



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

DESIGNS DEPARTMENT- INVALIDITY DIVISION

**DECISION OF
THE INVALIDITY DIVISION
OF 11/12/07**

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

FILE NUMBER	ICD 000003184
COMMUNITY DESIGN	000434782-0001
LANGUAGE OF PROCEEDINGS	English
APPLICANT	Euro Fire AB Box 16 SE-260 61, Hyllinge Sweden
REPRESENTATIVE OF THE APPLICANT	ADVOKATBYRÅN JONAS GULLIKSSON AB Järnvägsgatan 3 SE-251 11 Helsingborg Sweden
HOLDER	TARNAVVA Sp. z o.o. Wietrzychowice 191 33-270 Wietrzychowice POLONIA
REPRESENTATIVE OF THE HOLDER	KANCELARIA PATENTOWA KLAR MIROSŁAW ul. Biernackiego 1/29 39-900 Mielec Poland

The Invalidity Division,

composed of Martin Schlötelburg (rapporteur), Eva Udovc (member) and Eva Vyoralova (member) has taken the following decision on 11/12/07:

- 1. The Application for a declaration of invalidity of the registered Community design No. 000434782-0001 is rejected.**
- 2. The Applicant shall bear the costs of the Holder.**

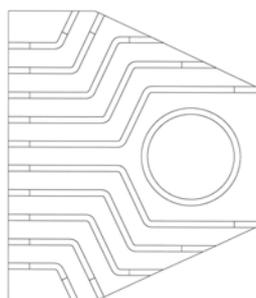
I. FACTS, EVIDENCE AND ARGUMENTS

- (1) The Community design No. 000434782-0001 (in the following: “the RCD”) has been registered in the name of the Holder with the date of filing of 18/11/2005. In the RCD, the indication of products reads “Stoves [heating, Fireplaces (indoor)]” and the design is represented in the following seven views (published at http://oami.europa.eu/bulletin/rcd/2005/2005_118/000434782_0001.htm :

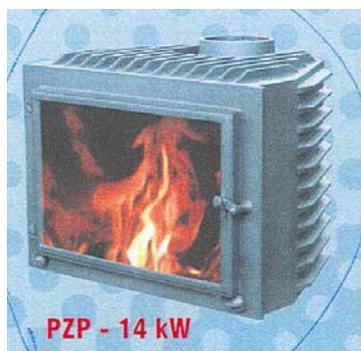


- (2) On 27/09/06, the Applicant filed an application for a declaration of invalidity (in the following: “the Application”) contesting the validity of the RCD. The fee for the Application was paid by current account with effect of 27/09/06.
- (3) The Applicant requests the invalidation of the RCD based on Article 25(1)(b) CDR because the contested design lacks novelty and individual character.
- (4) As evidence the Applicant provided various documents including inter alias

- a copy of a publication of the Community design registration no. 395744-0001 (in the following: "D1"), filed on 05/09/05 and published on 01/11/05. The indication of products reads "flued stoves" and the design is represented in the following view:
(published at http://oami.europa.eu/bulletin/rcd/2005/2005_103/000395744_0001.htm)



- an "excerpt" from the Applicant's website www.eurofire.se, bearing the date 22/09/2005, translated into English (in the following: "D2").
- a copy of the catalogue "Cast Iron Fireplace Inserts" TARNVVA (in the following: "D3"), depicting fireplaces produced in 2002, as claimed by both the Applicant and the Holder. The following image is enclosed in D3:



(5) The Applicant argues that the RCD lacks both novelty and individual character. He states that the view 0001.1 of the RCD is identical to D1 whereas the other views of the RCD contain D1. Furthermore, he claims that the RCD is also identical to the designs incorporated in D2. As far as the individual character of the RCD is concerned, the Applicant argues that "the characteristic flanges are identical in both designs and the shape and the proportions of the stoves are very similar. The very small differences that may occur do not influence the overall impression of the informed user". He adds thereof that it is obvious from D4 that "the actual fireplace insert, disregarding the Z-flanges, lacks both novelty and individual character in relation to prior fireplace inserts" and that "the Applicant has a previous right to the Z-flange design". Moreover, according to the Applicant, the difference

between the two designs concerning the continuous line of the flanges “does not lead to a different overall impression on the informed user as the shape and the proportions of the design are identical”, whereas “the faceplate [of the prior design] is flat and does not have the shape of a triangle but the same shape as D1”. In addition to that the Applicant claims that “the top and the sides [of cast iron cassettes/fireplace inserts] are often visible in normal use. As regards the credibility of D2, the Applicant claims that “it is clear from the dates of the printouts and the text on the copies that the information actually did appear on the website www.eurofire.se on September 22, 2005”.

- (6) The Holder replies that the RCD fulfils the criteria of novelty and individual character according to Articles 5 and 6 of the Community Design Regulation and he asks the rejection of the application for the declaration of invalidity of the RCD. In his response, the Holder points out the following alleged differences between the opposing designs:
- Subject of the RCD is the whole insert of a fireplace, as shown in Figures 0001.1 to 0001.7, whereas D1 presents only the view from above.
 - The ribs of D1 have the shape of a continuous broken line, whereas the ribs of the fireplace according to the RCD are separated segments.
 - The fireplace according to the RCD has vertical ribs on vertical side walls, located perpendicularly to the plane of vertical walls of the fireplace, whereas the ribs of the fireplace depicted in D2 are located to the acute angles to vertical walls of fireplace.
 - The fireplaces depicted in D2 have the shape of a triangle, whereas the fireplace according to the RCD has the shape of a pentagon.
 - The face plate of the RCD is flat, whereas the face plate depicted in D2 is convex.
 - The RCD differs also to the extent that a decorating element, presenting the shape of sun, is located on the inner side of fireplace back wall.

Based on the aforementioned alleged differences the Holder states that “the fireplace according to RCD is in so many aspects different, from designs presented in application for declaration of invalidity, that it produces different impression on the oriented user”. Moreover, the Holder claims that “the fireplace according to the RCD was created in August 2005” and that “fireplaces with similar shape and proportions, but with different configuration ribs, were produced by firma Tarnawa since 2002”. In support of his claims he provides a copy of the catalogue “Cast Iron Fireplace Inserts” TARNVVA, as described above as D4, which is also presented as evidence by the Applicant. Furthermore, the Holder calls in question the credibility of D2, “because they are only print outs, which can not be seen on present website of Euro Fire AB.” He also claims that “in normal use, fireplaces are so installed, that only the face plate is visible, which in case of the RCD it is flat, whereas in presented materials is convex”.

- (7) On 16/10/07 the Office informed both parties that the written proceedings were closed and that a decision concerning the invalidity would be taken.
- (8) 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

- (9) The indication of the grounds for invalidity on the form of the Office is a statement of the grounds on which the Application is based in the meaning of Art. 28(1)(b)(i) CDIR¹. Furthermore, the Application complies with Art. 28(1)(b)(vi) CDIR, since the attachment contains an indication of the facts, evidence and arguments submitted in support of those grounds. The other requirements of Art. 28(1) CDIR are fulfilled as well. The Application is admissible.

B. Substantiation

B.1 Evidence

- (10) The “excerpt” of the Applicant’s website (D2) is not accompanied by evidence certifying the correctness of the contents and the date of the excerpt. Since the website www.eurofire.se has changed since 2005, there are no means of verifying today that it was looking alike D2. Such means could have been for instance provided where the “excerpt” had been produced by the Wayback Machine which is run by the Internet Archive (www.Archive.org) as an independent institution giving certain credibility to the search results. Therefore, the Invalidity Division finds that the Applicant failed to provide proof that the website has included views of prior designs.
- (11) D1 is a valid means of evidence as such within the meaning of Article 7(1) CDR because it is a registered Community design and all circumstances such as date of publication are known to the Office.
- (12) D3 is accepted as evidence because both parties to the proceedings agree to its credibility and to the fact that the products disclosed in it were available in the market since 2002.

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

B.2 Novelty

- (13) According to Article 5 CDR the RCD lacks novelty when an identical design has been made available to the public prior to the date of filing of the RCD. Designs shall be deemed to be identical if their features differ only in immaterial details.
- (14) The RCD and the prior design in D1 and D2 concern stoves. However, the features of the RCD shown in the views 0.002 – 0.007 are not disclosed in the prior design of D1. Subject-matter not disclosed in the prior art cannot be taken into account when assessing the requirements of protection of the contested RCD. Therefore, D1 is not an obstacle to the novelty of the RCD.
- (15) The RCD and the prior design as disclosed in D3 differ at least in the following features:
- The flanges situated on the upper side of the RCD have a “Z” form, whereas D3 has straight flanges on the top of the cassette. As the Applicant admits, the views of the Z-flanges are a new element which does not appear in D3.
 - The ribs on the side walls of the RCD are located vertically to its walls, whereas the ribs of the fireplace depicted in D3 are located horizontally to vertical walls of fireplace.
 - A pedestal with a drawer as depicted in the RCD is not present in D3.
- (16) These features contrasting the RCD to the prior design of D3 do not concern immaterial details due to their size in relation to the overall dimensions of the stove. The RCD and the prior designs are not identical within the meaning of Art. 5 CDR.

B.4 Individual character

- (17) A design has an individual character if the overall impression it produces on the informed user differs from the overall impression produced on such a user by any prior design which has been made available to the public.
- (18) The informed user is familiar with heating stoves as shown in the RCD. He is aware that the degree of freedom of a designer concerned with heating stoves is limited only in so far as that it must be an item designed according to safety rules, where fire can be lighted.
- (19) The combination of “Z” shaped flanges on the top of the cassette, flanges on its sidewalls and the pedestal define the overall impression produced by the RCD on the informed user. None of the prior designs discloses such a combination. Therefore, none of the prior designs produces the same overall impression as the RCD.

- (20) Therefore, none of the prior designs forms an obstacle to the individual character of the RCD.

C. Conclusion

- (21) The evidence provided by the Applicant does not support the invoked ground for invalidity of Article 25(1)(b) CDR. Therefore, the Application has to be rejected.

III. Costs

- (22) Pursuant to Articles 70(1) CDR and 79(1) CDIR, the Applicant shall bear the fees and the costs of the Holder.

IV. RIGHT TO APPEAL

- (23) 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 this 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

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Eva Vyoralova

