Reports of Cases

OPINION OF ADVOCATE GENERAL
SZPUNAR
delivered on 6 March 2025 [1]

Case C-211/24

LEGO A/S
v
Pozitív Energiaforrás Kft.

(Request for a preliminary ruling from the Fővárosi Törvényszék (Budapest High Court, Hungary))

(Reference for a preliminary ruling – Intellectual property – Community designs – Regulation (EC) No 6/2002 – Article 8(3) – Design allowing the multiple assembly or connection of mutually interchangeable products within a modular system – Article 10 – Scope of protection – Concepts of 'informed user' and 'overall impression')

Introduction

1. EU industrial property law makes a clear distinction between the roles played by the various categories of protected rights: patents protect technical inventions, whereas designs protect the appearance of products; trade marks protect the link between goods and services and their manufacturers or suppliers. That distinction is of paramount importance, because it makes it possible to prevent monopolisation, by means of exclusive rights which are relatively easy to obtain and have a very long, or even indefinite, period of validity, of unique solutions essential for technical progress and undistorted economic competition. In order to ensure the effectiveness of that distinction, EU design law provides that the features of appearance of a product which are dictated solely by its technical function, and those which are essential for the interoperability of products of different makes, are not protected.

2. There is an exception to this rule, however, in the case of 'modular systems', whereby designs which are intended to enable connection of components within such a system can be protected. That exception is often called 'the Lego exception', because its main beneficiary is the building bricks system well known to any child of 3 to 103 years of age, marketed under the trade mark LEGO.

3. The Lego building bricks system was developed in the 1950s. The first patent application for it was filed in Denmark in 1958. The technical solution on which that application was based consisted in a brick assembly system combining studs above and tubes below each brick, devised

[1] Original language: French.

and arranged so as to ensure a stable connection and, at the same time, to allow relatively easy disassembly by a child's hands. Protection by the Lego system patents was then extended worldwide and supplemented by new technical solutions. [2]

4. However, the great majority of those patents expired in the 1970s and 1980s and the Lego brick manufacturer faced competition from manufacturers of bricks inspired by – and compatible with – its own system. Thereafter, the majority of the attempts to protect that system by other intellectual property rights, namely trade marks and designs, and even copyright, failed, in particular in view of the functional nature of the purpose of the protection sought. [3]

5. The existence of the 'Lego exception' nonetheless enables the protection of the Lego bricks system and, indirectly, of the technical solution on which it is based, to be maintained by rights to designs. [4] The present case provides the opportunity for the Court to clarify the scope of that protection in the light of the objectives of protection conferred in EU law by various categories of intellectual property rights.

Legal framework

6. Article 3(a), Article 4(1) and Articles 6, 8 and 10 of Council Regulation (EC) No 6/2002 of 12 December 2001 on Community designs [5] provide:

'Article 3

For the purposes of this Regulation:

(a) "design" means the appearance of the whole or a part of a product resulting from the features of, in particular, the lines, contours, colours, shape, texture and/or materials of the product itself and/or its ornamentation;

…

Article 4

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

…

[2] On the history of the protection of the Lego system under intellectual property law, see, in particular, Hunter, D. and Thomas, J., 'Lego and the System of Intellectual Property, 1955-2015', *Intellectual Property Quarterly*, 2016, No 1, pp. 1 to 18.

[3] On EU trade mark law, see judgment of 14 September 2010, *Lego Juris* v *OHIM* (C-48/09 P, EU:C:2010:516).

[4] See, in particular, judgment of 24 March 2021, *Lego* v *EUIPO – Delta Sport Handelskontor (Building block from a toy building set)* (T-515/19, EU:T:2021:155).

[5] OJ 2002 L 3, p. 1.

Article 6

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

…

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

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

…

Article 8

1. A Community design shall not subsist in features of appearance of a product which are solely dictated by its technical function.

2. A Community design shall not subsist in features of appearance of a product which must necessarily be reproduced in their exact form and dimensions in order to permit the product in which the design is incorporated or to which it is applied to be mechanically connected to or placed in, around or against another product so that either product may perform its function.

3. Notwithstanding paragraph 2, a Community design shall under the conditions set out in Articles 5 and 6 subsist in a design serving the purpose of allowing the multiple assembly or connection of mutually interchangeable products within a modular system.

…

Article 10

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

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

The facts, the procedure and the questions referred for a preliminary ruling

7. LEGO A/S, a company established under Danish law, is the holder of the Community design registered under No 0 019 509 810 001, with a priority date of 22 November 2011, the subject of which is a coupling component of a toy building set consisting of a cylinder with studs and two cross-section axles, perpendicular to each other and to the cylinder, which are connected to the cylinder by means of a cylindrical base,[6] and of the Community design registered under

[6] That component appears in the LEGO catalogue under the description 'Technic, Axle and pin connector hub with 2 perpendicular axles'.

No 0 021 371 900 002, with a priority date of 16 November 2012, the subject of which is a coupling component of a toy building set which is a modified variant of the Lego 2x1 studded brick, which has 2x1 studs on one of its sides ('the Community designs at issue in the main proceedings'). [7]

8. Pozitív Energiaforrás Kft., a company established under Hungarian law, sought to import, under the trade mark Qman, toy building sets consisting of plastic elements containing, among other components, one or more of the building blocks allegedly infringing the rights in the Community designs at issue in the main proceedings.

9. The Nemzeti Adó- és Vámhivatal Veszprém Megyei Adó- és Vámigazgatósága (National Tax and Customs Office, Veszprém County Tax and Customs Directorate, Hungary) ordered that the defendant's product be placed under customs supervision and instituted against the defendant administrative penalty proceedings on the ground of its suspicion that there had been an infringement of LEGO's industrial property rights.

10. On 22 June 2022, LEGO submitted to the Fővárosi Törvényszék (Budapest High Court, Hungary), pursuant to Articles 10 and 89 of Regulation No 6/2002, an application for interim measures ordering the seizure of the toy building sets at issue in the main proceedings. That court dismissed that application, holding that the Community designs at issue in the main proceedings were protected under Article 8(3) of that regulation and that, in so far as the form of the connecting components was entirely dictated by their technical function, the creative scope for imagining such a form was very limited. It held, by also taking into account the form and size of the product, that the informed user looked at such a design with a particularly keen eye attentive to the slightest details. Accordingly, it carried out a detailed comparison of the registered representations of the two Community designs at issue in the main proceedings with the photographic reproductions of the Pozitív Energiaforrás products and held that the latter products produced on the informed user an overall impression that differed from that produced by the Community designs at issue in the main proceedings.

11. The Fővárosi Ítélőtábla (Budapest Regional Court of Appeal, Hungary), which was hearing an appeal brought by LEGO, overturned that decision and ordered the seizure of the products at issue in the main proceedings on the ground that the Community designs at issue in the main proceedings and the products of Pozitív Energiaforrás did not produce on the informed user a different overall impression. The Kúria (Supreme Court, Hungary), hearing an appeal on a point of law brought by Pozitív Energiaforrás, upheld that decision.

12. LEGO then brought before the Fővárosi Törvényszék (Budapest High Court), the referring court, an action for infringement requesting, in essence, a declaration of the existence of an infringement, that Pozitív Energiaforrás be prohibited from proceeding with the acts of infringement and enforcement of other legal consequences of those acts.

[7] That component appears in the LEGO catalogue under the description 'Brick, modified 1 x 2 with studs on 1 side'.

13. In those circumstances, the Fővárosi Törvényszék (Budapest High Court) decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

'(1) In a case such as that in the main proceedings, in which the holder relies on a design protected under Article 8(3) of [Regulation No 6/2002] in connection with one or more building blocks from a toy building set made by the defendant which perform the same assembly function as the blocks in the applicant's design, is it compatible with EU law for the courts, when determining the scope of protection, within the meaning of Article 10 of the [re]gulation, of the applicant's design,

– to take as their point of reference an informed user who, in respect of the function of the design and that of the product, possesses the technical knowledge to be expected of a sectoral expert,

– to consider an informed user to be one who compares the applicant's design and the defendant's product by carrying out a thorough, technical and methodical examination, and

– to assume that the informed user's overall impression of the design and of the product is formed primarily of a technical opinion?

(2) In the event that, in a case as described above, it is to be concluded that the protection conferred by the applicant's design extends to one or a small number of pieces of the defendant's toy building sets, the number of which is nonetheless small in relation to the total number of building blocks, is it compatible with EU law for a court to have discretion to dismiss the claim for a prohibition on the continued importation of the toy building set into the country, after taking into consideration the partial nature of the infringement, the limited severity and extent of the infringement in relation to the product as a whole, and the interests associated with the unrestricted trade in a toy building set which is for the most part uncontested, those being classified as "sound reasons" for the purposes of Article 89(1) of the [r]egulation?'

14. The request for a preliminary ruling was received by the Court on 18 March 2024. Written observations were lodged by the parties to the main proceedings, the Hungarian Government and the European Commission. The Court decided to give judgment without holding a hearing.

Analysis

15. In accordance with the Court's wishes, I shall limit this Opinion to an analysis of the first question. The answer to the second question can easily be inferred from the settled case-law. [8]

16. By its first question, the referring court asks, in essence, whether Article 10 of Regulation No 6/2002 must be interpreted as meaning that the scope of protection of a design under Article 8(3) of that regulation is determined by reference to the overall impression produced by a design on an informed user possessing thorough technical knowledge and who is particularly observant with regard to technical aspects and whether that overall impression is mainly the result of technical considerations.

[8] See, in particular, judgment of 22 June 2016, *Nikolajeva* (C-280/15, EU:C:2016:467, paragraph 33 and the case-law cited).

17. In order to give an answer to that question which is relevant for the resolution of the dispute pending before the referring court, first, the concept of 'informed user', within the meaning of Regulation No 6/2002 and, second, the constituent elements of the overall impression which a design falling within Article 8(3) of that regulation produces on such a user, and the factors to be taken into account in assessing the scope of that design under Article 10 of that regulation, must be examined.

The informed user

18. The concept of 'informed user' is a key concept in Regulation No 6/2002, in that the overall impression produced by a design on that informed user determines both the capacity of the design to be protected, by attesting to its individual character, and the scope of that protection against potentially infringing designs. [9] The informed user is a concept which refers to a fictitious person and is the functional equivalent, in design law, of the concept of average consumer in trade mark law and the concept of expert (specialist) in patent law.

19. The characteristics of the informed user were stated by the Court in the judgment in *PepsiCo* v *Grupo Promer Mon Graphic*. [10] Thus, the concept of 'informed user', which is not defined in Regulation No 6/2002, must be understood as 'lying somewhere between that of the average consumer, applicable in trade mark matters, who need not have any specific knowledge and who, as a rule, makes no direct comparison between the trade marks in conflict, and the sectoral expert, who is an expert with detailed technical expertise'. Therefore, that concept refers 'not to a user of average attention, but to a particularly observant one, either because of his personal experience or his extensive knowledge of the sector in question'. [11]

20. The Court clarified that 'the qualifier "informed" suggests that, without being a designer or a technical expert, the user knows the various designs which exist in the sector concerned, possesses a certain degree of knowledge with regard to the features which those designs normally include, and, as a result of his interest in the products concerned, shows a relatively high degree of attention when he uses them'. [12]

21. Although the Court gave that definition of the concept of 'informed user' in proceedings for a declaration of invalidity of a Community design and, therefore, on the basis of Article 6 of Regulation No 6/2002, there is nothing to indicate that, in the case of Article 10 of that regulation, that concept must be interpreted differently. On the contrary, in accordance with the principle of reciprocity, the scope of protection of a design is the reverse of its individual character. [13] Both articles must therefore be assessed on the basis of the overall impression produced on the same fictitious person, namely the informed user, who has the same characteristics, whether it be a case of the validity or infringement of the design. The Court's considerations in the judgment in *PepsiCo* can therefore be fully transposed to the present case.

[9] On the concept of 'informed user' in EU design law, see, in particular, Stone, D., *European Union Design Law: A Practitioners' Guide*, Oxford University Press, 2016, pp. 209 to 229.

[10] Judgment of 20 October 2011 (C-281/10 P, 'the judgment in *PepsiCo*', EU:C:2011:679).

[11] Judgment in *PepsiCo* (paragraph 53).

[12] Judgment in *PepsiCo* (paragraph 59).

[13] That principle is summarised by the expression: 'That which infringes (protection of a design) if later, invalidates, if earlier'. On the principle of reciprocity, see, in particular, Hartwig, H., 'Reciprocity in European design law', in Hartwig, H. (ed.), *Research handbook on design law*, Edward Elgar Publishing, 2021, p. 119.

22. The referring court considers, however, that, in the case of designs falling within Article 8(3) of Regulation No 6/2002, their essential features consist in the technical function of the features of appearance of the product, namely the potential interconnection with other products in a modular system. Accordingly, it must be considered, according to the referring court, that the fictitious informed user has technical knowledge and is particularly observant and, therefore, that the technical aspects have an effect on the overall impression produced on him or her by the design in question.

23. That approach is not, in my view, correct.

24. Although designs falling within Article 8(3) of Regulation No 6/2002 necessarily have a technical function, they are still designs and are protected as such. According to the definition in Article 3(a) of that regulation, a design is 'the appearance of the whole or a part of a product'. Therefore, it is not the technical function of the product which is protected and which contributes to the overall impression produced on the informed user, but only the appearance of the product, that is to say, its visual aspect. [14] The fact that the appearance of the products to which the designs falling within Article 8(3) of that regulation apply or, at least, the appearance of some of the features of that appearance, is dictated by interconnection requirements in no way alters that finding.

25. On the other hand, the informed user, as conceived and assumed by the referring court, is close to the concept of the expert, who is responsible for deciding on the patentability of inventions in patent law. However, such an assessment does not relate to the appearance of a product, but to an abstract idea, namely the solution to a technical problem. Therefore, it cannot be transposed into design law.

26. The characteristics of the informed user stated by the Court in the judgment in *PepsiCo* remain, therefore, entirely valid for designs falling under Article 8(3) of Regulation No 6/2002. That finding appears to be common ground among the parties who have submitted observations in the present case.

The overall impression

27. By the third part of its first question, the referring court asks whether, for the purposes of Article 10 of Regulation No 6/2002, the overall impression produced on the informed user by a design falling under Article 8(3) of that regulation can be the result mainly of technical considerations. The answer to that question needs, in my view, to be qualified, in so far as such considerations are taken into account, but in a different way from that advocated by the referring court.

28. Under Article 10(1) of Regulation No 6/2002, the overall impression produced by a Community design on the informed user defines the scope of protection of that design, in that any design which does not produce a different overall impression on that user infringes the protection conferred by the design right concerned.

[14] See, to that effect, 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 50), and Opinion of Advocate General Mengozzi in *PepsiCo* v *Grupo Promer Mon Graphic* (C-281/10 P, EU:C:2011:302, point 73).

29. The characteristics of the informed user are those referred to in points 19 and 20 of this Opinion. It follows that the overall impression, which must be formed, as far as possible, by a direct comparison between the designs at issue,[15] will be the result, in particular, of that user's keen observation, his extended knowledge of the sector under consideration and of existing designs, and his interest in the products concerned.[16] Therefore, without having to be a technical expert, an informed user will be able to distinguish the elements of designs normally present in products of the sector in question from those which are 'new'. The differences in the innovative elements will have a greater effect on the overall impression produced on such a user than the similarities between common elements.[17]

30. The referring court does not state what it considers to be the typical user of the design product concerned.[18] However, even if the referring court were to consider that the user of Lego building bricks is typically a child,[19] the adjective 'informed' still fully applies, and therefore that user retains all the characteristics stated in points 19 and 20 of this Opinion. Also, as regards designs intended (primarily) for children, it is, in my view, well-known that children have a level of knowledge and observation at least equal to that of adults. The fact that the designs at issue are conceived for products intended for children is not therefore a reason for attributing to the informed user of such products less knowledge of the sector concerned or a lower level of observation.

31. Moreover, recital 14 of Regulation No 6/2002 states that the existence of a difference between the overall impressions produced by two designs must be determined, in particular, 'taking into consideration the nature of the product to which the design is applied'. In the case of designs applied to products forming part of modular systems, it can therefore legitimately be argued that the informed user will take into account not only the appearance of the product at issue, taken separately, but also the appearance that it will have when assembled with other components of the system.

32. However, determining the overall impression produced by a design on the informed user is not an end in itself. It is only an intermediate step in assessing the scope of protection of a Community design against a potentially infringing design.[20] That assessment is made by the court hearing the case which must 'put on the glasses' of the informed user in order to determine whether the designs at issue produce different overall impressions on such a user. In its assessment, the court will have to take into account circumstances of which the informed user may not be fully aware, but whose consideration is required by Regulation No 6/2002.

33. Thus, Article 8(1) and (2) of Regulation No 6/2002 excludes from protection features of the appearance of a product which are solely dictated by its technical function and features of appearance of a product referred to as 'interconnecting'. However, Article 8(3) of that regulation provides for an exception in the case of mutually interchangeable products within a modular system. Although, taken literally, it is an exception only to Article 8(2) and not to Article 8(1), the

15 Judgment in *PepsiCo* (paragraph 55).

16 Judgment in *PepsiCo* (paragraphs 53 and 59).

17 See, to that effect, 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, paragraphs 72 to 82).

18 Besides, the practice consisting in personifying the informed user by giving that user the traits of a real person is often criticised in the legal literature. The personification of the informed user is, in fact, a legal fiction and operates at a higher level of abstraction. See, in particular, Stone, D., *European Union Design Law: A Practitioners' Guide*, op. cit., p. 219.

19 By analogy to what the Court accepted in the judgment in *PepsiCo* (paragraph 54).

20 The scope of protection does not exist *in abstracto*. Under Article 10 of Regulation No 6/2002, it is always assessed in relation to another design.

General Court has held that, in order to preserve the effectiveness of Article 8(3) thereof, that provision must be interpreted as also constituting an exception to paragraph 1 of that article where the design at issue falls within both paragraph 2 and paragraph 1 thereof.[21] Accordingly, the interconnecting features of the appearance of a product forming part of a modular system also benefit from protection where they are solely dictated by the technical function of the product. They therefore contribute to the overall impression produced by a design on the informed user.

34. However, under Article 10(2) of Regulation No 6/2002, in assessing the scope of protection, the degree of freedom of the designer in developing his design must be taken into consideration.

35. It is generally acknowledged that technical constraints are among the factors limiting the designer's freedom.[22] In the case of features of appearance of a product which, according to the definition in Article 8(2) of Regulation No 6/2002, 'must necessarily be reproduced in their exact form and dimensions', it is in my view permissible to consider that the designer has little or no freedom. That is all the more the case where those features are solely dictated by the technical function of the product concerned, namely, in the present case, interconnection.

36. A low degree of designer freedom does not mean that a feature of the appearance of a product should be totally excluded from the overall impression produced by the design concerned on the informed user.[23] However, it will influence the comparison of the overall impressions of the designs at issue according to what the General Court calls the 'rule of inverse proportionality'.[24] Under that rule, the more the designer's freedom in developing the contested design is restricted, the more likely minor differences between the designs at issue will be sufficient to produce a different overall impression on the informed user. That is so because, in so far as similarities between the designs at issue relate to common features, in the development of which the designer's freedom is limited, in particular, by technical constraints, those similarities will have only minor importance in the overall impression produced by those designs on the informed user.[25]

37. In the case of designs applied to products forming parts of a modular system, such as building bricks, the interconnection features or the features dictated by the technical function of the product may represent a high proportion of the features of appearance of those products.[26] Those features remain protected under the exception provided for in Article 8(3) of Regulation No 6/2002. However, since the designer's freedom in developing them is very limited, their effect

[21] See, to that effect, judgment of 24 March 2021, *Lego* v *EUIPO – Delta Sport Handelskontor (Building block from a toy building set)* (T-515/19, EU:T:2021:155, paragraph 80).

[22] Judgments 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 67), and of 6 September 2023, *Cayago Tec* v *EUIPO – iAqua* (*Shenzhen*) *(Personal watercraft, Speedboat)* (T-377/22, EU:T:2023:504, paragraph 46 and the case-law cited). See also Opinion of Advocate General Mengozzi in *PepsiCo* v *Grupo Promer Mon Graphic* (C-281/10 P, EU:C:2011:302, point 31).

[23] Unlike the features falling within Article 8(1) and (2) of Regulation No 6/2002, which do not contribute to that impression at all, unless they are covered by paragraph 3 of that article.

[24] Judgment of 6 September 2023, *Cayago Tec* v *EUIPO – iAqua* (*Shenzhen*) *(Personal watercraft, Speedboat)* (T-377/22, EU:T:2023:504, paragraph 48 and the case-law cited).

[25] 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, paragraphs 67 and 72).

[26] To give an example, in the case giving rise to the judgment of 24 March 2021, *Lego* v *EUIPO – Delta Sport Handelskontor (Building block from a toy building set)* (T-515/19, EU:T:2021:155), the Board of Appeal of EUIPO had identified six features of the appearance of the product in question (a Lego brick other than those at issue in the main proceedings), which were all solely dictated by its technical function The General Court then identified one single additional characteristic which it held was not dictated by the technical function of that product (see paragraphs 102 to 114 of that judgment).

in the comparison of the overall impressions produced on the informed user by the designs at issue will be greatly reduced. Therefore, minor differences in the designs concerned will not result in the finding of an infringement.

38. The question therefore arises whether, in order to fully preserve the effectiveness of Article 8(3) of Regulation No 6/2002, that provision should also be interpreted as an exception to Article 10(2) of that regulation. I consider, however, that that question must be answered in the negative.

39. First, it is true that the General Court held that Article 8(3) of Regulation No 6/2002 which, according to its wording, only derogates from paragraph 2 of that article, must be read as also derogating from paragraph 1 of that article.[27] However, the situation in the present case is different from that of Article 10(2) of that regulation.

40. Both paragraphs 1 and 2 of Article 8 of Regulation No 6/2002 raise the same issue, namely the capacity to be protected by two categories of features of appearance of the products: those dictated solely by the technical function and those providing interconnection. It is therefore reasonable to extend the exception relating to that second category to features which simultaneously fall within the second and first categories. Otherwise, that exception would be applied asymmetrically, since only the features referred to in Article 8(2) of Regulation No 6/2002 which do not simultaneously fall within paragraph 1 of that article would benefit from it, whereas paragraph 3 of that article can be applied to all features falling within paragraph 2 thereof.[28] However, as the interconnection features often tend to be dictated solely by their technical function,[29] they would greatly reduce the effectiveness of Article 8(3) of Regulation No 6/2002.

41. The same does not apply in the case of Article 10(2) of Regulation No 6/2002. That provision concerns a different issue, namely consideration, when assessing the scope of protection, of the degree of freedom of the designer of the design at issue. It applies not just to designs falling within Article 8(3) of that regulation, but to all designs without distinction, and the freedom of the designer can also be limited by factors other than technical constraints. There is therefore no likelihood of any asymmetrical application of that provision. Accordingly, in the absence of any indication to that effect in that regulation, designs falling within Article 8(3) of that regulation cannot be excluded from Article 10(2) thereof.

42. Second, that finding is supported by the very wording of Article 8(3) of Regulation No 6/2002. That provision requires that, in order to be protected, the designs falling within it must fulfil, in particular, the condition laid down in Article 6 of that regulation, namely that they have individual character. That individual character is assessed in relation to any design made available before the date of filing the application for registration of a design (or, where applicable, before the date of priority claimed). However, Article 6(2) of that regulation lays down a rule similar to that laid down in Article 10(2) thereof, under which the degree of freedom of the designer must be taken into consideration in the assessment of individual character.

[27] Judgment of 24 March 2021, *Lego* v *EUIPO – Delta Sport Handelskontor (Building block from a toy building set)* (T-515/19, EU:T:2021:155, paragraph 80).

[28] See, to that effect, judgment of 24 March 2021, *Lego* v *EUIPO – Delta Sport Handelskontor (Building block from a toy building set)* (T-515/19, EU:T:2021:155, paragraphs 77 to 79).

[29] See point 37 of this Opinion.

43. According to the principle of reciprocity,[30] the scope of protection, determined in accordance with Article 10 of Regulation No 6/2002, is the counterpart of the individual character of the design at issue assessed in accordance with Article 6 of that regulation. There can therefore be no designs for which the scope of protection from potentially infringing designs is determined according to rules which are less strict than those under which their individual character is assessed against earlier designs. However, that would be the case if the degree of freedom of the designer were taken into consideration in order to assess individual character, resulting in the lowering of the threshold of difference required for accepting such character, and was not the case in assessing the scope of protection, resulting in an increase in the threshold of difference needed to avoid a finding of infringement.

44. That would lead to an absurd outcome. An earlier design might, in fact, produce on the informed user a different overall impression than that produced by another registered design or one which has been applied for, thereby preventing that registration or the validity of the design from being contested,[31] but might, on the other hand, be regarded as infringing that same registered design. Therefore, the owner of the registered design would be able to remove earlier designs from the market without the owners of those designs being able to contest the validity of that registered design.

45. The principle of reciprocity therefore requires that the degree of freedom of the designer be taken into consideration for all designs, including those falling within Article 8(3) of Regulation No 6/2002, for the purpose of assessing individual character and of assessing the scope of protection.

46. Finally, third, although Article 8(3) of Regulation No 6/2002 enables designs applied to interchangeable products within a modular system to be protected, despite the functional features of appearance of those products, the general objective of that regulation remains that stated in recital 10 thereof, namely not to hinder technological innovation or the interoperability of products of different makes by granting protection to features dictated solely by a technical function or enabling mechanical fittings.

47. That objective would be undermined if the interconnecting features of appearance of the products forming part of a modular system, which are often dominant in that appearance, could be decisive for the overall impression produced on the informed user for the purposes of assessing the scope of protection of designs. In my view, the taking into consideration, in that assessment, of the degree of freedom of the designer enables that objective to be achieved without casting doubt on the effectiveness of the exception provided for in Article 8(3) of Regulation No 6/2002.

Reply to the first question referred

48. Taking account of the information contained in the request for a preliminary ruling, it is specifically the concern to protect the objective referred to in point 46 of this Opinion that led the referring court to raise the question of whether it might be appropriate, in order to determine the scope of protection of designs falling within Article 8(3) of Regulation No 6/2002, to apply specific criteria in view of the specific nature of those designs.

[30] See point 21 of this Opinion.

[31] The validity of the design is assessed, inter alia, in the light of the requirement of individual character; see Article 25(1)(b) of Regulation No 6/2002.

49. I consider, however, as is clear from the foregoing considerations, that, on the contrary, the strict and full application of the provisions of Regulation No 6/2002, as interpreted by the Courts of the European Union, enables that objective to be achieved, while respecting the effectiveness of Article 8(3) of that regulation.

50. I propose, therefore, that the answer to the first question referred for a preliminary ruling should be that Article 10 of Regulation No 6/2002 must be interpreted as meaning that the scope of protection of a design falling within Article 8(3) of that regulation is determined by reference to the overall impression produced by that design on an informed user who, without being a designer or a technical expert, knows the various designs which exist in the sector concerned, possesses a certain degree of knowledge with regard to the features which those designs normally include, and, as a result of his or her interest in the products concerned, shows a relatively high level of attention when he or she uses them as components of the modular system of which they form part. In assessing the scope of protection, the degree of freedom of the designer of the design concerned, including in the development of the features of appearance of the product necessary for interconnection, is taken into consideration.

Conclusion

51. In the light of all of the foregoing considerations, I propose that the Court of Justice should answer the first question for a preliminary ruling referred by the Fővárosi Törvényszék (Budapest High Court, Hungary) as follows:

Article 10 of Council Regulation (EC) No 6/2002 of 12 December 2001 on Community designs

must be interpreted as meaning that: the scope of protection of a design falling within Article 8(3) of that regulation is determined by reference to the overall impression produced by that design on an informed user who, without being a designer or a technical expert, knows the various designs which exist in the sector concerned, possesses a certain degree of knowledge with regard to the features which those designs normally include, and, as a result of his or her interest in the products concerned, shows a relatively high level of attention when he or she uses them as components of the modular system of which they form part. In assessing the scope of protection, the degree of freedom of the designer of the design concerned, including in the development of the features of appearance of the product necessary for interconnection, is taken into consideration.