

JUDGMENT OF THE GENERAL COURT (Tenth Chamber)

29 March 2023 (\*)

(Community design – Invalidity proceedings – Registered Community design representing fluid distribution equipment – Ground for invalidity – Non-compliance with requirements for protection – Article 25(1)(b) of Regulation (EC) No 6/2002 – Features of appearance of a product solely dictated by its technical function – Article 8(1) of Regulation No 6/2002)

In Case T- 505/21,

**Tinnus Enterprises LLC**, established in Plano, Texas (United States), represented by T. Wuttke and J. Lewandowski, lawyers,

applicant,

v

**European Union Intellectual Property Office (EUIPO)**, represented by J. Ivanauskas, acting as Agent,

defendant,

the other party to the proceedings before the Board of Appeal of EUIPO being

**Mystic Products Import & Export, SL**, established in Badalona (Spain),

THE GENERAL COURT (Tenth Chamber),

composed, at the time of the deliberations, of A. Kornezov, President, E. Buttigieg (Rapporteur) and K. Kowalik-Bańczyk, Judges,

Registrar: A. Juhász-Tóth, Administrator,

having regard to the written part of the procedure,

further to the hearing on 8 July 2022,

gives the following

### **Judgment**

1 By its action under Article 263 TFEU, the applicant, Tinnus Enterprises LLC, seeks the annulment and alteration of the decision of the Third Board of Appeal of the European Union Intellectual Property Office (EUIPO) of 9 June 2021 (Case R 1003/2018-3) (‘the contested decision’).

### **Background to the dispute**

2 On 13 June 2016, Mystic Products Import & Export, SL filed with EUIPO an application for a declaration of invalidity of the Community design registered under number 1431829-0010 following a multiple application for registration filed by the applicant on 10 March 2015, and which is represented in the following views:



3 The product to which the design in respect of which a declaration of invalidity was sought is intended to be applied is in Class 23.01 of the Locarno Agreement Establishing an International Classification for Industrial Designs of 8 October 1968, as amended, and corresponds to the following description: ‘Fluid distribution equipment’.

4 The multiple application for registration mentioned in paragraph 2 above included nine other designs which also applied to the product ‘fluid distribution equipment’, and which had also been registered.

5 The grounds relied on in support of the application for a declaration of invalidity were, inter alia, those set out in Article 25(1)(b) of Council Regulation (EC) No 6/2002 of 12 December 2001 on Community designs (OJ 2002 L 3, p. 1), read in conjunction with Article 8(1) of that regulation.

6 The applicant for a declaration of invalidity claimed, inter alia, that all the features of appearance of the product concerned were solely dictated by its technical function and that, consequently, the contested design was not eligible for any protection.

7 On 30 April 2018, the Invalidity Division declared the contested design invalid on the basis of Article 25(1)(b) of Regulation No 6/2002, read in conjunction with Article 8(1) of that regulation.

8 On 31 May 2018, the applicant filed a notice of appeal with EUIPO against the decision of the Invalidity Division.

9 On 7 January 2020, the Third Board of Appeal of EUIPO adopted an interim decision pursuant to which it stayed the appeal proceedings pending the General Court’s final judgment in the action brought by the applicant against the Board of Appeal’s decision in a parallel case (R 1002/2018-3) declaring invalid a design registered under number 1431829-0001 which had been included in the multiple application for registration referred to in paragraph 4 above.

10 By judgment of 18 November 2020, *Tinnus Enterprises v EUIPO – Mystic Products and Koopman International (Fluid distribution equipment)* (T- 574/19, EU:T:2020:543), the General Court dismissed the action referred to in paragraph 9 above.

11 By order of 5 May 2021, *Tinnus Enterprises v EUIPO* (C- 29/21 P, not published, EU:C:2021:357), the Court of Justice did not allow the applicant’s appeal against the judgment of the General Court, referred to in paragraph 10 above, to proceed.

12 After having informed the parties of the resumption of the proceedings, the Third Board of Appeal of EUIPO upheld the Invalidity Division’s decision and dismissed the appeal referred to in paragraph 8 above. Thus, it upheld the application for a declaration of the contested design’s invalidity on the basis of Article 25(1)(b) of Regulation No 6/2002, read in conjunction with Article 8(1) of that regulation, finding that the design subsisted in features of appearance of the product concerned which were solely dictated by its technical function (paragraph 44 of the contested decision).

### **Forms of order sought**

13 The applicant claims that the Court should:

- annul the contested decision;
- alter the contested decision so that it allows the appeal before the Board of Appeal, dismisses the application for a declaration of the contested design’s invalidity and orders the applicant for a declaration of invalidity to pay the costs incurred by the applicant before the Board of Appeal and the Invalidity Division;
- order the applicant for a declaration of invalidity to pay the fees and costs incurred by the applicant.

14 EUIPO contends that the Court should:

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

### **Law**

15 The applicant relies, in essence, on a single plea in law, alleging infringement of Article 8(1) of Regulation No 6/2002. That plea can be divided into four parts.

***The first part, alleging failure to take into account all the features of appearance of the product concerned and breach of the rule on allocation of the burden of proof***

16 The applicant puts forward two complaints.

17 In the first place, it complains that the Board of Appeal failed to take into account all the features of appearance of the product concerned and thereby infringed Article 3(a) of Regulation No 6/2002. The applicant claims that the Board of Appeal took into account only the ‘essential’

features of appearance of the product concerned, in accordance with paragraph 5.5.1 of the EUIPO document entitled ‘Guidelines for examination of registered Community designs’.

18 According to the applicant, the features of appearance of the product concerned that were not taken into account by the Board of Appeal are as follows:

- the smooth surface of the hollow tubes, balloons and rings;
- the uniform elongated shape of the uninflated balloons;
- the two groups of balloons;
- the squat-shaped housing with an upper outer rim;
- the hexagonal shape of the array, whereby that array is configured with holes arranged in a corresponding hexagonal shape wherein the hollow tubes are placed in those holes;
- the straight, not splayed out, hollow tubes in two different lengths wherein those lengths are significantly longer than the length of the housing and of the balloons;
- the rings being each a single band on the neck of each balloon;
- the high contrast of the balloons compared to the housing and the transparent appearance of the tubes.

19 In the second place, the applicant complains that the Board of Appeal breached the rule on allocation of the burden of proof, according to which it is for the applicant for a declaration of invalidity to identify all of the features of appearance of the product concerned and to demonstrate that they are solely dictated by its technical function. According to the applicant, the Board of Appeal disregarded the fact that, in the present case, the applicant for a declaration of invalidity failed to carry out such a demonstration.

20 EUIPO contests the applicant’s arguments.

21 As regards the first complaint raised by the applicant, it must be borne in mind that Article 3(a) of Regulation No 6/2002 defines ‘design’ as ‘the appearance of the whole or a part of a product resulting from the features of, in particular, the lines, contours, colours, shape, texture and/or materials of the product itself and/or its ornamentation’.

22 Article 8(1) of Regulation No 6/2002 provides that a Community design is not to subsist in features of appearance of a product which are solely dictated by its technical function.

23 It is apparent from recital 10 of Regulation No 6/2002 that Article 8(1) thereof aims to protect technological innovation, which ‘should not be hampered by granting design protection to features dictated solely by a technical function[; it] is understood that this does not entail that a design must have an aesthetic quality’.

24 It is apparent from the wording of Article 8(1) of Regulation No 6/2002, of recital 10 of that regulation and of the judgment of 8 March 2018, *DOCERAM* (C- 395/16, EU:C:2018:172), that the

assessment of a Community design in terms of the abovementioned provision comprises the following steps: it is necessary, first, to determine the technical function of the product concerned, second, to analyse the features of appearance of that product within the meaning of Article 8(1) of Regulation No 6/2002, which entails the identification of those features, and, third, to examine, in the light of all the relevant objective circumstances, whether those features are solely dictated by the technical function of the product concerned. In other words, it must be examined whether the need to fulfil that technical function is the sole factor that determined the choice by the designer of those features, with considerations of another nature, in particular those related to the visual aspect of that product, having played no role in the choice of those features (judgments of 18 November 2020, *Fluid distribution equipment*, T- 574/19, EU:T:2020:543, paragraph 23, and of 24 March 2021, *Lego v EUIPO – Delta Sport Handelskontor (Building block from a toy building set)*, T- 515/19, not published, EU:T:2021:155, paragraph 98).

25 Furthermore, it is apparent from Article 8(1) of Regulation No 6/2002 and from recital 10 thereof that a design must be declared invalid if all the features of its appearance are solely dictated by the technical function of the product concerned by that design. It follows that, if at least one of the features of appearance of the product concerned by a contested design is not solely dictated by the technical function of that product, the design at issue cannot be declared invalid under Article 8(1) of Regulation No 6/2002 (judgment of 18 November 2020, *Fluid distribution equipment*, T- 574/19, EU:T:2020:543, paragraph 24; see also judgment of 24 March 2021, *Building block from a toy building set*, T- 515/19, not published, EU:T:2021:155, paragraph 96 and the case-law cited).

26 Regulation No 6/2002 does not provide a precise definition of ‘features of appearance of a product’. In the definition of a design in Article 3(a) of that regulation, the term ‘features’ is used in a broad sense, covering all possible aspects of the appearance of a product, in particular the features of the lines, contours, colours, shape, texture or materials of the product itself or its ornamentation. The identification of those features must be carried out on a case-by-case basis and depends on the product concerned (judgment of 18 November 2020, *Fluid distribution equipment*, T- 574/19, EU:T:2020:543, paragraph 41).

27 Accordingly, identification of the features of appearance of a product may, depending on the case, and in particular having regard to its degree of complexity, be carried out by means of a simple visual analysis of the design or, on the contrary, be based on a detailed examination in which relevant criteria of assessment are taken into account, such as surveys or expert opinions, or data relating to intellectual property rights conferred previously in respect of the product concerned (see judgment of 18 November 2020, *Fluid distribution equipment*, T- 574/19, EU:T:2020:543, paragraph 42 and the case-law cited).

28 It is in the light of those principles that the applicant’s first complaint must be examined.

29 In paragraphs 32 and 33 of the contested decision, the Board of Appeal stated that the product concerned was fluid distribution equipment intended to facilitate water balloon fights and that its function was to fill a number of inflatable balloons at the same time.

30 In paragraph 34 of the contested decision, the Board of Appeal noted that ‘it [was] common ground between the parties’ that the contested design had the following features of appearance:

- a housing with an opening and a number of holes;
- a number of hollow tubes attached to the housing;
- a number of inflatable balloons connected to the ends of the tubes;
- a number of fasteners fixing the balloons to the tubes.

31 In paragraph 35 of the contested decision, the Board of Appeal noted that the four features referred to above corresponded to the component parts of the product concerned and concluded that all those features and arrangement thereof were solely dictated by the technical function of the product concerned.

32 For the purposes of identifying the features of appearance of the product concerned and assessing whether they are solely dictated by its technical function, the Board of Appeal referred, in paragraph 36 of the contested decision, to European patent application EP 3 005 948 A2 filed in the applicant's name on 10 March 2015 and published on 13 April 2016 ('the European patent application') and, in paragraph 37 of the contested decision, to the article entitled 'Bunch O Balloons will revolutionise water fights', with the subtitle 'The product fills multiple balloons with water simultaneously', published on 27 July 2014 on the website [www.arstechnica.com](http://www.arstechnica.com) ('the "Bunch O Balloons" article'). Those two documents had been submitted during the proceedings before EUIPO in support of the application for a declaration of invalidity.

33 In the first place, as regards the applicant's argument that the Board of Appeal failed to take into account, as a feature of appearance of the product concerned, the 'smooth' surface of the hollow tubes, balloons and rings, it should be pointed out, first, that that supposedly 'smooth' surface is not actually visible on the views of the contested design, and it cannot therefore be classified as a 'feature of appearance of the product concerned'. Next, as EUIPO correctly notes, the tubes, balloons and fasteners of fluid distribution equipment normally have smooth surfaces, such that that 'smooth' surface cannot be considered specific to the product concerned. Consequently, the 'smooth' surface cannot be considered, in the present case, to be the result of a specific choice made by the designer of the contested design. That circumstance distinguishes the present case from the case which gave rise to the judgment of 24 March 2021, *Building block from a toy building set* (T- 515/19, not published, EU:T:2021:155), in which the Court held, in paragraph 107, that the smooth surface of the upper face of the product at issue (a toy brick) was a feature of the specific appearance of that product and should therefore have been taken into account by the Board of Appeal.

34 It must therefore be concluded that the Board of Appeal did not err in not mentioning explicitly, in the contested decision, the supposedly 'smooth' surface of the hollow tubes, balloons and rings.

35 In the second place, as regards the applicant's argument that the Board of Appeal failed to take into account the 'uniform elongated shape of the uninflated balloons', it must be held that the Board of Appeal took into account, in paragraphs 34 and 36 of the contested decision, the 'inflatable' balloons as a feature of appearance of the product concerned. It should also be noted that the 'elongated' shape of the uninflated balloon, referred to by the applicant, is the result of the normal state of an uninflated balloon and not the result of a specific choice made by the designer of the

contested design. Therefore, it was not necessary for the Board of Appeal to refer explicitly to that 'elongated' shape for it to identify a feature of appearance of the product concerned in relation to the balloons, the reference to 'inflatable' balloons being sufficient in that regard. The applicant's argument must therefore be rejected.

36 In the third place, the applicant complains that the Board of Appeal failed to take into account the existence of the 'two groups of balloons' and the 'straight, not splayed out, hollow tubes in two different lengths wherein those lengths are significantly longer than the length of the housing and of the balloons'.

37 In that regard, it should be noted that, in paragraph 36 of the contested decision, the Board of Appeal, referring to the European patent application, observes that the hollow tubes are attached to the housing and enable the flow of the fluid. Furthermore, in paragraph 40 of the contested decision, the Board of Appeal notes that the European patent application states that the different length of the tubes is intended to prevent crowding and to accommodate more balloons. It can be inferred from the identification of the different lengths of the tubes, which allows more balloons to be accommodated, that the Board of Appeal took into account the existence of 'two groups of balloons' and the fact that the tubes were longer than the housing and the balloons.

38 It should also be noted that the Board of Appeal, while referring to the 'hollow tubes', does not use the adjectives 'straight' and 'not splayed out' to describe them, as the applicant does. However, in the case of the product concerned, the tubes are usually 'straight' and therefore 'not splayed out', so as to enable the fluid to flow and inflate the balloons quickly. It follows that the 'straight' and 'not splayed out' nature of the hollow tubes cannot be considered, in the present case, to be the result of a specific choice made by the designer of the contested design.

39 It can therefore be concluded that, contrary to the applicant's argument, the Board of Appeal took into account the features referred to in paragraph 36 above.

40 In the fourth place, as regards the applicant's argument that the Board of Appeal failed to take into account the fact that the 'rings are each a thick single band on the neck of each balloon', it should be pointed out that, in paragraph 36 of the contested decision, the Board of Appeal, referring to the European patent application, noted that 'the elastic fastener or band affixed to the necks of balloons clamp[ed] the balloon to the tube sealing the fluid therein'. It thus appears that the Board of Appeal did take into account the feature referred to above.

41 In the fifth place, as regards the applicant's argument that the Board of Appeal failed to take into account the high contrast of the balloons compared to the housing and the transparent appearance of the tubes, it should be noted that the contested design was represented in the application for registration in black and white, not in colour, and that there was no indication in that representation that the applicant was seeking protection of the 'features' referred to above. For that reason, the applicant's argument must be rejected.

42 In the sixth place, the applicant complains that the Board of Appeal failed to take into account the 'squat-shaped housing with an upper outer rim' and the 'hexagonal shape of the array, whereby that array is configured with holes arranged in a corresponding hexagonal shape wherein the hollow tubes are placed in those holes'.



43 In that regard, it should be noted that, in paragraph 36 of the contested decision, the Board of Appeal, referring to the European patent application, stated that ‘the housing can be of cylindrical shape with the first end having an outermost perimeter that is smaller in length than the outermost perimeter of the second end in order to attach a hose, while the second end is attached to the plurality of hollow tubes’. It also stated that ‘the hollow tubes are attached to the housing via holes in arrays of concentric circles and enable the fluid to flow through’.

44 Moreover, in paragraph 38 of the contested decision, the Board of Appeal, relying both on the ‘Bunch O Balloons’ article and on the European patent application, stated that all the features of the contested design and their arrangement were solely dictated by a technical function and were necessary for the technical solution of the product concerned on how to fill with water a number of balloons at the same time. According to the Board of Appeal, that becomes more evident when considering that the configuration of all features of that product are meant to be in contact with a fluid, so that the shape, number and position of the features have an impact on the fluid flow and the inflation of the balloons or containers.

45 It follows from the Board of Appeal’s analysis that the cylindrical shape of the housing is dictated by the cylindrical shape of the water supply (for example, the tap or hosepipe) to which it is attached. That housing has two ends, the first attached to the water supply and the second connected to the tubes that fill the balloons with water. The diameter of the first end results from the diameter of the tap or other fluid supply. The diameter of the second end (which contains the holes) depends on the number of tubes that are attached and, ultimately, the number of balloons that are filled with fluid: the greater the number of tubes that are connected, the greater the diameter of the second end of the housing. It thus appears that the relationship between the diameter of the first end of the housing and the diameter of the second end of the housing represented in this case (which gives the housing a ‘squat-shape’ as the diameter of the first end will be greater than the diameter of the second end) results, according to the Board of Appeal’s analysis, from technical considerations. It follows from that analysis by the Board of Appeal that it took into account the ‘squat-shaped housing with an upper outer rim’.

46 As regards the applicant’s reference to the ‘hexagonal shape of the array’ and to the ‘hexagonal arrangement’ of the holes, it should be recalled that an identification of features of appearance may be based, depending on the particular case, on a multitude of factors and not solely on a simple visual analysis (see paragraph 27 above). In the present case, taking into account the fact that, when the product concerned is used, the housing attaches to the water source, it may be inferred that the ‘hexagonal’ shape of the array and arrangement of the holes will not be noticed by the user of the product concerned and that it does not have a real visual impact capable of classifying it as a ‘feature of appearance’. The Board of Appeal cannot therefore be criticised for not having identified, in the contested decision, the ‘hexagonal’ shape of the array and arrangement of the holes.

47 On the basis of the considerations set out in paragraphs 43 to 46 above, the applicant’s argument set out in paragraph 42 above must be rejected. It must therefore be concluded that the Board of Appeal took into account all the features of appearance of the product concerned, within the meaning of Article 8(1) of Regulation No 6/2002, and, consequently, the applicant’s first complaint must be rejected.

48 As regards the applicant’s second complaint, according to which the Board of Appeal breached the rule on the allocation of the burden of proof, it should be noted that, according to that



rule, when an applicant for a declaration of invalidity refers to the ground of invalidity set out in Article 25(1)(b) of Regulation No 6/2002, it is for that applicant to provide evidence to demonstrate that the contested design does not fulfil the requirements of Articles 4 to 9 of that regulation (judgment of 21 September 2017, *Easy Sanitary Solutions and EUIPO v Group Nivelles*, C- 361/15 P and C- 405/15 P, EU:C:2017:720, paragraph 60). Once that obligation has been fulfilled, it is then for the holder of the contested design to produce counter-arguments and evidence demonstrating why the contested design should not be declared invalid. The final outcome depends on an evaluation of all the facts, arguments and evidence provided by the parties as is required by Article 63(1) of Regulation No 6/2002.

49 That rule on the allocation of the burden of proof was applied correctly by the Board of Appeal in the contested decision, as is apparent from paragraph 31 thereof. In so far as the applicant for a declaration of invalidity in the present case provided reliable and solid arguments and evidence supporting its argument that all the features of appearance of the product concerned were dictated by its technical function, it was for the applicant, as holder of the contested design, to produce arguments and evidence to the contrary. As EUIPO rightly notes, the holder of the contested design is best placed to provide information as to the creation of the contested design and the features of appearance of the product to which that design applies. Accordingly, if that proprietor is of the view that the applicant for a declaration of invalidity has not identified all the features of appearance of the product concerned, it is for it to specify before the departments of EUIPO the unidentified features for which protection is sought.

50 In the light of the foregoing considerations, the applicant's second complaint and, consequently, the first part of the plea must be rejected.

***The second part, alleging the incorrect application of the criteria set out in the judgment of 8 March 2018, DOCERAM (C- 395/16), for the purposes of determining whether the features of appearance of the product concerned are covered by Article 8(1) of Regulation No 6/2002***

51 The applicant maintains that the Board of Appeal made errors in the assessment of the objective circumstances, identified in the judgment of 8 March 2018, *DOCERAM* (C- 395/16, EU:C:2018:172, paragraphs 36 and 37), which are relevant in the present case for the purposes determining whether the features of appearance of the product concerned are solely dictated by its technical function within the meaning of Article 8(1) of Regulation No 6/2002.

52 In that regard, first, the applicant claims that the contested design is a toy and that the deflated decorative balloons are an essential part of it. The applicant also claims that the contested design was wrongly registered in Class 23.01 of the Locarno Agreement, entitled 'Fluid distribution equipment', when Class 21.01, entitled 'Games and toys', was the correct class.

53 Second, the applicant claims that, in so far as the product concerned is a toy, it must be attractive to children and, therefore, its appearance is of particular importance to the designer of the contested design, greater than the importance attributed to its technical function. In that regard, the applicant relies on the witness statement of the designer of the contested design, annexed to the application. The applicant also refers to the 'Bunch O Balloons' article from which it is apparent that the purpose of the product concerned is to facilitate water balloon fights among children.

54 Third, the applicant relies on the fact that alternative designs of the contested design exist and refers, inter alia, to the designs in the multiple application for registration. It claims, more generally, that several other design alternatives exist for the product concerned in the present case.

55 EUIPO contests the applicant's arguments.

56 It should be recalled that the Court of Justice, in the judgment of 8 March 2018, *DOCERAM* (C- 395/16, EU:C:2018:172, paragraphs 36 and 37), stated that, in order to determine whether the features concerned of the appearance of a product are covered by Article 8(1) of Regulation No 6/2002, account should be taken of all the objective circumstances relevant to each case. Such an assessment must be made, in particular, having regard to the design at issue, the objective circumstances indicative of the reasons which dictated the choice of features of appearance of the product concerned, data on its use or the existence of alternative designs which fulfil the same technical function, provided that those circumstances, data or that existence of alternative designs are supported by reliable evidence.

57 In the present case, in paragraphs 32 to 43 of the contested decision, the Board of Appeal examined the features of appearance of the product concerned in the light of the objective circumstances identified in the judgment of 8 March 2018, *DOCERAM* (C- 395/16, EU:C:2018:172, paragraph 37). In the first place, in paragraph 32 of the contested decision, the Board of Appeal identified the product concerned as being fluid distribution equipment intended to facilitate water balloon fights. It concluded, in paragraph 33 of the contested decision, that the function of the product concerned is to fill a number of inflatable balloons at the same time. In the second place, in paragraphs 34 to 38 of the contested decision in particular, the Board of Appeal analysed the contested design and its features of appearance relying on the European patent application and the 'Bunch O Balloons' article, that is to say, reliable evidence. In the third place, in paragraphs 40 to 42 of the contested decision, the Board of Appeal examined and rejected the applicant's arguments alleging that the product concerned is a consumer product, that there are several possible shapes and arrangements of the product concerned and that the Invalidity Division had, wrongly, taken into account the other designs included in the multiple application for registration. In its assessment, the Board of Appeal also took into account, in paragraph 41 of the contested decision, the witness statement of the designer of the contested design.

58 The applicant's argument does not show that the Board of Appeal made errors in the application of the objective circumstances in the present case.

59 So far as concerns the applicant's arguments set out in paragraphs 52 and 53 above, it should be noted first of all that, as is apparent from the case file before EUIPO, the applicant had stated that the product concerned was 'a system used to fill a number of balloons or bags with fluid from a single source' and that, according to the applicant, the contested design should be classified in Class 23.01 of the Locarno Agreement and the product described as 'fluid distribution equipment'. Therefore, EUIPO cannot be criticised for having classified the contested design in Class 23.01 of the Locarno Agreement and for having given the product the indication of 'fluid distribution equipment'.

60 Next, as EUIPO correctly submits, even if the indication of the product concerned was 'games and toys', as the applicant claims, that would have no impact on the assessment of the contested design under Article 8(1) of Regulation No 6/2002. In that regard, it should be recalled that, under

Article 3(2) of Commission Regulation (EC) No 2245/2002 of 21 October 2002 implementing Regulation No 6/2002 (OJ 2002 L 341, p. 28), the classification of products under the Locarno Agreement is to serve exclusively administrative purposes and that, as is apparent from Article 36(6) of Regulation No 6/2002, the indication of the product concerned in the application for registration of the design at issue is not to affect the scope of protection of the design as such. Accordingly, as soon as it can be inferred from the design itself, and from the evidence submitted, that its technical function is to fill a number of inflatable balloons at the same time, even assuming that the indication of the product concerned is ‘games and toys’, as the applicant claims, that would have no impact on the assessment of the contested design under Article 8(1) of Regulation No 6/2002.

61 Furthermore, the mere fact that the product concerned is used as a toy, as is apparent from the ‘Bunch O Balloons’ article, is not, in itself, sufficient to call into question the conclusion that all its features of appearance are solely dictated by its technical function. The applicant has not shown that aesthetic considerations necessarily play a role when designing toys or, more generally, products meant for entertainment.

62 As regards the witness statement by the designer of the contested design, cited by the applicant, it must be noted that, in the judgment of 18 November 2020, *Fluid distribution equipment* (T- 574/19, EU:T:2020:543, paragraph 100), the Court already held that that witness statement, which was also submitted in the case file, had limited evidential value in so far as it presented the personal and subjective opinion of the designer of the contested design and in so far as that designer, as president and proprietor of the applicant, had a personal interest in the validity of the contested design.

63 Quite apart from the limited evidential value that should be placed on the abovementioned witness statement, it should also be noted that that statement does not support the applicant’s argument that, since the product in question is a toy, its appearance is of particular importance, above and beyond its technical function. In his witness statement, the designer does not describe the product concerned as a ‘toy’ nor does he base any argument on the function of that product as a ‘toy’. The designer merely states that aesthetic considerations play a role in the ‘design’ of products intended to be sold directly to the end consumer in contrast to what happens to goods which are incorporated into other goods and which are not seen by the end consumer (paragraph 4 of the witness statement).

64 The applicant’s arguments set out in paragraphs 52 and 53 above must therefore be rejected.

65 As regards the applicant’s argument alleging the existence of alternative designs (see paragraph 54 above), it is worth noting that the Board of Appeal, in paragraph 40 of the contested decision, rightly indicated, citing the judgment of 8 March 2018, *DOCERAM* (C- 395/16, EU:C:2018:172, paragraph 32), that the mere fact that an alternative design existed did not mean that the appearance of a product had been dictated by considerations other than technical considerations. The Board of Appeal went on to find that there were alternative designs in the case in respect of the size, shape and position of such features, but that those alternative designs could also be solely dictated by a technical function, as was apparent from the European patent application. The Board of Appeal concluded that the existence of alternative designs in the case did not call into question the finding that the features of appearance of the product concerned in the case and the way in which they were designed resulted solely from its technical function.

66 It must therefore be held that the Board of Appeal took into account in the present case the existence of alternative designs of the contested design and that its analysis in that regard is not vitiated by error.

67 In the light of the foregoing considerations, the second part of the plea must be rejected.

***The third part, alleging the application of an incorrect legal test in the context of the assessment of the contested design under Article 8(1) of Regulation No 6/2002***

68 The applicant complains that the Board of Appeal endorsed, in the contested decision, the Invalidity Division's analysis which sought to determine whether any feature of appearance of the product concerned 'enhance[d] the product's appearance'. According to the applicant, that test for the application of Article 8(1) of Regulation No 6/2002 is incorrect.

69 The applicant also complains that the Board of Appeal focused its analysis on the components of the product concerned rather than on the features of its appearance and that it upheld the Invalidity Division's finding that the product concerned was a single-use disposable product and thus had limited aesthetic value.

70 EUIPO contests the applicant's arguments.

71 As regards the complaint set out in paragraph 68 above, it is sufficient to hold that the Board of Appeal correctly applied in the contested decision – which alone is the subject of the review of legality carried out by the Court – the legal principles set out in the judgment of 8 March 2018, *DOCERAM* (C- 395/16, EU:C:2018:172). In particular, it is in no way apparent from the contested decision that the Board of Appeal sought to determine, for the purposes of applying Article 8(1) of Regulation No 6/2002, whether a given feature of appearance of the product concerned 'enhance[d] its appearance' or, in other words, gave it an aesthetic quality. Likewise, it is in no way apparent from that decision that the Board of Appeal 'endorsed' an analysis such as the one allegedly carried out by the Invalidity Division. The applicant's complaint must therefore be rejected.

72 The two complaints set out in paragraph 69 above cannot be upheld, either.

73 First, in the judgment of 18 November 2020, *Fluid distribution equipment* (T- 574/19, EU:T:2020:543, paragraph 47), the Court concluded that, as regards the design that was at issue in that case – which was included in the multiple application for registration referred to in paragraph 4 above – the fact that the features of appearance of the product concerned coincided with its individual component parts did not mean that the Board of Appeal had erred in the identification of those features. It should also be recalled that, in the assessment of the first part of the plea, the Court concluded that the Board of Appeal had not erred in the identification of the features of appearance of the product concerned. Accordingly, the complaint that the Board of Appeal wrongly focused its analysis on the components of the product concerned and not on its features of appearance cannot be upheld.

74 Second, as regards the applicant's claim that the Board of Appeal confirmed the Invalidity Division's analysis that the product concerned was a single-use product and thus had limited aesthetic value, it must be held that the contested decision is in no way based on such a consideration.

75 On the basis of the foregoing considerations, the third part of the plea must be rejected.

***The fourth part, alleging misinterpretation of the European patent application and of the applicant's multiple application for registration***

76 In the fourth part of the plea, the applicant raises two complaints against the Board of Appeal.

77 In the first place, the applicant claims that the Board of Appeal misinterpreted the European patent application, in so far as that application was silent on a potential technical function of a number of features of appearance of the product concerned, such as the smooth surface of the hollow tubes, balloons and rings, the uniform elongated shape of the uninflated balloons, the thick appearance of the rings, the hexagonal array in the centre section of the housing and the choice of colour and contrasts.

78 According to the applicant, the European patent application even mentions various design alternatives for certain features of appearance of the product concerned without mentioning any technical function of these design alternatives at all. The applicant refers, by way of example, to paragraph [0121] of the European patent application in which it is stated that the shape of the housing may be conical, cylindrical or pyramidal.

79 EUIPO contests the applicant's arguments.

80 It should be recalled that, in paragraph 34 of the contested decision, the Board of Appeal identified the features of appearance of the product concerned as being (i) a housing with an opening and a number of holes, (ii) a number of hollow tubes attached to the housing, (iii) a number of inflatable balloons connected to the ends of the tubes and, (iv) a number of fasteners fixing the balloons to the tubes. It should also be recalled that, in the assessment of the first part of the plea, the Court concluded that the Board of Appeal had not erred in the identification of the features of appearance of the product concerned.

81 Therefore, it must be held that, as the Board of Appeal rightly noted in paragraph 36 of the contested decision, the European patent application provides information on all the abovementioned features of appearance of the product concerned and that Figures 9A to 9C of that application correspond visually to the views of the contested design.

82 Moreover, the fact that, in paragraph [0121] of the European patent application, it is stated that the shape of the housing may be conical, cylindrical or pyramidal is not sufficient to demonstrate that, in the present case, the cylindrical shape of the housing is not solely dictated by technical considerations related to the fact that the water distribution facility – such as a tap or hosepipe – normally has a cylindrical shape. In that regard, it should be recalled that the existence of alternative designs is not decisive for the purposes of assessing whether the features of appearance of a product are solely dictated by its technical function (judgment of 8 March 2018, *DOCERAM*, C- 395/16, EU:C:2018:172, paragraph 32).

83 The applicant's first complaint must therefore be rejected.

84 In the second place, the applicant maintains that the Board of Appeal erred in finding that the multiple application for registration showed that the various features of appearance of the product

concerned were solely dictated by the technical function of the product. According to the applicant, that multiple application for registration shows the opposite, namely that a large variety of design options exist for the contested design.

85 The applicant adds that the Board of Appeal's analysis results in an application of Article 8(1) of Regulation No 6/2002 to multiple applications for registration which does not correspond to the scheme of that regulation. The applicant relies in that regard on Article 37(4) of that regulation, which provides that each design included in a multiple application for registration must be examined separately.

86 The applicant claims that, if the analysis of the multiple application for registration carried out by the Board of Appeal in the present case were upheld, it would mean that Article 8(1) of Regulation No 6/2002 would apply more readily to designs included in multiple applications for registration than to designs included in individual applications, which would place applicants for multiple registration at a disadvantage.

87 EUIPO contests the applicant's arguments.

88 It should be noted that, in paragraph 42 of the contested decision, the Board of Appeal found that the Invalidity Division was fully entitled to take into account the applicant's other designs included in the multiple application for registration, given that the information which could be inferred from those other registered designs for the same product was one of the relevant objective circumstances in the present case that had to be taken into account in order to determine whether Article 8(1) of Regulation No 6/2002 applied.

89 The Invalidity Division had taken into account the other registered designs (of which the applicant was proprietor) for the same product and found that those other designs exemplified the analysis of the Court of Justice in the judgment of 8 March 2018, *DOCERAM* (C- 395/16, EU:C:2018:172, paragraph 30), according to which the existence of alternative designs was not decisive for the purposes of applying Article 8(1) of Regulation No 6/2002:

‘... A single economic operator would be able to obtain several registrations as a Community design of different possible forms of a product incorporating features of appearance of that product which are exclusively dictated by its technical function. That would enable such an operator to benefit, with regard to such a product, from exclusive protection which is, in practice, equivalent to that offered by a patent, but without being subject to the conditions applicable for obtaining the latter, which would prevent competitors offering a product incorporating certain functional features or limit the possible technical solutions, thereby depriving Article 8(1) of its full effectiveness.’

90 It should be noted, as the Invalidity Division did, that the configurations of the tubes and balloons, which appear on the designs included in the multiple application for registration, are different ways of enabling a large number of balloons to be filled with water at the same time, which, in the circumstances of the present case, is an indication of the applicant's intention to enjoy exclusive protection, equivalent to that conferred by a patent, in respect of the technical solution that is the basis of the product concerned.

91 At the same time, it is apparent from the contested decision that the multiple registrations made by the applicant for the same product constituted one of the objective circumstances examined



by the Board of Appeal, which is, moreover, consistent with the clarifications provided by the Court of Justice in the judgment of 8 March 2018, *DOCERAM* (C- 395/16, EU:C:2018:172). In other words, the Board of Appeal's analysis was not based exclusively on that multitude of registrations and that fact was not even decisive in that analysis. It is apparent from the contested decision that the Board of Appeal *inter alia* took into account the appearance of the contested design (paragraphs 32 to 35 of the contested decision), the European patent application (paragraph 36 of the contested decision) and the 'Bunch O Balloons' article (paragraph 37 of the contested decision) and examined the counter-arguments put forward by the applicant and the witness statement by the designer of the contested design (paragraphs 40 to 43 of the contested decision).

92 Furthermore, in view of the fact that the multiple registrations were, in the present case, one of the objective circumstances taken into account by the Board of Appeal, and not the most decisive, it must be held that its analysis in no way leads to the conclusion that Article 8(1) of Regulation No 6/2002 applies, as a matter of principle, more readily to designs included in multiple applications for registration than to designs included in individual applications. The argument of the applicant set out in paragraph 86 above is therefore unfounded.

93 In the light of the foregoing considerations, the applicant's second complaint and, consequently, the fourth part of the plea must be rejected. The present action must therefore be dismissed in its entirety.

#### **Costs**

94 Under Article 134(1) of the Rules of Procedure of the General Court, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the applicant has been unsuccessful, it must be ordered to pay the costs incurred by EUIPO, as applied for in its pleadings.

On those grounds,

THE GENERAL COURT (Tenth Chamber)

hereby:

1. **Dismisses the action;**
2. **Orders Tinnus Enterprises LLC to bear its own costs and to pay those incurred by the European Union Intellectual Property Office (EUIPO).**

Kornezov

Buttigieg

Kowalik-Bańczyk

Delivered in open court in Luxembourg on 29 March 2023.

E. Coulon

S. Papasavvas

Registrar

President

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\* Language of the case: English.