHIM [2006] ECR I-7057, paragraph 50.

24 – Joined Cases C-204/00 P, C-205/00 P, C-211/00 P, C-213/00 P, C-217/00 P and C-219/00 P Aalborg Portland and Others v Commission [2004] ECR I-123, paragraph 50, and the Order of 16 December 2004 in Case C-222/03 P APOL and AIPO v Commission, paragraph 40.