

JUDGMENT OF THE GENERAL COURT (Fifth Chamber)

21 April 2021 (\*) (1)

(Community design – Invalidity proceedings – Registered Community design representing a beverage bottle – Prior international design – Ground for invalidity – Conflict with a prior design – Individual character – Informed user – Degree of freedom of the designer – Different overall impression – Article 6 and Article 25(1)(d)(iii) of Regulation (EC) No 6/2002)

In Case T-326/20,

**Bibita Group**, established in Tirana (Albania), represented by C. Seyfert, lawyer,  
applicant,

v

**European Union Intellectual Property Office (EUIPO)**, represented by  
G. Sakalaitė–Orlovskienė and J. Crespo Carrillo, acting as Agents,  
defendant,

the other party to the proceedings before the Board of Appeal of EUIPO being  
**Benkomers OOD**, established in Sofia (Bulgaria),

ACTION brought against the decision of the Third Board of Appeal of EUIPO of  
27 April 2020 (Case R 1070/2018-3), relating to invalidity proceedings between Bibita  
Group and Benkomers,

THE GENERAL COURT (Fifth Chamber),

composed of D. Spielmann, President, O. Spineanu–Matei (Rapporteur) and  
R. Mastroianni, Judges,

Registrar: E. Coulon,

having regard to the application lodged at the Court Registry on 27 May 2020,

having regard to the response lodged at the Court Registry on 27 July 2020,

having regard to the fact that no request for a hearing was submitted by the 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

### Judgment

#### Background to the dispute

1 On 13 March 2017, Benkomers OOD filed an application for registration of a  
Community design with the European Union Intellectual Property Office (EUIPO)  
pursuant to Council Regulation (EC) No 6/2002 of 12 December 2001 on Community  
designs (OJ 2002 L 3, p. 1), as amended.

2 The Community design in respect of which registration was sought and which

is contested in the present case is represented in the following views:

3 The products to which the design is intended to be applied are in Class 09–01 of the Locarno Agreement of 8 October 1968 establishing an International Classification for Industrial Designs, as amended, and correspond to the following description: ‘Beverage bottles’.

4 The contested design was registered under the number 3797091–0001 and published in *Community Designs Bulletin* No 56/2017 of 22 March 2017.

5 On 24 July 2017, the applicant, Bibita Group, filed an application for a declaration of invalidity of the contested design pursuant to Article 52 of Regulation No 6/2002.

6 The ground relied on in support of the application for a declaration of invalidity was that set out in Article 25(1)(d)(iii) of Regulation No 6/2002.

7 The applicant submitted in its application for a declaration of invalidity that, since, in the context of Article 25(1)(d) of Regulation No 6/2002, the same criteria as for the assessment of individual character under Article 25(1)(b), read in conjunction with Article 6 of that regulation, should be applied, the contested design lacked individual character in relation to the design that formed the subject of international registration No 095336, of which it was the holder, which had been protected from a date prior to the application for registration of the contested design. The prior international design is represented below:

8 On 10 May 2018, the Invalidity Division rejected the application for a declaration of invalidity. In essence, it found that the contested design produced a different overall impression on the informed user, which made it possible to rule out a conflict with the prior design.

9 On 8 June 2018, the applicant filed a notice of appeal with EUIPO, pursuant to Articles 55 to 60 of Regulation No 6/2002, against the decision of the Invalidity Division.

10 By decision of 14 January 2019, the Third Board of Appeal of EUIPO found that the designs at issue produced a different overall impression on the informed user and that they were not in conflict within the meaning of Article 25(1)(b) of Regulation No 6/2002.

11 On 26 March 2019, the applicant brought an action before the Court against the decision referred to in paragraph 10 above, which was registered as Case T-180/19.

[12](#) On 17 May 2019, the Registry of the Boards of Appeal sent a communication to the parties pursuant to Article 39 of Commission Regulation (EC) No 2245/2002 of 21 October 2002 implementing Regulation No 6/2002 (OJ 2002 L 341, p. 28) and Article 68 of Regulation No 6/2002. In that communication, the Rapporteur of the Board of Appeal that adopted the decision of 14 January 2019, referred to in paragraph 10 above, stated that the conclusion contained in that decision was that the designs at issue were not in conflict within the meaning of Article 25(1)(b) of Regulation No 6/2002, whereas the application for a declaration of invalidity of the contested design and the decision of the Invalidity Division were based on Article 25(1)(d) of that regulation. He stated that the decision of 14 January 2019 was therefore clearly vitiated by a substantial procedural error and that the Board of Appeal intended to revoke it and to re-examine the appeal brought against the decision of the Invalidity Division.

[13](#) By decision of 30 September 2019, the Third Board of Appeal revoked the decision of 14 January 2019.

[14](#) By order of 4 March 2020, *Bibita Group v EUIPO – Benkomers (Beverage bottles)* (T-180/19, not published, EU:T:2020:84), the Court declared that there was no longer any need to adjudicate on the action brought by the applicant and ordered EUIPO to bear its own costs and to pay the costs incurred by the applicant.

[15](#) By decision of 27 April 2020 ('the contested decision'), the Third Board of Appeal of EUIPO dismissed the applicant's appeal against the decision of the Invalidity Division, after finding that the designs at issue each produced a different overall impression on the informed user and that they were therefore not in conflict within the meaning of Article 25(1)(d)(iii) of Regulation No 6/2002.

[16](#) On 10 July 2020, the Board of Appeal adopted a corrigendum to the contested decision, on the basis of Article 39 of Regulation No 2245/2002, in order to correct an error of transcription in paragraphs 4, 21, 22 and 28 thereof concerning the registration number of the prior design. That corrigendum was notified to the parties by letter of 13 July 2020 and was placed on the file by decision of the President of the Fifth Chamber of the General Court of 7 August 2020.

#### **Forms of order sought**

[17](#) The applicant claims that the Court should:

- annul the contested decision and, accordingly, declare the contested design invalid;
- order EUIPO and the other party to the proceedings before EUIPO to pay the costs of the proceedings before the Board of Appeal, in accordance with

Article 190 of the Rules of Procedure of the General Court:

- order EUIPO to pay the entirety of the costs of the present proceedings.

18 EUIPO contends that the Court should:

- dismiss the action;
- order the applicant to pay the costs.

## **Law**

### ***Admissibility***

19 In the first place, as regards the second part of the applicant's first head of claim, by which it requests that the Court declare the contested design invalid, it should be borne in mind that, under Article 61(3) of Regulation No 6/2002, the Court has jurisdiction to annul or to alter a contested decision. Under Article 61(6) of that regulation, EUIPO is required to take the necessary measures to comply with the judgment of the Court, which means that it is not for the Court to issue directions to EUIPO; rather, it is for EUIPO to draw the appropriate inferences from the operative part of the Court's judgment and from the grounds stated. Accordingly, a head of claim by which it is requested that the Court declare a design invalid is inadmissible (see, to that effect, judgment of 18 July 2017, *Chanel v EUIPO – Jing Zhou and Golden Rose 999 (Ornamentation)*, T-57/16, EU:T:2017:517, paragraphs 16 to 18 and the case-law cited). The second part of the applicant's first head of claim must therefore be rejected as inadmissible.

20 In the second place, in paragraphs 17 to 19 of the response, EUIPO submits that Annex A.15 to the application must be rejected as inadmissible, in so far as that evidence was neither submitted nor assessed by the Invalidity Division, or subsequently by the Board of Appeal, having been submitted for the first time before the Court.

21 It should be noted that Annex A.15 to the application consists of an English translation of the letter of 27 June 2017 from the other party to the proceedings before EUIPO, produced, in its original Bulgarian version, as Annex A.13 to the application and which, according to the applicant, shows that that other party acknowledged the similarity of the designs at issue. The applicant also produced an Albanian translation of that letter as Annex A.14 to the application. That letter was submitted in its original Bulgarian version during the administrative procedure as Annex 4 to the application for a declaration of invalidity. In that application, the applicant stated that it would provide an English translation of the letter in due course.

[22](#) It must be borne in mind that Article 29(5) of Regulation No 2245/2002 provides that, where the evidence in support of the application is not filed in the language of the invalidity proceedings, the applicant is to file a translation of that evidence into that language within two months of the filing of such evidence.

[23](#) Thus, in order for the letter of 27 June 2017 to have been taken into account first by the adjudicating bodies of EUIPO and subsequently by the Court, it would have had to satisfy the language requirements laid down in Article 29(5) of Regulation No 2245/2002. In so far as the applicant submitted a translation of the letter of 27 June 2017 into English, that is, the language of the invalidity proceedings, for the first time before the Court, Annex A.13 to the application does not satisfy those requirements, so that Annexes A.13 to A.15 cannot be taken into consideration by the Court.

#### ***Substance***

[24](#) In support of its action, the applicant puts forward a single plea in law, alleging infringement of Article 25(1)(d)(iii) of Regulation No 6/2002.

[25](#) EUIPO disputes all the applicant's arguments.

*The fact that the design relied on in support of the application for a declaration of invalidity is a prior design and the concept of conflict within the meaning of Article 25(1)(d)(iii) of Regulation No 6/2002*

[26](#) In accordance with Article 25(1)(d)(iii) of Regulation No 6/2002, a Community design may be declared invalid if it 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 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 design right registered under the Geneva Act of the Hague Agreement concerning the international registration of industrial designs, adopted in Geneva on 2 July 1999, which was approved by Council Decision 2006/954/EC of 18 December 2006 (OJ 2006 L 386, p. 28), and which has effect in the European Union, or by an application for such a right.

[27](#) In the first place, it should be noted that the application for registration of the prior design was filed on 28 September 2016, that is to say, before the date of filing of the contested design, namely 13 March 2017, and was made available to the public on 31 March 2017, that is to say, after the date of filing of the contested design. The applicant's rights under the registration of the prior design have been recognised in the European Union since the date of its filing. Moreover, the parties do not dispute the findings in paragraphs 20 to 22 of the contested decision that the conditions laid down in that regard in Article 25(1)(d)(iii) of Regulation No 6/2002 are fulfilled in the present case.

[28](#) Nor do the parties dispute the Board of Appeal's finding, in paragraph 27 of the contested decision, that the designs at issue are intended to be applied to 'beverage bottles'.

[29](#) In the second place, since the concept of conflict within the meaning of Article 25(1)(d)(iii) of Regulation No 6/2002 is not defined as such in that regulation, account must be taken of the interpretation provided by the case-law.

[30](#) For the purposes of the interpretation of Article 25(1)(d) of Regulation No 6/2002, it must be recalled that, in accordance with Article 10 of that regulation, the scope of the protection conferred by a design is to include any design which does not produce on the informed user a different overall impression and that, in assessing the scope of that protection, the degree of freedom of the designer in developing his or her design is to be taken into consideration.

[31](#) Consequently, Article 25(1)(d) of Regulation No 6/2002 must be interpreted as meaning that a Community design is in conflict with a prior design when, taking into consideration the freedom of the designer in developing the Community design, that design does not produce on the informed user a different overall impression from that produced by the prior design relied on (judgment of 18 March 2010, *Grupo Promer Mon Graphic v OHIM - PepsiCo (Representation of a circular promotional item)*, T-9/07, EU:T:2010:96, paragraph 52).

[32](#) That interpretation of Article 25(1)(d) of Regulation No 6/2002 is the only one which can ensure that the rights of the holder of a prior design that is referred to in that provision is protected against any infringement of the design resulting from the coexistence of a subsequent Community design that produces the same overall impression on the informed user. If Article 25(1)(d) of Regulation No 6/2002 were not interpreted in that way, the holder of an earlier right would be precluded from applying for a declaration of invalidity in respect of a subsequent Community design that produces the same overall impression, and deprived of the actual protection conferred by his or her design under Article 10 of Regulation No 6/2002 (judgment of 18 March 2010, *Representation of a circular promotional item*, T-9/07, EU:T:2010:96, paragraph 53).

[33](#) The Board of Appeal was therefore fully entitled to adopt such an interpretation in paragraph 23 of the contested decision, finding, like the Invalidity Division found, that a conflict arose between two designs when they produced the same overall impression on the informed user, and that in that connection the degree of freedom of the designer in developing the contested design had to be taken into account.

*The alleged 'particularly broad' protection of the prior design*

[34](#) In the first place, the applicant claims that the prior design enjoys particularly broad protection under Article 6 of Regulation No 6/2002, read in conjunction with recital 14 of that regulation.

[35](#) According to recital 14 of Regulation No 6/2002, the assessment as to whether a design has individual character should be based on whether the overall impression produced on an informed user viewing the design clearly differs from that produced on him or her by the existing design corpus, taking into consideration the nature of the product to which the design is applied or in which it is incorporated, and in particular the industrial sector to which it belongs and the degree of freedom of the designer in developing the design.

[36](#) Article 6 of Regulation No 6/2002 provides that a design is to 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, 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 or, 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. In assessing individual character, the degree of freedom of the designer in developing the design is to be taken into consideration.

[37](#) Despite the reference in recital 14 of Regulation No 6/2002 to the existence of a 'clear' difference between the overall impressions produced by the designs at issue, it should be noted that the wording of Article 6 of that regulation is clear and unambiguous. In accordance with the case-law relating to that provision, it must be borne in mind, for the purposes of applying Article 25(1)(d) of that regulation and assessing whether there is a conflict between the designs at issue, that a design is eligible for the protection afforded by the Community design under the relevant legislation if it produces on the informed user a different overall impression from that produced by a prior design (see, to that effect, judgment of 22 November 2018, *Buck-Chemie v EUIPO - Henkel (Cleansing block for toilets)*, T-296/17, not published, EU:T:2018:823, paragraph 29 and the case-law cited).

[38](#) In the second place, the applicant claims that the prior design was entirely new on the date of its filing. It submits that the uniqueness of the shape resembling the structure of a dumbbell for a beverage bottle justifies the increased protection that would be afforded to the prior design.

[39](#) In that regard, it should be noted that, by relying on the 'particularly broad protection' enjoyed by the prior design, the applicant is in fact seeking to introduce a

new criterion for the protection of a prior design relating to its alleged innovative and unprecedented character in the sector of the industry to which the products at issue belong.

[40](#) On the one hand, even if it were established that, at the date of its registration, the shape resembling the structure of a dumbbell applied to a beverage bottle would have been entirely new in the industrial sector concerned, the uniqueness of such a shape does not confer on the prior design broader protection than that which it enjoys under Regulation No 6/2002. On the other hand, the individual character of a design required for its registration applies to the contested design in relation to the prior design, without the allegedly unprecedented character or originality of its appearance having any influence whatsoever on the assessment of the individual character of the contested design. The applicant's arguments in that regard must therefore be rejected.

[41](#) Thus, it is necessary to examine, by carrying out a four-stage assessment, whether the contested design is in conflict with the prior design, in the sense that they produce the same overall impression on the informed user, taking into consideration the designer's degree of freedom in developing the contested design. That examination consists in deciding upon, first, the sector to which the products in which the design is intended to be incorporated or to which it is intended to be applied belong; second, the informed user of those products in accordance with their purpose and, with reference to that informed user, the degree of awareness of the prior art and the level of attention to the similarities and the differences in the comparison of the designs; third, the designer's degree of freedom in developing his or her design, the influence of which on individual character is in inverse proportion; and, fourth, taking that degree of freedom into account, the outcome of the comparison, direct if possible, of the overall impressions produced on the informed user by the contested design and by the prior design which has been made available to the public, taken individually (see judgment of 13 June 2019, *Visi/one v EUIPO – EasyFix (Display holder for vehicles)*, T-74/18, EU:T:2019:417, paragraph 66 and the case-law cited).

[42](#) The individual character of a design results from an overall impression of difference or lack of 'déjà vu', from the point of view of an informed user, in relation to the prior design relied on, without taking account of any differences that are insufficiently significant to affect that overall impression, even though they may be more than insignificant details, but taking account of differences that are sufficiently marked so as to produce dissimilar overall impressions (see, to that effect, judgment of 16 February 2017, *Antrax It v EUIPO – Vasco Group (Thermosiphons for radiators)*, T-828/14 and T-829/14, EU:T:2017:87, paragraph 53 and the case-law cited).



*The informed user*

[43](#) The Board of Appeal noted, first, that the relatively relevant sector in which the informed user of the contested design was to be identified was that of ‘beverage bottles’. Secondly, it stated that the informed user of the contested design could be both a professional in the packaging sector and an informed ordinary consumer of the beverages for which the bottles are used.

[44](#) The applicant does not dispute the Board of Appeal’s findings set out in paragraph 43 above. It submits, however, that the overall impression produced by the designs at issue must be determined in relation to the average consumer of beverage bottles.

[45](#) With regard to the concept of ‘informed user’, the status of ‘user’ implies that the person concerned uses the product in which the design is incorporated or to which it is applied in accordance with the purpose for which that product is intended. The qualifier ‘informed’ suggests, in addition, that, without being a designer or a technical expert, the user is familiar with 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 or her interest in the products concerned, shows a relatively high level of attention when he or she uses them (see, to that effect, judgment of 15 October 2015, *Promarc Technics v OHIM – PIS (Part of door)*, T-251/14, not published, EU:T:2015:780, paragraph 42 and the case-law cited).

[46](#) The concept of the ‘informed user’ 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 at issue, and the sectoral expert, who has detailed technical expertise. Thus, the concept of the informed user may be understood as referring not to a user displaying an average level of attention, but to a particularly observant one, either because of his or her personal experience or his or her extensive knowledge of the sector in question (see judgment of 15 October 2015, *Part of door*, T-251/14, not published, EU:T:2015:780, paragraph 43 and the case-law cited).

[47](#) In the present case, it should thus be noted that the informed user represented by the ‘end consumer’ of beverage bottles does not correspond to the ‘average consumer’, who is the consumer deemed to be reasonably well informed and reasonably observant and circumspect, forming part of the relevant public interested in the goods covered by a trade mark (see, to that effect, judgment of 12 March 2020, *Gamma-A v EUIPO – Zivju pārstrādes uzņēmumu serviss (Packaging for foodstuffs)*, T-352/19, not published, EU:T:2020:94, paragraph 36).

[48](#) Irrespective of whether the user is, as in the present case, a professional or indeed the end consumer of the products concerned, the qualifier ‘informed’ suggests that the concept lies somewhere between that of the average consumer and that of the sectoral expert, as defined in paragraphs 45 and 46 above.

[49](#) Therefore, the Board of Appeal did not err in basing its analysis of the individual character of the contested design on professionals in the beverage–packaging sector and the informed ordinary consumer of the beverages for which the bottles are used, and not on the ‘average consumer’. The applicant’s arguments seeking to call that conclusion into question must therefore be rejected.

*The designer’s degree of freedom*

[50](#) In paragraphs 24 and 25 of the contested decision, the Board of Appeal noted that the factors limiting the designer’s degree of freedom in developing the design of a beverage bottle were, first, the measurements of the bottle, in that it must correspond to the standardised quantities in which the respective beverage is sold, and, secondly, the presence of a tightly fitting cap and a flattened bottom. By contrast, it found that the designer’s degree of freedom was considerable in terms of developing the shape of the body of the bottle, the neck, the proportions of the dimensions between the body and the neck and the materials used to manufacture the bottle as well as the labels attached to it and its decoration and embellishments. Furthermore, in paragraph 30 of the contested decision, the Board of Appeal stated that the shape resembling the structure of a dumbbell had a technical function, namely that of enabling the user to grip the bottle more easily.

[51](#) The applicant acknowledges that the development of the designs of beverage bottles is subject to certain limitations, in that the measurements of the bottle must correspond to the standardised quantities in which beverages are sold and that the bottle must have a tightly fitting cap in order to preserve its contents and a flattened bottom to stand on.

[52](#) However, it submits that the Board of Appeal erred in its interpretation and application of the principles set out in Article 6 of Regulation No 6/2002, since the designer’s degree of freedom in developing the prior design was ‘endless’ as regards the use of a shape resembling the structure of a dumbbell. According to the applicant, there were no limitations caused by functionalities or quantity standardisation that made such a shape necessary. In that regard, it emphasises that a design relating to a bottle with such a shape did not exist before the prior design. Moreover, the applicant claims that that shape does not merely fulfil a technical function, but gives the product a ‘sporty’ impression and image, distinguishing it from other bottles present on the market with slimmer middle parts.

[53](#) The designer's degree of freedom in developing his or her design is established, inter alia, by 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. Those constraints result in a standardisation of certain features, which will thus be common to the designs applied to the product concerned (judgment of 18 March 2010, *Representation of a circular promotional item*, T-9/07, EU:T:2010:96, paragraph 67).

[54](#) Accordingly, the greater the designer's freedom in developing a design, the less likely it is that minor differences between the designs at issue will be sufficient to produce a different overall impression on an informed user. Conversely, the more the designer's freedom in developing a 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 an informed user. Consequently, if the designer enjoys a high degree of freedom in developing a design, that reinforces the conclusion that designs that do not have significant differences produce the same overall impression on an informed user (see judgment of 18 July 2017, *Ornamentation*, T-57/16, EU:T:2017:517, paragraph 30 and the case-law cited).

[55](#) At the outset, it should be noted that the applicant is wrong to refer to the designer's degree of freedom in developing the prior design, and not to the designer's degree of freedom in developing the contested design, whereas only the latter must be taken into consideration in order to establish whether the differences between the designs at issue are sufficient to produce a different overall impression on an informed user, as has been noted in paragraph 54 above.

[56](#) Furthermore, the applicant contradicts itself when it acknowledges that there are constraints in developing a design for a beverage bottle which were pointed out by the Board of Appeal (see paragraph 52 above), while asserting that the designer of the prior design enjoyed complete freedom to create the shape of the prior design and that the designer of the contested design had complete freedom and unlimited design options in developing a design of a beverage bottle which did not adopt a shape resembling the structure of a dumbbell.

[57](#) As the Board of Appeal noted in paragraph 25 of the contested decision, common features are found in designs for beverage bottles, in that a bottle must correspond to the standardised quantities in which the respective beverage is sold and must have a tightly fitting cap and a flattened bottom in order to meet the technical requirements in respect of which it is designed. However, as is moreover apparent from the representations of bottles produced by the applicant in the proceedings before EUIPO, there are designs of bottles which are very different in shape, in particular as regards the body and the neck, their proportions and dimensions and the

materials used for their manufacture as well as the labels attached to them and their possible decoration.

[58](#) Therefore, the Board of Appeal was fully entitled to find that the designer's degree of freedom was considerable, but not unlimited, contrary to the applicant's claims.

*The overall impression produced by the designs at issue on the informed user*

[59](#) In paragraphs 31 to 33 of the contested decision, the Board of Appeal noted, first, that the most eye-catching characteristic of the contested design was not the construction of the bottle from two bulky sections with a tube-like part in the middle, but rather its linear patterns, which did not fulfil any technical function but gave the contested design different contours and a notably different overall shape compared to the prior design. Secondly, it noted a further difference, consisting in the octagonal shape of the top and bottom sections of the contested design, whereas the respective parts in the prior design appeared to be a circular shape. Thirdly, it stated that the contested design showed different indentations in the top and bottom parts of each of its bulky sections, which slightly protruded vertically, whereas the prior design consisted of a flat top and bottom. Fourthly, according to the Board of Appeal, the informed user would notice those differences, since they concern two thirds of the surface of the designs at issue and cannot be offset by the fact that they have the same shape resembling the structure of a dumbbell. The Board of Appeal concluded that those differences meant that the designs at issue each produced a different overall impression from the point of view of the informed user.

[60](#) The applicant claims, on the contrary, that the contested design lacks individual character, since there is no clear difference between the overall impression it produces on the informed user and the overall impression produced on that user by the prior design. According to the applicant, when comparing the designs at issue directly, the Board of Appeal focused on minor characteristics of the contested design. Furthermore, the black lines in that design which were mentioned by the Board of Appeal are not drawn in black on the bottles covered by that design, but depict a shape change that is barely visible.

[61](#) According to case-law, the comparison of the overall impressions produced by the designs at issue must be synthetic and may not be limited to an analytic comparison of a list of similarities and differences. That comparison must take as a basis the features disclosed in the contested design and must relate solely to the features protected, without taking account of the features, particularly technical features, excluded from the protection (see judgment of 13 June 2019, *Display holder for vehicles*, T-74/18, EU:T:2019:417, paragraph 84 and the case-law cited).

[62](#) Where the similarities between the designs at issue relate to the constraints of the features imposed, inter alia, by the technical function of the product or an element thereof, those similarities will have only minor importance in the overall impression produced by those designs on the informed user (see, to that effect, judgment of 18 March 2010, *Representation of a circular promotional item*, T-9/07, EU:T:2010:96, paragraph 72).

[63](#) Furthermore, differences will be insignificant in the overall impression produced by the designs at issue where they are not sufficiently pronounced to distinguish the goods at issue in the perception of the informed user or offset the similarities found between those designs (see, to that effect, judgment of 21 November 2013, *El Hogar Perfecto del Siglo XXI v OHIM – Wenf International Advisers (Corkscrew)*, T-337/12, EU:T:2013:601, paragraph 53).

[64](#) In the first place, as has been noted in paragraph 31 above, a design has individual character if the overall impression it produces on the informed user differs from the overall impression produced on such a user by the prior design. Contrary to what the applicant claims, the assessment to be made in that regard involves taking into account all the elements that distinguish the designs at issue, other than those which remain insufficiently significant to affect that overall impression.

[65](#) In the second place, as the Board of Appeal noted in paragraph 30 of the contested decision, the shape of the designs at issue, resembling a dumbbell structure consisting of a body that is slimmer in the middle and wider at the top and bottom, also has a technical function, namely to allow for a firmer grip on the bottle in question. Accordingly, that common feature of the designs at issue will have only minor importance in the overall impression produced by them on the informed user, in the light of the case-law referred to in paragraph 62 above.

[66](#) In the third place, contrary to what the applicant claims, the differences between the designs at issue which the Board of Appeal correctly pointed out in paragraphs 31 and 32 of the contested decision can be perceived by the informed user, given that they concern two thirds of the surface of the designs at issue and significantly influence the overall impression that they produce on that user, notwithstanding the fact that they share the same shape.

[67](#) Those differences, which concern the linear patterns, giving rise to the octagonal shape of the top and bottom sections of the contested design, and the indentations on the top and bottom parts of each of its sections, give the contested design an angular appearance which distinguishes it from the prior design, which is characterised by the cylindrical shape of its top and bottom parts and, accordingly, by the circular shape of their sections, which give the prior design a rounder and

smoother appearance. Furthermore, the different dimensions of the two octagonal shapes in the contested design contribute to giving a less symmetrical overall impression in relation to an axis passing through the centre of the bottle than the prior design.

[68](#) The differences observed between the designs at issue, as noted by the Board of Appeal, which concern elements in respect of which the designer's freedom may be manifested, are numerous and significant. While the appearance of the prior design alludes to the shape resembling the structure of a dumbbell, the overall impression produced by the contested design is less suggestive of such a shape.

[69](#) In the fourth place, contrary to what the applicant claims, the linear patterns represented by fine black lines in the contested design do not depict a shape change that is barely visible on a translucent or transparent beverage bottle. Those linear patterns are clearly visible in the views of the contested design and, as EUIPO has pointed out, there is no representation including them as disclaimed features of the design. In addition, those black lines highlight the octagonal shapes in the top and bottom sections of the contested design and give it different contours compared to the prior design. Therefore, they are clearly visible irrespective of the translucent or transparent material that could be used to make the bottles represented by the contested design.

[70](#) As regards the label on the prior design, in paragraph 35 of the contested decision, the Board of Appeal found that it did not play a significant role in the comparison of the overall impressions produced by the designs at issue. Before the Court, the applicant merely reproduced the prior design without the word elements on that label, and did not call the Board of Appeal's finding into question. Even without a label, the designs at issue have significant differences, as has been stated in paragraphs 66 to 69 above.

[71](#) It follows that the Board of Appeal made no error of assessment in finding, in paragraphs 36 and 37 of the contested decision, that the contested design and the prior design produced different overall impressions on the informed user and in concluding that the contested design could not be considered to be in conflict with the prior design within the meaning of Article 25(1)(d)(iii) of Regulation No 6/2002.

[72](#) In the light of all the foregoing considerations, the applicant's single plea in law must be rejected and, consequently, the action must be dismissed in its entirety.

#### **Costs**

[73](#) Under Article 134(1) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's

pleadings.

[74](#) Since the applicant has been unsuccessful, it must be ordered to pay the costs, in accordance with the form of order sought by EUIPO. Furthermore, as regards the costs relating to the proceedings before the Board of Appeal, it is sufficient to note that, since the present judgment dismisses the action brought against the contested decision, it is the operative part of that decision which continues to determine the costs in question (see, to that effect, judgment of 28 February 2019, *Lotte v EUIPO – Générale Biscuit–Glico France (PEPERO original)*, T-459/18, not published, EU:T:2019:119, paragraph 194).

On those grounds,

THE GENERAL COURT (Fifth Chamber)

hereby:

1. **Dismisses the action;**
2. **Orders Bibita Group to pay the costs.**

Spielmann  
Delivered in open court in Luxembourg on 21 April 2021.

Spineanu-Matei

Mastroianni

E. Coulon  
Registrar

S. Papasavvas  
President

---