Reports of Cases

JUDGMENT OF THE COURT (Third Chamber)

13 February 2014*

(Reference for a preliminary ruling — Intellectual property — Community designs — Regulation (EC) No 6/2002 — Articles 7(1), 11(2), 19(2), 88 and 89(1)(a) and (d) — Unregistered Community design — Protection — Making available to the public — Novelty — Action for infringement — Burden of proof — Extinction of rights over time — Time-barring — Applicable law)

In Case C-479/12,

REQUEST for a preliminary ruling under Article 267 TFEU from the Bundesgerichtshof (Germany), made by decision of 16 August 2012, received at the Court on 25 October 2012, in the proceedings

H. Gautzsch Großhandel GmbH & Co. KG

v

Münchener Boulevard Möbel Joseph Duna GmbH,

THE COURT (Third Chamber),

composed of M. Ilešič, President of the Chamber, C.G. Fernlund, A. Ó Caoimh, C. Toader and E. Jarašiūnas (Rapporteur), Judges,

Advocate General: M. Wathelet,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

— Münchener Boulevard Möbel Joseph Duna GmbH, by A. Rinkler, Rechtsanwalt,

— the European Commission, by G. Braun and F. Bulst, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 5 September 2013,

gives the following

* Language of the case: German.

Judgment

1 This request for a preliminary ruling concerns the interpretation of Articles 7(1), 11(2), 19(2) and 89(1)(a) and (d) of Council Regulation (EC) No 6/2002 of 12 December 2001 on Community designs (OJ 2002 L 3, p. 1).

2 The request has been made in proceedings between H. Gautzsch Großhandel GmbH & Co. KG ('Gautzsch Großhandel') and Münchener Boulevard Möbel Joseph Duna GmbH ('MBM Joseph Duna') concerning an action for infringement of an unregistered Community design, brought by MBM Joseph Duna against Gautzsch Großhandel.

Legal context

3 Recital 1 in the preamble to Regulation No 6/2002 states:

'A unified system for obtaining a Community design to which uniform protection is given with uniform effect throughout the entire territory of the Community would further the objectives of the Community as laid down in the Treaty.'

4 Recitals 21 and 22 of that regulation state:

'(21) The exclusive nature of the right conferred by the registered Community design is consistent with its greater legal certainty. It is appropriate that the unregistered Community design should, however, constitute a right only to prevent copying. Protection could not therefore extend to design products which are the result of a design arrived at independently by a second designer. This right should also extend to trade in products embodying infringing designs.

(22) The enforcement of these rights is to be left to national laws. It is necessary therefore to provide for some basic uniform sanctions in all Member States. These should make it possible, irrespective of the jurisdiction under which enforcement is sought, to stop the infringing acts.'

5 Recital 31 of that regulation is worded as follows:

'This Regulation does not preclude the application to designs protected by Community designs of the industrial property laws or other relevant laws of the Member States, such as those relating to design protection acquired by registration or those relating to unregistered designs, trade marks, patents and utility models, unfair competition or civil liability.'

6 Pursuant to Article 1(1) and (2)(a) of Regulation No 6/2002, a design which complies with the conditions contained in that regulation is to be protected by an 'unregistered Community design', if made available to the public in the manner provided for in that regulation.

7 Paragraph 1 of Article 4 of Regulation No 6/2002, entitled 'Requirements for protection', provides that a design is to be protected by a Community design to the extent that it is new and has individual character.

8 Paragraph 1 of Article 5 of that regulation, entitled 'Novelty', states:

'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;

…’

9 Paragraph 1 of Article 6 of Regulation No 6/2002, entitled ‘Individual character’, provides:

‘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;

…’

10 Paragraph 1 of Article 7 of that regulation, entitled ‘Disclosure’, provides:

‘For the purpose of applying Articles 5 and 6, a design shall be deemed to have been made available to the public if it has been published following registration or otherwise, or exhibited, used in trade or otherwise disclosed, before the date referred to in Articles 5(1)(a) and 6(1)(a) or in Articles 5(1)(b) and 6(1)(b), as the case may be, except where these events could not reasonably have become known in the normal course of business to the circles specialised in the sector concerned, operating within the Community. The design shall not, however, be deemed to have been made available to the public for the sole reason that it has been disclosed to a third person under explicit or implicit conditions of confidentiality.’

11 Article 11 of Regulation No 6/2002, entitled ‘Commencement and term of protection of the unregistered Community design’, provides:

‘1. A design which meets the requirements under Section 1 shall be protected by an unregistered Community design for a period of three years as from the date on which the design was first made available to the public within the Community.

2. For the purpose of paragraph 1, a design shall be deemed to have been made available to the public within the Community if it has been published, exhibited, used in trade or otherwise disclosed in such a way that, in the normal course of business, these events could reasonably have become known to the circles specialised in the sector concerned, operating within the Community. The design shall not, however, be deemed to have been made available to the public for the sole reason that it has been disclosed to a third person under explicit or implicit conditions of confidentiality.’

12 Paragraphs 1 and 2 of Article 19 of Regulation No 6/2002, entitled ‘Rights conferred by the Community design’, state:

‘1. A registered Community design shall confer on its holder the exclusive right to use it and to prevent any third party not having his consent from using it. The aforementioned use shall cover, in particular, the making, offering, putting on the market, importing, exporting or using of a product in which the design is incorporated or to which it is applied, or stocking such a product for those purposes.

2. An unregistered Community design shall, however, confer on its holder the right to prevent the acts referred to in paragraph 1 only if the contested use results from copying the protected design.

The contested use shall not be deemed to result from copying the protected design if it results from an independent work of creation by a designer who may be reasonably thought not to be familiar with the design made available to the public by the holder.’

13 Article 88 of that regulation, entitled ‘Applicable law’, provides:

‘1. The Community design courts shall apply the provisions of this Regulation.

2. On all matters not covered by this Regulation, a Community design court shall apply its national law, including its private international law.

3. Unless otherwise provided in this Regulation, a Community design court shall apply the rules of procedure governing the same type of action relating to a national design right in the Member State where it is situated.’

14 Paragraph 1 of Article 89 of Regulation No 6/2002, entitled ‘Sanctions in actions for infringement’, provides:

‘Where in an action for infringement or for threatened infringement a Community design court finds that the defendant has infringed or threatened to infringe a Community design, it shall, unless there are special reasons for not doing so, order the following measures:

(a) an order prohibiting the defendant from proceeding with the acts which have infringed or would infringe the Community design;

(b) an order to seize the infringing products;

(c) an order to seize materials and implements predominantly used in order to manufacture the infringing goods, if their owner knew the effect for which such use was intended or if such effect would have been obvious in the circumstances;

(d) any order imposing other sanctions appropriate under the circumstances which are provided by the law of the Member State in which the acts of infringement or threatened infringement are committed, including its private international law.’

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

15 It can be seen from the order for reference that the parties to the main proceedings trade in garden furniture. MBM Joseph Duna’s product range includes a canopied gazebo, marketed in Germany, the design for which was created by the manager of MBM Joseph Duna in the autumn of 2004. For its part, Gautzsch Großhandel began marketing a gazebo called ‘Athen’ (‘the “Athen” gazebo’) manufactured by Zhengte, an undertaking established in China, in 2006.

16 MBM Joseph Duna brought an action for infringement against Gautzsch Großhandel before the Landgericht Düsseldorf (Regional Court, Düsseldorf) (Germany), claiming the protection afforded to unregistered Community designs for its design and seeking the following orders against that company: that it cease to use that gazebo; that it surrender, for purposes of destruction, the infringing products currently in its possession or ownership; that it disclose information relating to its activities; and that it be required to pay compensation for the damage resulting from those activities.

17 In support of its action, MBM Joseph Duna claimed, inter alia, that the ‘Athen’ gazebo was a copy of its own design, which, in April and May 2005, appeared in its ‘MBM-Neuheitenblätter’ (new products leaflets), which had been distributed to the sector’s largest furniture and garden furniture retailers and to German furniture-purchasing associations.

18 Gautzsch Großhandel opposed the action, contending that the 'Athen' gazebo had been independently created by Zhengte, which was unaware of MBM Joseph Duna's design, at the beginning of 2005. It stated that its gazebo had been presented to European customers in March 2005 in Zhengte's showrooms in China and that a model had been sent to Kosmos, a company established in Belgium, in June 2005. In its defence, Gautzsch Großhandel contended that MBM Joseph Duna's rights had been extinguished over time ('extinction of rights over time') and that the right to bring an action was time-barred ('time-barring'), maintaining that MBM Joseph Duna had been aware of the 'Athen' gazebo's existence since September 2005 and that it had known that it was being marketed since August 2006.

19 The Landgericht Düsseldorf found that, in view of the expiry of the three-year protection period for unregistered Community designs, there was no need to give a ruling on the first two heads of claim, asking for Gautzsch Großhandel to cease its use of the 'Athen' gazebo and to surrender the infringing products. Ruling on the other heads of claim, it ordered Gautzsch Großhandel to disclose information relating to its activities and found that it was obliged to pay financial compensation for the damage resulting from those activities.

20 The appeal brought by Gautzsch Großhandel against that judgment was dismissed by the appeal court, which held that the first two heads of claim were, in the light of Articles 19(2) and 89(1)(a) and (d) of Regulation No 6/2002 and the German legislation on the legal protection of designs, well founded originally and that MBM Joseph Duna was indeed entitled to obtain both the information sought and compensation for the damage it had suffered.

21 In the context of the appeal on a point of law brought by Gautzsch Großhandel before the Bundesgerichtshof (Federal Court of Justice) ('the referring court'), that court seeks to ascertain, in view of the facts before it, the scope of the concept of 'disclosure' which appears in, inter alia, Articles 7(1) and 11(2) of Regulation No 6/2002 for the purposes of determining whether the unregistered design for which protection is claimed was made available to the public for the purpose of that regulation and whether the design on which the opposition is based was made available to the public at an earlier date.

22 In addition, the referring court is uncertain whether proof of infringement of the unregistered design and the defences of the extinction of rights over time and that the action was time-barred that may be raised against the action for infringement are governed by EU law or whether they are a matter for national law. It is also uncertain whether the law applicable to claims for destruction of infringing products, disclosure of information relating to the activities of the infringing party and compensation for the damage resulting from those activities is its own national law or the law of the Member State in which the acts of infringement were committed.

23 In those circumstances, the Bundesgerichtshof decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

'1. Is Article 11(2) of Regulation … No 6/2002 to be interpreted as meaning that, in the normal course of business, a design could reasonably have become known to the circles specialised in the sector concerned, operating within the European Union, if images of the design were distributed to traders?

2. Is the first sentence of Article 7(1) of Regulation … No 6/2002 to be interpreted as meaning that a design could not reasonably have become known in the normal course of business to the circles specialised in the sector concerned, operating within the European Union, even though it was disclosed to third parties without any explicit or implicit conditions of confidentiality, if:

(a) it is made available to only one undertaking in the specialised circles,

or

(b) it is exhibited in a showroom of an undertaking in China which lies outside the scope of normal market analysis?

3(a) Is Article 19(2) of Regulation … No 6/2002 to be interpreted as meaning that the holder of an unregistered Community design bears the burden of proving that the contested use results from copying the protected design?

3(b) If Question 3(a) is answered in the affirmative:

Is the burden of proof reversed or is the burden of proof incumbent on the holder of the unregistered Community design lightened if there are material similarities between the design and the contested use?

4(a) Is the right to obtain an injunction prohibiting further infringement of an unregistered Community design, provided for in Article 19(2) and Article 89(1)(a) of Regulation … No 6/2002, extinguished over time?

4(b) If Question 4(a) is answered in the affirmative:

Is such extinction governed by European Union law and, if so, by what provision?

5(a) Is the right to bring an action seeking an injunction prohibiting further infringement of an unregistered Community design, provided for in Article 19(2) and Article 89(1)(a) of Regulation … No 6/2002, subject to time-barring?

5(b) If Question 5(a) is answered in the affirmative:

Is such time-barring governed by European Union law and, if so, by what provision?

6. Is Article 89(1)(d) of Regulation … No 6/2002 to be interpreted as meaning that claims for destruction, disclosure of information and damages by reason of infringement of an unregistered Community design which are pursued in relation to the entirety of the European Union are subject to the law of the Member States in which the acts of infringement are committed?'

Consideration of the questions referred

Question 1

24 According to the referring court, the appeal court held that the MBM Joseph Duna gazebo design at issue in the main proceedings had been made available to the public for the first time when, in April and May 2005, MBM Joseph Duna distributed between 300 and 500 copies of the 'MBM-Neuheitenblätter' containing images of that design to retailers and wholesalers and to two German furniture-purchasing associations.

25 In the light of those events, the referring court is uncertain whether the distribution of images of that design to traders is sufficient grounds for considering that, in the normal course of business, that design could reasonably have become known to the circles specialised in the sector concerned, operating within the European Union, for the purpose of Article 11(2) of Regulation No 6/2002. In that regard, the referring court states that it is assumed by some that those specialised circles include only such persons as are involved in creating designs and developing or manufacturing products based on

those designs within the sector concerned. Thus, on that view, it is not traders as a body that are regarded as forming part of the circles specialised, but only those which have a creative influence on the design of the product they are marketing.

26 However, no such interpretation of the concept of 'the circles specialised' can be inferred from the wording of Article 11(2) of Regulation No 6/2002.

27 As pointed out by the Commission in its observations submitted to the Court and by the Advocate General in point 34 et seq. of his Opinion, Article 11(2) of that regulation lays down no restrictions relating to the nature of the activity of natural or legal persons who may be considered to form part of the circles specialised in the sector concerned. Moreover, it can be inferred from the wording of that provision, especially from the fact that it considers use in trade to be one means of making unregistered designs available to the public and the fact that it requires 'the normal course of business' to be taken into account when assessing whether events constituting disclosure could reasonably have become known to the circles specialised, that traders which have not been involved in the design of the product in question cannot, in principle, be excluded from the group of persons who may be considered to form part of those circles.

28 An exclusion of that nature would, moreover, create a restriction of the protection of unregistered Community designs which is not supported by any of the other provisions or recitals of Regulation No 6/2002.

29 The question whether the distribution of an unregistered design to traders in the sector concerned operating within the European Union is sufficient grounds for considering that that design could reasonably have become known in the normal course of business to the circles specialised in that sector is, however, a question of fact; the answer to that question is dependent on the assessment, by the Community design court, of the particular circumstances of each individual case.

30 Consequently, the answer to the first question is that, on a proper construction of Article 11(2) of Regulation No 6/2002, it is possible that an unregistered design may reasonably have become known in the normal course of business to the circles specialised in the sector concerned, operating within the European Union, if images of the design were distributed to traders operating in that sector, which it is for the Community design court to assess, having regard to the circumstances of the case before it.

Question 2

31 According to the referring court, the appeal court acknowledged that the MBM Joseph Duna design at issue in the main proceedings was new within the meaning of Article 5(1)(a) of Regulation No 6/2002, holding that, in the normal course of business, the 'Athen' design presented in Zhengte's showrooms in China and sent to Kosmos in Belgium in 2005 could not reasonably have become known to the circles specialised in the sector concerned.

32 In the light of the foregoing, the referring court is uncertain whether the first sentence of Article 7(1) of Regulation No 6/2002 is to be interpreted as meaning that a design could not reasonably have become known in the normal course of business to the circles specialised in the sector concerned, operating within the European Union, even though it was disclosed to third parties without any explicit or implicit conditions of confidentiality, if it has been made available to only one undertaking in that sector or has been presented only in the showrooms of an undertaking which lies outside 'the scope of normal market analysis'.

33 In that regard, it should be pointed out that it can be seen from the wording of the first sentence of Article 7(1) of Regulation No 6/2002 that it is not absolutely necessary, for the purpose of applying Articles 5 and 6 of that regulation, for the events constituting disclosure to have taken place within the European Union in order for a design to be deemed to have been made available to the public.

34 However, according to Article 7, a design cannot be deemed to have been made available to the public if the events constituting its disclosure could not reasonably have become known in the normal course of business to the circles specialised in the sector concerned, operating within the European Union. The question whether events taking place outside the European Union could reasonably have become known to persons forming part of those circles is a question of fact; the answer to that question is dependent on the assessment, by the Community design court, of the particular circumstances of each individual case.

35 The same is true of the question whether the fact that a design has been disclosed to a single undertaking in the sector concerned within the European Union is sufficient grounds for considering that the design could reasonably have become known in the normal course of business to the circles specialised in that sector: it is quite possible that, in certain circumstances, a disclosure of that kind may indeed be sufficient for that purpose.

36 In the light of the foregoing, the answer to the second question is that, on a proper construction of the first sentence of Article 7(1) of Regulation No 6/2002, it is possible that an unregistered design may not reasonably have become known in the normal course of business to the circles specialised in the sector concerned, operating within the European Union, even though it was disclosed to third parties without any explicit or implicit conditions of confidentiality, if it has been made available to only one undertaking in that sector or has been presented only in the showrooms of an undertaking outside the European Union, which it is for the Community design court to assess, having regard to the circumstances of the case before it.

Question 3

37 According to the referring court, the appeal court ruled that Gautzsch Großhandel's design was not an independent work of creation, but rather a copy of MBM Joseph Duna's design, finding that the burden of proof incumbent on MBM Joseph Duna was lightened in that regard, given the 'actual material similarities' between those two designs.

38 In the light of those elements, the referring court is uncertain whether Article 19(2) of Regulation No 6/2002 is to be interpreted as meaning that the holder of an unregistered Community design bears the burden of proving that the contested use results from copying that design and, if so, whether the burden of proof is reversed or lightened if there are 'material similarities' between that design and another design, the use of which is contested.

39 In that regard, Article 19 of Regulation No 6/2002, which, as its title indicates, concerns the rights conferred by the Community design, provides no express rules on producing evidence.

40 However, as the Advocate General notes in points 67 to 74 of his Opinion, making reference to trade mark law, if the issue of the onus of proving that the contested use results from copying the protected design were a matter for the national law of the Member States, the consequence for holders of Community designs could be that protection would vary according to the legal system concerned, with the result that the objective of providing uniform protection with uniform effect throughout the entire territory of the European Union, as set out in recital 1 of Regulation No 6/2002 in particular, would not be attained (see, by analogy, Case C-405/03 *Class International* [2005] ECR I-8735, paragraph 73).

41 In view of that objective and in view of the structure and broad logic of Article 19(2) of Regulation No 6/2002, it should be held that, where the holder of a protected design is relying on the right set out in the first subparagraph of that provision, the onus of proving that the contested use results from copying that design rests with that holder, whereas, in the second subparagraph of that provision, the onus of proving that the contested use results from an independent work of creation rests with the opposing party.

42 As Regulation No 6/2002 does not provide any express rules on producing evidence, it follows from Article 88 of that regulation that such rules are to be determined according to the national law of the Member States. However, according to case-law, the Member States must, in accordance with the principles of equivalence and effectiveness, ensure that such rules are not less favourable than those applicable to similar domestic actions and that they do not make it in practice impossible or excessively difficult for individuals to exercise rights conferred by EU law (see, to that effect, Case C-55/06 *Arcor* [2008] ECR I-2931, paragraph 191).

43 Therefore, as the Commission points out, if the Community design court finds that the fact of requiring the holder of the protected design to prove that the contested use results from copying that design is likely to make it impossible or excessively difficult for such evidence to be produced, that court is required, in order to ensure observance of the principle of effectiveness, to use all procedures available to it under national law to counter that difficulty (see, by analogy, Case C-526/04 *Laboratoires Boiron* [2006] ECR I-7529, paragraph 55, and Case C-264/08 *Direct Parcel Distribution Belgium* [2010] ECR I-731, paragraph 35). Thus, that court may, where appropriate, apply rules of national law which provide for the burden of proof to be adjusted or lightened.

44 Consequently, the answer to the third question is that, on a proper construction of the first subparagraph of Article 19(2) of Regulation No 6/2002, the holder of the protected design must bear the burden of proving that the contested use results from copying that design. However, if a Community design court finds that the fact of requiring that holder to prove that the contested use results from copying that design is likely to make it impossible or excessively difficult for such evidence to be produced, that court is required, in order to ensure observance of the principle of effectiveness, to use all procedures available to it under national law to counter that difficulty, including, where appropriate, rules of national law which provide for the burden of proof to be adjusted or lightened.

Questions 4 and 5

45 First, the referring court explains that the appeal court found that, at the time when the action was brought, the right to obtain an injunction prohibiting further infringing acts on the basis of Articles 19(2) and 89(1)(a) of Regulation No 6/2002 had not been extinguished. The referring court is uncertain, with regard to that finding, whether the right to obtain such an injunction is limited in time and, if so, whether that limitation falls within the scope of EU law. The referring court observes, in that regard, that Regulation No 6/2002 contains no provisions that deal specifically with that subject, but that Article 89(1) thereof states that, where a Community design court finds that the defendant has infringed or threatened to infringe a Community design, it is to order a sanction ‘unless there are special reasons for not doing so’.

46 Secondly, noting that the appeal court rejected Gautzsch Großhandel’s objection that the action was time-barred, the referring court is also uncertain whether – and, if so, in what circumstances – the right to bring an action for infringement based on Articles 19(2) and 89(1)(a) of Regulation No 6/2002 may be time-barred. According to the referring court, it is important to determine whether the circumstances leading Gautzsch Großhandel to plead that the action is time-barred can be regarded as being among the ‘special reasons’ referred to in the latter provision.

47 In that regard, it must be stated that Regulation No 6/2002 is silent on the subject of the extinction of rights over time and of an action being time-barred, both of which are defences that may be raised against an action brought on the basis of Articles 19(2) and 89(1)(a) thereof.

48 The term 'special reasons', as used in Article 89(1) of that regulation, relates to factual circumstances specific to a given case (see, by analogy, Case C-316/05 *Nokia* [2006] ECR I-12083, paragraph 38). Consequently, it does not cover the extinction of rights over time or an action being time-barred, both of which constitute legal circumstances.

49 Accordingly, pursuant to Article 88(2) of Regulation No 6/2002, the defences of the extinction of rights over time and of an action being time-barred that may be raised against an action brought on the basis of Articles 19(2) and 89(1)(a) of that regulation are governed by national law, which must be applied in a manner that observes the principles of equivalence and effectiveness, the substance of which is set out in paragraph 42 above (see also, by analogy, Joined Cases C-295/04 to C-298/04 *Manfredi and Others* [2006] ECR I-6619, paragraphs 77 to 80; Case C-406/08 *Uniplex (UK)* [2010] ECR I-817, paragraphs 32 and 40; Case C-246/09 *Bulicke* [2010] ECR I-7003, paragraph 25; Case C-177/10 *Rosado Santana* [2011] ECR I-7907, paragraphs 89, 90, 92 and 93; and Case C-591/10 *Littlewoods Retail and Others* [2012] ECR, paragraph 27).

50 Consequently, the answer to the fourth and fifth questions is that the defences of the extinction of rights over time and of an action being time-barred that may be raised against an action brought on the basis of Articles 19(2) and 89(1)(a) of Regulation No 6/2002 are governed by national law, which must be applied in a manner that observes the principles of equivalence and effectiveness.

Question 6

51 Stating that the appeal court did not indicate what law was applicable to the claims for destruction of the infringing products, for disclosure of information relating to Gautzsch Großhandel's activities and for compensation for the damage resulting from those activities, the referring court is uncertain whether those claims obey the national law of the Member State in which those rights are invoked or whether Article 89(1)(d) of Regulation No 6/2002 should be interpreted to the effect that those claims are governed by the law of the Member States in which the acts of infringement were committed. The referring court notes, in that regard, that establishing a link to the law of a single Member State could be justified as being the most effective application of that law, but that Article 89(1)(d) of Regulation No 6/2002 could militate against that approach.

52 First, regarding the claim for destruction of the infringing products, it is clear from Article 89(1) of Regulation No 6/2002, which refers, in subparagraph (a) thereof, to an order prohibiting the defendant from proceeding with the acts which have infringed or would infringe the Community design and, in subparagraphs (b) and (c), to an order to seize the infringing products and to an order to seize materials and implements used in order to manufacture those products, that the destruction of those products falls within the 'other sanctions appropriate under the circumstances' referred to in Article 89(1)(d) of that regulation. It follows that, under Article 89(1)(d) of Regulation No 6/2002, the law applicable to that claim is the law of the Member State in which the acts of infringement or threatened infringement have been committed, including its private international law.

53 Secondly, regarding the claims for compensation for the damage resulting from the activities of the person responsible for the acts of infringement or threatened infringement and for disclosure, in order to determine the extent of that damage, of information relating to those activities, it must be found that the obligation to provide such information and to pay compensation for the damage suffered does not, by contrast, constitute a sanction within the meaning of Article 89 of Regulation No 6/2002.

54 Accordingly, pursuant to Article 88(2) of Regulation No 6/2002, the law applicable to the claims listed in paragraph 53 above is the national law of the Community design court hearing the proceedings, including its private international law. That finding is borne out, moreover, by recital 31 of that regulation, which states that the regulation does not preclude the application to designs protected by Community designs of the laws of the Member States relating to civil liability.

55 In the light of the foregoing, the answer to the sixth question is that, on a proper construction of Article 89(1)(d) of Regulation No 6/2002, claims for the destruction of infringing products are governed by the law of the Member State in which the acts of infringement or threatened infringement have been committed, including its private international law. Claims for compensation for damage resulting from the activities of the person responsible for the acts of infringement or threatened infringement and for disclosure, in order to determine the extent of that damage, of information relating to those activities, are governed, pursuant to Article 88(2) of that regulation, by the national law of the Community design court hearing the proceedings, including its private international law.

Costs

56 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national 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 (Third Chamber) hereby rules:

1. **On a proper construction of Article 11(2) of Council Regulation (EC) No 6/2002 of 12 December 2001 on Community designs, it is possible that an unregistered design may reasonably have become known in the normal course of business to the circles specialised in the sector concerned, operating within the European Union, if images of the design were distributed to traders operating in that sector, which it is for the Community design court to assess, having regard to the circumstances of the case before it.**

2. **On a proper construction of the first sentence of Article 7(1) of Regulation No 6/2002, it is possible that an unregistered design may not reasonably have become known in the normal course of business to the circles specialised in the sector concerned, operating within the European Union, even though it was disclosed to third parties without any explicit or implicit conditions of confidentiality, if it has been made available to only one undertaking in that sector or has been presented only in the showrooms of an undertaking outside the European Union, which it is for the Community design court to assess, having regard to the circumstances of the case before it.**

3. **On a proper construction of the first subparagraph of Article 19(2) of Regulation No 6/2002, the holder of the protected design must bear the burden of proving that the contested use results from copying that design. However, if a Community design court finds that the fact of requiring that holder to prove that the contested use results from copying that design is likely to make it impossible or excessively difficult for such evidence to be produced, that court is required, in order to ensure observance of the principle of effectiveness, to use all procedures available to it under national law to counter that difficulty, including, where appropriate, rules of national law which provide for the burden of proof to be adjusted or lightened.**

4. **The defences of the extinction of rights over time and of an action being time-barred that may be raised against an action brought on the basis of Articles 19(2) and 89(1)(a) of Regulation No 6/2002 are governed by national law, which must be applied in a manner that observes the principles of equivalence and effectiveness.**

5. **On a proper construction of Article 89(1)(d) of Regulation No 6/2002, claims for the destruction of infringing products are governed by the law of the Member State in which the acts of infringement or threatened infringement have been committed, including its private international law. Claims for compensation for damage resulting from the activities of the person responsible for the acts of infringement or threatened infringement and for disclosure, in order to determine the extent of that damage, of information relating to those activities, are governed, pursuant to Article 88(2) of that regulation, by the national law of the Community design court hearing the proceedings, including its private international law.**

[Signatures]