



**OFFICE FOR HARMONIZATION IN THE INTERNAL MARKET
(TRADE MARKS AND DESIGNS)**

DESIGNS DEPARTMENT- INVALIDITY DIVISION

**DECISION OF
THE INVALIDITY DIVISION
OF 23/02/05**

**IN THE PROCEEDINGS FOR A DECLARATION OF INVALIDITY
OF A REGISTERED COMMUNITY DESIGN**

**FILE NUMBER
COMMUNITY DESIGN
LANGUAGE OF PROCEEDINGS**

ICD 000000370
000150206-0001
English

APPLICANT

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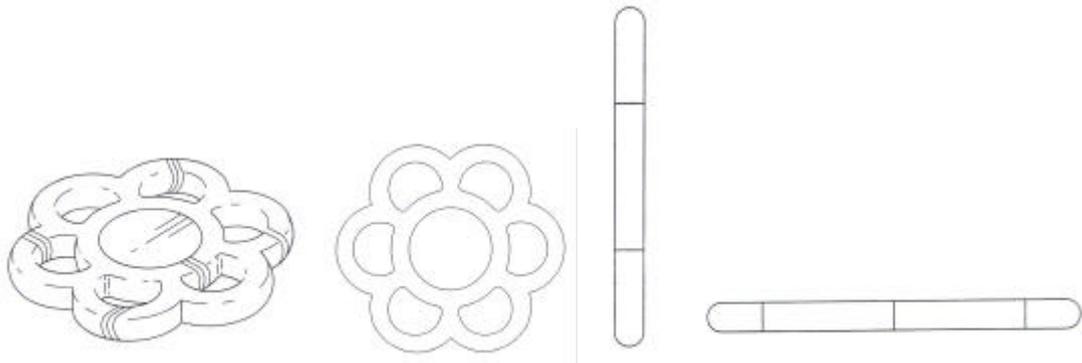
The Invalidity Division,

composed of Martin Schlötelburg (rapporteur), June Davies (member) and Harri Salmi (member) took the following decision on 23/02/05:

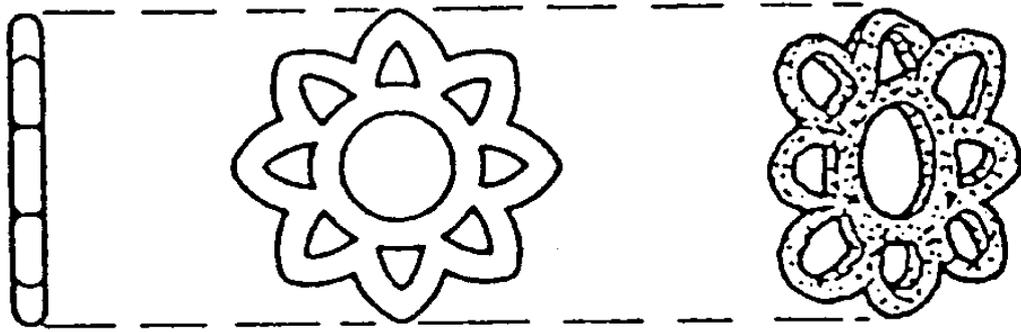
- 1. The application for a declaration of the registered Community design No. 000150206-0001 is rejected.**
- 2. The Applicant shall bear the costs of the Holder.**

I. FACTS, EVIDENCE AND ARGUMENTS

- (1) The Community design No. 000150206-0001 (in the following: “the CD”) has been registered in the name of the Holder with the date of filing of 20/02/04 and the date of priority of 19/01/04. In the CD, the indication of products reads “biscuits” and the design is represented in the following views (published at http://oami.eu.int/bulletin/rcd/2004/2004_045/000150206_0001.htm):



- (2) On 01/07/04, the Applicant filed an application for a declaration of invalidity (in the following: “the Application”) contesting the validity of the CD. The fee for the Application was paid by current account with effect of 01/07/04.
- (3) The Applicant, by referring to “the right recognised by article 25 point 1 section b), of the regulation in force in regard to Community Drawings and Models”, claims “lack of novelty and singularity of the challenged Community design is lacking, prior and demanded requirements in articles 4, 5 and 6 of the Regulations for Community Drawings and Models“. He argues that the CD “does not have any novelty and singularity necessary for its registration, given that the distinguished features presented by same are included in the Community Brand of my principal, which were made public in this industry specialised circulars prior to the Community Design application date.”
- (4) As evidence, the Applicant indicated the publication of the Community trademark no 14217 (in the following: prior design) in the Community Trademark Bulletin on 12/05/97 and provided a copy of an extract from the Community trademark database of the Office. The Community trademark no 14217 as published on 12/05/97 is as follows:



- (5) In comparing the prior design with the CD, the Applicant argues that “the challenged Community Design biscuit being the same as the opposing Community Brand design is made up of a three dimensional shaped body, of reduced thickness, and having structurally similar proportions. Both designs are formed out of a circular crown from whose external shape or sides stem a number of extensions, in the form of arches, noticeably circular, constituting a second concentric zone around the inner crown.” He states “that the challenged biscuit has details, such as the presence of slits variably distributed on one of the sides of the biscuits, that in some cases could be distinguish the registrations in conflict, but is very clear that these variations do not alter the structural essence of the requested object, hence the general impression of the challenged biscuit would involve a high risk of confusion for the consumer”.
- (6) On 12/07/04 the Holder was notified of the Application and a time limit for submitting his observations.
- (7) The Holder did not submit any observations.
- (8) On 04/10/04 the Office informed both parties that the written proceedings were closed and that a decision concerning the invalidity will be taken.
- (9) For further details to the facts, evidence and arguments submitted by the Applicant and the Holder reference is made to the documents on file.

II. GROUNDS OF THE DECISION

A. Admissibility

- (10) The request of the Applicant to declare the invalidity of the CD due to “lack of novelty and singularity of the challenged Community” is a statement of the grounds on which the Application is based. Therefore, the requirement of Art. 28(1)(b)(i) CDIR¹ is fulfilled. Furthermore, the Application complies with Art. 28(1)(b)(v)(vi) CDIR, since the attachment contains an indication of the facts, evidence and arguments submitted in support of those grounds, in particular a

¹ Commission Regulation (EC) No 2245/2002 of 21 October 2002 implementing Council Regulation (EC) No 6/2002 on Community designs

reproduction of the prior design according to the Community Trademark database of the Office. The other requirements of Art. 28(1) CDIR are fulfilled as well. The Application is admissible.

B. Substantiation

- (11) The prior design has been registered as a three-dimensional Community trademark for goods in class 29 and 30, including *inter alia* “crackers and savoury foods”. By means of publication of the trademark in the Community Trademark Bulletin before the date of filing of the CD, the prior design has been made available to the public, in particular to the sectors operating within the Community concerned with the production of “biscuits” as indicated in the CD.

B.1 Novelty

- (12) The prior design and the CD are similar to the extent that both consist of an inner ring surrounded by a number of arches, each arch encompassing an opening. However, the prior design and the CD are different in the number of arches as well as in the shapes of the arches: the CD comprises 6 arches having a circular shape, whereas the prior design comprises 8 arches having a pointed shape. Therefore, the prior design and the CD are not identical in the meaning of Art. 5 CDR. The Applicant’s submission that the CD lacks novelty is not founded.

B.2 Individual Character

- (13) Due to the difference in the numbers and shapes of the arches, the geometrical form of the biscuit according to the prior design and the CD are basically different. Whereas the prior design follows an octagonal structure, the biscuit of the CD is basically hexagonal. The difference in the forms lead to different overall impressions produced on the informed user by the prior design and CD, respectively. Therefore, the Applicant’s submission that the CD lacks individual character is not founded.

C. Conclusion

- (14) The Applicant fails to provide evidence for the alleged lack of novelty (Art. 5 CDR) and lack of individual character (Art. 6 CDR) of the CD. The ground for invalidity of Art. 25(1)(b) CDR is not substantiated. The Application is to be rejected.

III. COSTS

- (15) Pursuant to Article 70(1) CDR and Art. 79(1) CDIR, the Applicant bears the costs incurred by him essential to the proceedings.

IV. RIGHT TO APPEAL

- (16) An appeal shall lie from the present decision. Notice of appeal must be filed at the Office within two months after the date of notification of that decision. The notice is deemed to have been filed only when the fee for appeal has been paid. Within four months after the date of notification of the decision, a written statement setting out the grounds of appeal must be filed (Art. 57 CDR).

THE INVALIDITY DIVISION

Martin Schlötelburg

Harri Salmi

June Davies