Reports of Cases

JUDGMENT OF THE COURT (Fourth Chamber)

21 November 2019*

(Reference for a preliminary ruling — Designs — Regulation (EC) No 6/2002 — Article 90(1) — Provisional and protective measures — Jurisdiction of national courts of first instance — Exclusive jurisdiction of the courts designated in that provision)

In Case C-678/18,

REQUEST for a preliminary ruling under Article 267 TFEU from the Hoge Raad der Nederlanden (Supreme Court of the Netherlands), made by decision of 2 November 2018, received at the Court on 5 November 2018, in the proceedings

Procureur-Generaal bij de Hoge Raad der Nederlanden

THE COURT (Fourth Chamber),

composed of M. Vilaras (Rapporteur), President of the Chamber, S. Rodin, D. Šváby, K. Jürimäe and N. Piçarra, Judges,

Advocate General: M. Campos Sánchez-Bordona,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

– the Procureur-Generaal bij de Hoge Raad der Nederlanden, by R. van Peursem, acting as Agent,

– the Netherlands Government, by C.S. Schillemans and M. Bulterman, acting as Agents,

– the European Commission, by É. Gippini Fournier and A. Nijenhuis, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 18 September 2019,

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Article 90(1) of Council Regulation (EC) No 6/2002 of 12 December 2001 on Community designs (OJ 2002 L 3, p. 1).

* Language of the case: Dutch.

2 The request has been made in the context of an appeal in cassation in the interest of the law brought by the Procureur-Generaal bij de Hoge Raad der Nederlanden (Procurator General at the Supreme Court of the Netherlands) ('the Procurator General') against a decision of the judge at the rechtbank Amsterdam (District Court, Amsterdam, Netherlands) dealing with applications for interim measures delivered on 12 January 2017 and concerning the determination as to which courts have jurisdiction to order provisional and protective measures in respect of Community designs.

Legal context

EU law

3 Title IX of Regulation No 6/2002, entitled 'Jurisdiction and procedure in legal actions relating to Community designs', includes a Section 2, itself entitled 'Disputes concerning the infringement and validity of Community designs', which consists of Articles 80 to 92 of that regulation.

4 Article 80 of Regulation No 6/2002, entitled 'Community design courts', provides in its paragraph 1:

'The Member States shall designate in their territories as limited a number as possible of national courts and tribunals of first and second instance (Community design courts) which shall perform the functions assigned to them by this Regulation.'

5 Article 81 of that regulation, entitled 'Jurisdiction over infringement and validity', provides:

'The Community design courts shall have exclusive jurisdiction:

(a) for infringement actions and — if they are permitted under national law — actions in respect of threatened infringement of Community designs;

(b) for actions for declaration of non-infringement of Community designs, if they are permitted under national law;

(c) for actions for a declaration of invalidity of an unregistered Community design;

(d) for counterclaims for a declaration of invalidity of a Community design raised in connection with actions under (a).'

6 Article 90 of that regulation, entitled 'Provisional measures, including protective measures', reads as follows:

'1. Application may be made to the courts of a Member State, including Community design courts, for such provisional measures, including protective measures, in respect of a Community design as may be available under the law of that State in respect of national design rights even if, under this Regulation, a Community design court of another Member State has jurisdiction as to the substance of the matter.

…

3. A Community design court whose jurisdiction is based on Article 82(1), (2), (3) or (4) shall have jurisdiction to grant provisional measures, including protective measures, which, subject to any necessary procedure for recognition and enforcement pursuant to Title III of the Convention on Jurisdiction and Enforcement, are applicable in the territory of any Member State. No other court shall have such jurisdiction.'

Netherlands law

7 Article 3 of the wet tot uitvoering van de verordening van de Raad van de Europese Unie betreffende Gemeenschapsmodellen houdende aanwijzing van de rechtbank voor het Gemeenschapsmodel (Uitvoeringswet EG — verordening betreffende Gemeenschapsmodellen) (Law implementing the Regulation of the Council of the European Union on Community designs and designating the Community design court), of 4 November 2004 (Stb. 2004, No 573) ('the Law of 4 November 2004')), provides:

'In respect of all actions referred to in Article 81 of [Regulation No 6/2002], the rechtbank Den Haag (District Court, The Hague, Netherlands) shall have exclusive jurisdiction at first instance, and, in interim proceedings, the voorzieningenrechter (judge dealing with applications for interim measures) of that court.'

The dispute in the main proceedings and the question referred for a preliminary ruling

8 Spin Master Ltd is a company which has its registered office in Toronto (Canada) and operates in the toy sector. Under the brand name Bunchems, it markets a toy consisting of small plastic balls which bunch together and are available in eight colours. These balls make it possible to create all kinds of shapes and figures.

9 On 16 January 2015 a Community design was registered for that toy in the name of Spin Master under number 002614669-0002.

10 High5 Products BV is a company with its registered office in Waalwijk (Netherlands) which distributes, under the name 'Linkeez', a toy consisting of small plastic balls which bunch together, also available in eight colours.

11 By letter of 18 November 2016, Spin Master served formal notice on High5 Products to bring an end to the infringement of the abovementioned Community design.

12 As High5 Products did not comply with that formal notice, Spin Master brought an application for interim relief before the judge of the rechtbank Amsterdam (District Court, Amsterdam) dealing with applications for interim relief, by which it sought an order prohibiting the marketing of the toy distributed by High5 Products.

13 A plea of lack of jurisdiction having been raised in respect of that application, the judge of the rechtbank Amsterdam (District Court, Amsterdam) dealing with applications for interim relief held, in a decision of 12 January 2017, that he had jurisdiction to deal with the application for interim relief which had been submitted to him. In that regard, he based his decision on the fact, first, that Netherlands law confers jurisdiction on him to rule on a similar request based on a Benelux design and, secondly, that Article 3 of the Law of 4 November 2004 does not mean that he does not have jurisdiction in interim proceedings giving rise to an application for an injunction limited to the territory of the Netherlands, such as the application before him.

14 On 31 August 2018, the Procurator General lodged an appeal in cassation in the interest of the law against that decision before the Hoge Raad der Nederlanden (Supreme Court of the Netherlands) on the ground that, in the Procurator General's view, the judge of the rechtbank Den Haag (District Court, The Hague), dealing with applications for interim measures, as the court designated under Article 80(1) of Regulation No 6/2002, has exclusive jurisdiction in Community design matters, including provisional and protective measures.

15 The referring court states that the question raised before it is whether Article 90(1) of Regulation No 6/2002 precludes the legislation of a Member State from providing that the exclusive jurisdiction of the courts designated under Article 80(1) of that regulation also extends to provisional measures, including protective measures, within the meaning of that Article 90(1).

16 The referring court points out that, by adopting Article 3 of the Law of 4 November 2004, the Netherlands legislature sought to make use of the specific intellectual-property expertise of the rechtbank Den Haag (District Court, The Hague) and of the Gerechtshof Den Haag (Court of Appeal, The Hague, Netherlands). It observes that the question of the exclusive jurisdiction of the courts designated under Article 80(1) of Regulation No 6/2002 in respect of provisional measures, including protective measures, has given rise to divergent assessments in case-law and academic legal writing, including in Member States other than the Kingdom of the Netherlands.

17 The referring court is uncertain as to the proper interpretation of Article 90(1) of Regulation No 6/2002. According to one interpretation, the EU legislature, by that provision, introduced a mandatory exception to the wish, otherwise expressed therein, to promote specialisation in the courts, since Member States are not free to confer exclusive jurisdiction on Community design courts to hear all applications for provisional measures, including protective measures, in design matters. According to a second interpretation, the EU legislature, by that provision, sought merely to allow Member States to provide, in their national legislation, that jurisdiction to hear such applications is also to be conferred on other courts with jurisdiction to adopt such measures in cases relating to national designs.

18 The referring court also contemplates the possibility that, in so far as Article 81 of Regulation No 6/2002 establishes on a mandatory basis the domestic jurisdiction of the Community design courts for the claims referred to in that article, Article 90 applies only to provisional measures, including protective measures, of another kind.

19 Finally, the referring court states that the setting-aside of a decision following an appeal in the interest of the law brought by the Procurator General has no influence on the legal situation of the parties concerned by that decision, as the proceedings in that event relate only to a point of law raised in numerous cases and forming the subject of divergent assessments.

20 In those circumstances, the Hoge Raad der Nederlanden (Supreme Court of the Netherlands) decided to stay the proceedings and to refer the following question to the Court of Justice for a preliminary ruling:

‘Must Article 90(1) of [Regulation No 6/2002] be interpreted as requiring the mandatory granting, to all courts and tribunals of a Member State referred to therein, of jurisdiction to grant provisional and protective measures, or does it leave the Member States — in full or in part — free to delegate jurisdiction to grant such measures exclusively to the courts and tribunals which, in accordance with Article 80(1) of Regulation No 6/2002, have been designated as courts (of first and second instance) for Community design?’

Admissibility of the request for a preliminary ruling

21 According to the information provided by the referring court, the lodging of an appeal in cassation in the interest of the law falls within the exclusive competence of the Procurator General and seeks to have a judicial decision set aside after the ordinary remedies available to the parties are no longer available. Where such an appeal in cassation is upheld, the judicial decision in question is set aside without, however, there being any alteration in the *inter partes* situation.

22 The Netherlands Government states that the request for a preliminary ruling is admissible since the referring court is required to rule on an appeal in the interest of the law brought by the Procurator General, which is an appeal designed to ensure uniformity of the law and its development at national level.

23 It should be noted that, according to settled case-law, although Article 267 TFEU does not make the reference to the Court subject to there having been an *inter partes* hearing in the proceedings in the course of which the national court refers the questions for a preliminary ruling, a national court may refer a question to the Court only if there is a case pending before it and if it is called upon to give judgment in proceedings intended to lead to a decision of a judicial nature (judgments of 25 June 2009, *Roda Golf & Beach Resort*, C-14/08, EU:C:2009:395, paragraphs 33 and 34, and of 16 June 2016, *Pebros Servizi*, C-511/14, EU:C:2016:448, paragraph 24).

24 In that regard, it is of importance, as the Advocate General observed in point 33 of his Opinion, solely that the court requesting the assistance of the Court of Justice is exercising a judicial function and that it takes the view that an interpretation of EU law is necessary to enable it to give its decision. The fact that the situation between the parties to the dispute giving rise to the request for a preliminary ruling can no longer be altered as a result of that request is not such as to affect those considerations, which are linked to the nature of the functions performed by the referring court.

25 In addition, it should be noted that, although the term 'give judgment', within the meaning of the second paragraph of Article 267 TFEU, encompasses the entire procedure leading to the referring court's decision, that term must be interpreted broadly in order to prevent many procedural questions from being regarded as inadmissible and from being unable to be the subject of interpretation by the Court and the latter from being unable to interpret all procedural provisions of EU law that the referring court is required to apply (see, to that effect, judgments of 11 June 2015, *Fahnenbrock and Others*, C-226/13, C-245/13, C-247/13 and C-578/13, EU:C:2015:383, paragraph 30, and of 16 June 2016, *Pebros Servizi*, C-511/14, EU:C:2016:448, paragraph 28).

26 It follows from the foregoing that, where a court or tribunal against whose decisions there is no judicial remedy, within the meaning of Article 267 TFEU, raises questions concerning the interpretation of EU law in the context of an appeal in cassation in the interest of the law, it is required to refer a question to the Court for a preliminary ruling notwithstanding the fact that the *inter partes* situation will not be altered following the Court's decision on the request for a preliminary ruling.

27 Consequently, the request for a preliminary ruling is admissible.

Consideration of the question referred

28 By its question, the referring court asks, in essence, whether Article 90(1) of Regulation No 6/2002 must be interpreted as meaning that the courts or tribunals of the Member States with jurisdiction to order provisional or protective measures in respect of a national design also have jurisdiction to order such measures in respect of a Community design or whether the Member States are free, either wholly or in part, to confer jurisdiction in that respect exclusively on the courts designated as Community design courts.

29 Article 90(1) of Regulation No 6/2002 provides that application may be made to the courts of a Member State, including Community design courts, for such provisional measures, including protective measures, in respect of a Community design as may be available under the law of that State in respect of national design rights even if, under that regulation, a Community design court of another Member State has jurisdiction as to the substance of the matter.

30 The referring court's question relates in particular to the first part of that provision, namely the determination of the courts and tribunals with jurisdiction within each Member State to order provisional measures, including protective measures, in respect of a Community design.

31 It must be recalled that, in interpreting a provision of EU law, it is necessary to consider not only its wording but also the context in which it occurs and the objectives pursued by the rules of which it is part (judgment of 22 June 2016, *Thomas Philipps*, C-419/15, EU:C:2016:468, paragraph 18 and the case-law cited).

32 It follows from the wording of Article 90(1) of Regulation No 6/2002 that a litigant may apply for provisional measures, including protective measures, in respect of a Community design not only to the Community design courts of the Member State, but also to any court or tribunal in that State with jurisdiction to adopt such measures in respect of national designs. In that regard, as the Advocate General noted in point 41 of his Opinion, the use of the word 'including' confirms that that court does not necessarily have to be a specialised court.

33 That finding is not affected by the use of the word 'may' in Article 90(1) of Regulation No 6/2002. The use of that word cannot be regarded as meaning that that provision gives Member States a discretionary power as to the attribution of jurisdiction concerning provisional measures, including protective measures, in respect of a Community design. As the Advocate General observes in point 66 of his Opinion, the word 'may' thus refers only to litigants who wish to bring an action before a court for a provisional or protective measure relating to one of the actions listed in Article 81 of Regulation No 6/2002.

34 Moreover, whilst the Netherlands Government maintains that that provision does not govern the domestic jurisdiction of courts within a Member State, but specifies the rules of international jurisdiction with regard to provisional measures, including protective measures, it follows from a comprehensive reading of that provision that only its second part, which is not, in itself, the subject of the question raised by the referring court, may be given such a scope, which does not affect the question of the determination of the courts with jurisdiction, within each Member State, to order provisional measures, including protective measures, in respect of a Community design.

35 Moreover, contrary to what that Government claims, the finding in paragraph 32 above is confirmed by the legislative scheme of Article 90(1) of Regulation No 6/2002.

36 In that regard, it should be noted that that provision forms part of Title IX of that regulation, entitled 'Jurisdiction and procedure in legal actions relating to Community designs'. More specifically, it appears in Section 2 of that title, headed 'Disputes concerning the infringement and validity of Community designs', which includes Articles 80 to 92 of that regulation.

37 It follows from the general scheme of Regulation No 6/2002 that the provisions included in that Section 2 contain specific rules on jurisdiction in actions for infringement or for invalidity of Community designs. Those specific rules are also distinct from the rules on jurisdiction in disputes relating to Community designs other than infringement and invalidity actions, set out in Section 3 of Title IX of that regulation.

38 Therefore, contrary to what is submitted by the Netherlands Government, the provisional measures, including protective measures, in respect of a Community design, referred to in Article 90(1) of Regulation No 6/2002, first, relate to infringement or invalidity actions, set out in Article 81 of that regulation, and, secondly, may be ordered by the courts of a Member State which have jurisdiction to adopt such measures in respect of national designs.

39 In that regard, the scope of Article 90(1) of Regulation No 6/2002 cannot differ from that of the other provisions of Section 2 of Title IX of that regulation, since, as the Advocate General notes in point 50 of his Opinion, Article 90(1), like Articles 82 to 89 of that regulation, relates to the actions mentioned in Article 81 of that regulation.

40 Furthermore, such an interpretation of Article 90(1) meets the objectives of Regulation No 6/2002. It is true that the EU legislature intended, through the establishment of Community design courts in each Member State, to establish specialisation of the courts with jurisdiction in Community design matters in order, as stated in recital 28 of that regulation, to assist the development of uniform interpretation of the requirements governing the validity of those designs.

41 However, whilst the pursuit of that objective of uniform interpretation is entirely justified in the case of court proceedings the substance of which concerns infringement or invalidity actions, the EU legislature also pointed out, in recital 29 of Regulation No 6/2002, that the exercise of the rights conferred by a design must be enforced in an efficient manner throughout the territory of the European Union. The EU legislature was therefore able to ensure that, in the case of requests for provisional measures, including protective measures, concerning infringement or invalidity, the requirements of proximity and efficiency should prevail over the objective of specialisation.

42 The conferral of jurisdiction to adopt such measures on any court of a Member State having jurisdiction to adopt measures of the same kind in respect of national designs is thus likely to bring about a rapid and effective cessation of acts which infringe the rights of Community design holders.

43 Moreover, the effect of such provisional measures, including protective measures, is, by its nature, limited in time and their grant by the court having jurisdiction in the matter cannot prejudge the outcome of the action for infringement or invalidity brought on the substance, which falls within the exclusive jurisdiction of the Community design courts.

44 It follows from all of the foregoing that Article 90(1) of Regulation No 6/2002 must be interpreted as meaning that the courts and tribunals of the Member States with jurisdiction to order provisional measures, including protective measures, in respect of a national design also have jurisdiction to order such measures in respect of a Community design.

Costs

45 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the referring court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

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

Article 90(1) of Council Regulation (EC) No 6/2002 of 12 December 2001 on Community designs must be interpreted as meaning that the courts and tribunals of the Member States with jurisdiction to order provisional measures, including protective measures, in respect of a national design also have jurisdiction to order such measures in respect of a Community design.

[Signatures]