

Identification of the product

Consistency Circle Designs

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1 Introduction

- 1 This report is a compilation of case-law from the Court of Justice (CJ), the General Court (GC), and the Boards of Appeal (the Boards or BoA), drawn up with the aim of identifying and analysing the relevant case-law and trends on the topic.
- 2 The purpose is to further support the work of the BoA with a view to maintaining and enhancing the **consistency** of its decision-making practice with the case-law of the EU Courts and among the BoA. As such, it contributes to improving the **predictability** of decisions and legal certainty in general. Through divulging relevant legal information, it also serves to increase **knowledge, awareness and transparency** among the various BoA stakeholders.
- 3 It is a working document that reflects existing case-law and the result of discussions within the Consistency Circles and the General Consistency Meeting of the BoA at the given date of the report. **It does not have any binding effect on the BoA.** It has been made available to the staff of the BoA and the public in general for information purposes only.
- 4 The relevance of the product indication in the context of Article 4(2) CDR (component part of a complex product) and for the comparison of products under Article 25(1)(e) CDR (conflict with an earlier trade mark) are beyond the scope of this case-law analysis. Furthermore, in the absence of a sufficient body of case-law, the specific issue of how to identify the relevant product where the design is filed for 'ornamentation' in Class 32 of the Locarno Classification is not covered by the report.

2 Legal Framework

2.1 EU law

- 5 **Recital 14 CDR** ⁽¹⁾ provides: *'The assessment as to whether a design has individual character should be based on whether the overall impression produced on an informed user viewing the design clearly differs from that produced on him by the existing design corpus, taking into consideration the nature of the product to which the design is applied or in which it is incorporated, and in particular the industrial sector to which it belongs and the degree of freedom of the designer in developing the design'.*

- 6 **Article 3 CDR** gives the following definitions:

'(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;

(b) 'product' means any industrial or handicraft item, including inter alia parts intended to be assembled into a complex product, packaging, get-up, graphic symbols and typographic typefaces, but excluding computer programs'.

⁽¹⁾ Council Regulation (EC) No 6/2002 of 12 December 2001 on Community designs (OJ L 3, 5.1.2002, p. 1).

- 7 **Article 36 CDR** lists the conditions with which Community design applications must comply. In particular,
- **Article 36(1)(c) CDR** states that an application shall contain ‘a representation of the design suitable for reproduction’.
 - **Article 36(2) CDR** stipulates that ‘the application shall further contain an indication of the products in which the design is intended to be incorporated or to which it is intended to be applied’.
 - **Article 36(6) CDR** provides that ‘the information contained in the elements mentioned in paragraph 2 [...] shall not affect the scope of protection of the design as such’.
- 8 **Article 1(1)(d) CDIR**⁽²⁾ on the content of the design application provides that the application must contain ‘an indication, in accordance with Article 3(3), of the products in which the design is intended to be incorporated or to which it is intended to be applied’.
- 9 **Article 3(3) CDIR** details that ‘the indication of products shall be worded in such a way as to indicate clearly the nature of the products and to enable each product to be classified in only one class of the Locarno classification, preferably using the terms appearing in the list of products set out therein’.

2.2 Other instruments

- 10 The **Office’s Guidelines** on *Examination of design invalidity applications* deal with this topic, in particular, in Point 5 *The different grounds of invalidity* / 5.1 *Not a design*; 5.5 *Technical function* and 5.7 *Lack of novelty and individual character*.
- 11 This topic is also dealt with in the section on *Examination of applications for registered Community designs*, in Point 6 *Additional elements that an application must or may contain* / 6.1 *Mandatory requirements* / 6.1.4 *Indication of products*.

3 Case-law Analysis

- 12 The case-law analysis covers the identification of the product both in examination and in invalidity proceedings.

3.1 Identification of the product

- 13 The identification of the product is relevant in the examination of design applications, and in invalidity proceedings initiated against registered designs.

⁽²⁾ Commission Regulation (EC) No 2245/2002 of 21 October 2002 implementing Council Regulation (EC) No 6/2002 on Community designs (OJ EC No L 341 of 17.12.2002, p. 28).

3.1.1 Identification of the product in examination proceedings

- 14 The identification of the product is relevant when examining the registrability of the design pursuant to Article 3(a) CDR. Indeed, pursuant to Article 47(1)(a) CDR, the Office must examine whether the design applied for corresponds to the definition of a design.
- 15 When examining an application for registration of a design, the examiner relies, in the first place, on the **representation of the design**, that is, the views, as filed by the applicant. They determine the relevant product and the subject matter of the application. When the representation of the design does not enable the identification of a specific product, the **product indication** provided by the applicant may help to define the subject matter of the protection sought.
- 16 Nevertheless, when the representation of the design is deficient and does not enable its subject matter to be clearly determined (e.g. reproduction of the design in a non-neutral background – Article 4(1)(e) CDIR), the applicant cannot rely on the product indication to remedy the deficiency if it is contrary to the product shown in the representation⁽³⁾.
- 17 Considering the definition of ‘a product’ in Article 3(b) CDR, only the appearance of the whole or a part of an industrial or handicraft item may constitute a design within the meaning of Article 3(a) CDR. Accordingly, a living organism, in its natural shape, cannot be protected as a design if it is not the result of a manual or industrial process.
- 18 In those cases, the **product indication** will be taken into account to clarify whether the product incorporating the design has actually undergone an industrial or manual process so that it can be deemed to be an ‘industrial or handicraft item’.
- 19 In **GROENTE EN FRUIT**⁽⁴⁾, a design with the product indication ‘Heart shaped tomato’, showing a heart-shaped tomato, was refused registration for being a natural product rather than an industrial or handicraft item.



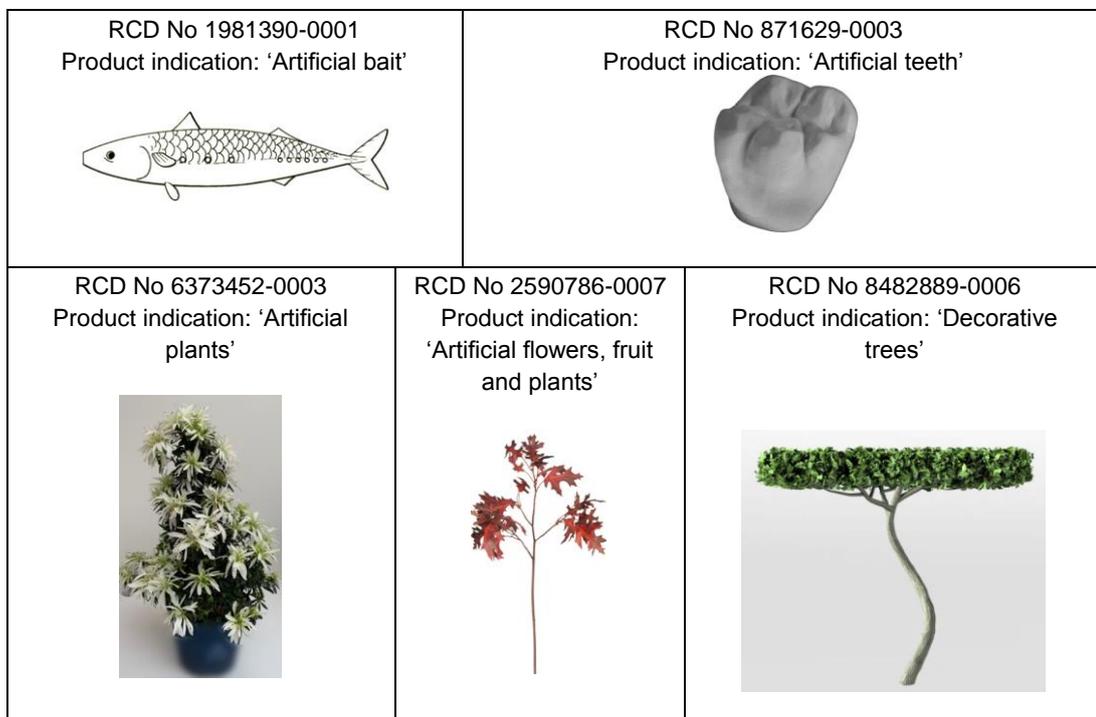
⁽³⁾ 17/11/2015, R 1842/2015-3, Becher, § 18 (not challenged by the applicant before the Court, see 09/02/2017, T-16/16, BECHER, EU:T:2017:68 and 05/07/2018, C-217/17 P, Becher, EU:C:2018:534).

⁽⁴⁾ 18/02/2013, R 595/2012-3, Groente en fruit, § 11.

- 20 In **PRODOTTI DI VERDURA PRONTI**⁽⁵⁾, protection was sought for a design with the product indication ‘ready-made vegetable products’ showing a cut artichoke. Although the contested design was declared invalid under a different invalidity ground, the Board also questioned the registrability of the design.



- 21 When the representation shows that the design concerns a **living** organism, such as a living animal or plant or (parts of) the human body, and this is confirmed by the product indication, the design is not accepted for registration.
- 22 By contrast, when the product indication states that the design concerns an industrial or handicraft item, such as **artificial** bait, teeth or plants, the application can be accepted for registration.



⁽⁵⁾ 05/07/2021, R 2400/2018-3, Prodotti di verdura pronti, § 19-28.

3.1.2 Identification of the product in invalidity proceedings

23 In invalidity proceedings based on Article 25(1)(b) CDR (e.g. lack of individual character or technical function of the product), the question of product identification may arise both in relation to the contested design and the prior design invoked.

3.1.2.1 Identification of the product of the contested design

24 With regard to a contested design that has been registered and published in the Community Design Bulletin, the **registered product indication** should be taken into account and, where necessary, the **representation of the design** itself, insofar as it makes the nature of the product, its intended purpose or its function clear ⁽⁶⁾.

25 In the majority of cases, the product indication **matches** the representation of the design. In these 'standard cases', the Boards will rely on the product indication to identify the relevant product.

26 For instance, in **VACUUM CLEANER BAGS** ⁽⁷⁾, the Board identified the product by reference to the product indication 'vacuum cleaner bags' and simply confirmed that the representation of the contested design shows a disposable vacuum cleaner bag.



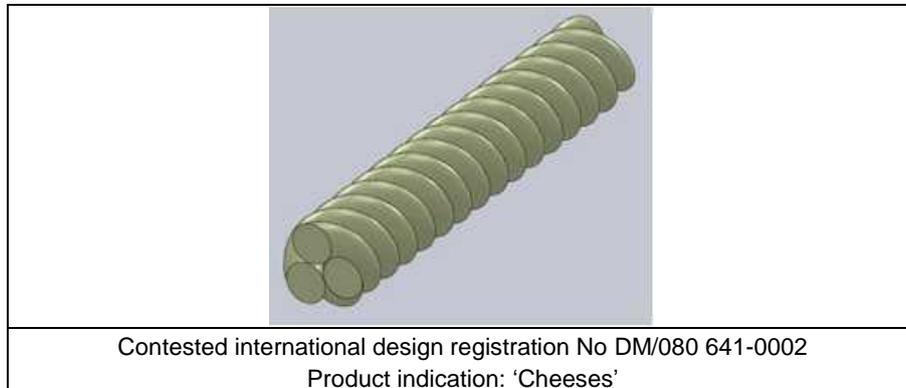
27 In **CHEESES** ⁽⁸⁾, the representation of the design, considered on its own, did not reveal a specific product. However, the product indication 'cheese' enabled the product concerned to be identified, and when read together with the representation of the design, the product could be clearly identified, being a cheese with a specific triple

⁽⁶⁾ 18/03/2010, T-9/07, Metal rappers, EU:T:2010:96, § 56; 15/10/2020, T-818/19, Support pillows, EU:T:2020:486, § 31; 10/11/2021, T-193/20, Panels, EU:T:2021:782, § 36-40.

⁽⁷⁾ 23/08/2021, R 299/2021-3, vacuum cleaner bags, § 24.

⁽⁸⁾ 21/08/2020, R 1925/2019-3, Cheeses, § 42.

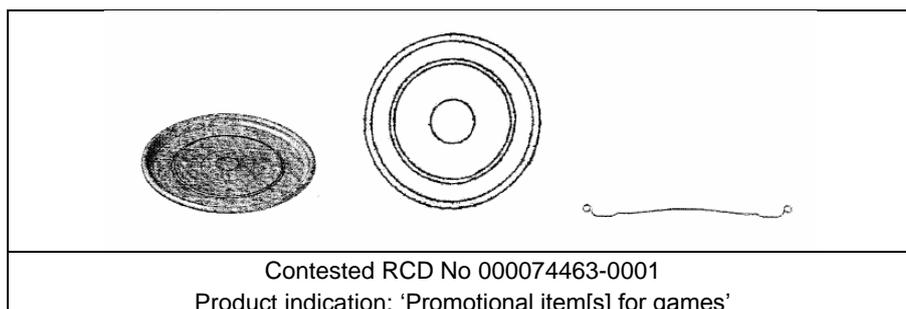
helicoid shape. Therefore, the product indication together with the representation of the design enabled the nature of the product to be identified⁽⁹⁾.



- 28 However, there may be cases where the Boards will have to address discrepancies between the representation of the design and the product indication, in particular, when: (a) the product indication is broader than the product shown in the representation, (b) the design is registered with several product indications or (c) the registered representation of the design does not match the product indication.

(a) the product indication is broader than the product shown in the representation

- 29 Already in **METAL RAPPERS**⁽¹⁰⁾, the first judgment on individual character pursuant to Article 6 CDR, the GC established the principles to be applied when the representation shows a very specific product within a broad product category, as indicated in the registration.



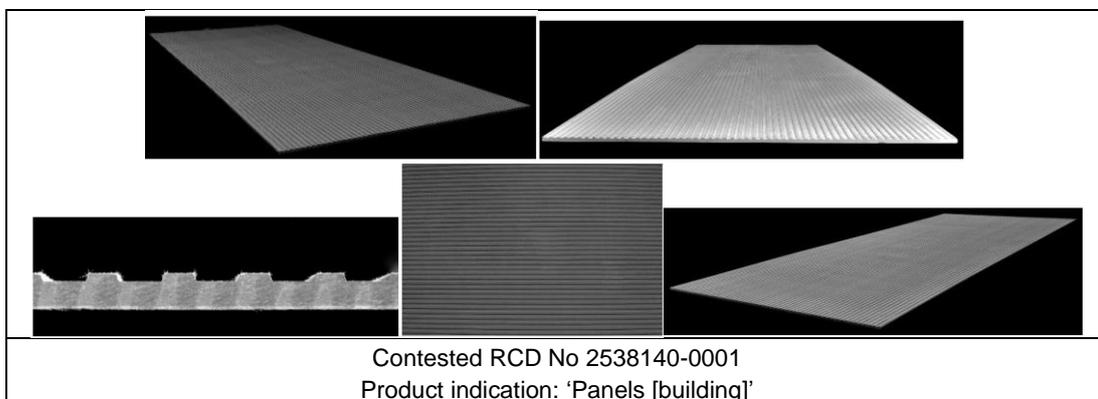
- 30 The contested design was registered with the product indication 'promotional item[s] for games'. However, the BoA based the assessment of individual character on a particular category of promotional items **as shown in the representation of the design** as registered, namely 'pogs', 'tazos' or 'rappers', for which it found the design freedom to be severely restricted. That finding was confirmed by the GC holding that (i) by virtue of Article 36(6) CDR, the product indication does not affect the scope of protection of the design as such and (ii) in order to ascertain the relevant product, the

⁽⁹⁾ This approach was not challenged before the Court, see 01/12/2021, T-662/20, Triple helicoid cheese, EU:T:2021:843).

⁽¹⁰⁾ 18/03/2010, T-9/07, Metal rappers, EU:T:2010:96, § 55-56.

registered product indication should be taken into account *'but also, where necessary, the design itself, in so far as it makes clear the nature of the product, its intended purpose or its function. Taking into account the design itself may enable the product to be placed within a broader category of goods indicated at the time of registration and, therefore, to determine the informed user and the degree of freedom of the designer in developing the design'*.

- 31 In **PANELS** ⁽¹¹⁾, the GC endorsed the BoA's finding that it was not possible to establish a narrower subcategory within the broad category of 'building panels' of the product indication and dismissed the design holder's claim that the relevant products should be characterised as '(fibrous) façade panels for buildings'.

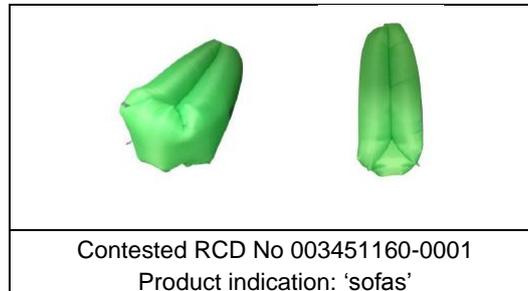


- 32 The **products actually marketed** to which the design at issue is applied or in which it is incorporated, can be taken into account **only for illustrative purposes** in order to determine the visible aspects of the design and the extent to which the products correspond to the design as registered. The representation of the contested design did not reveal the nature of the products, their intended purpose or their function. There was nothing in the design to indicate that it was intended to be applied solely to façade panels for buildings, to the exclusion of any other type of building panel. Where examination of the contested design itself does not reveal a product of a specific nature, intended purpose or function within the broad category indicated, a mere reference to the products actually put on the market is not sufficient to establish a narrower category ⁽¹²⁾.
- 33 These principles established by the Court are consistently applied by the BoA.

⁽¹¹⁾ 10/11/2021, T-193/20, Panels, EU:T:2021:782.

⁽¹²⁾ 10/11/2021, T-193/20, Panels, EU:T:2021:782, § 33, 38-43, 60.

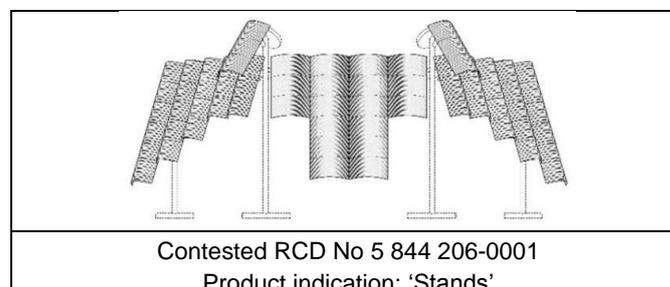
- 34 For instance, in **SOFAS**⁽¹³⁾, the design was registered with the product indication ‘sofas’, but its representation, as well the parties’ submissions, clearly showed that it concerned inflatable bags. The Board continued its assessment on this basis.



- 35 In **ARMCHAIRS**⁽¹⁴⁾, the design holder claimed that, in spite of the product indication ‘armchairs’, the design related to the specific category of ‘racing style gaming chairs’, recognisable by their standard ‘bucket’ shape. After considering the facts, arguments and evidence presented by the parties, the Board conceded that the designs related to ‘gaming chairs’, which is a narrower category. Nevertheless, it still considered that the design holder had failed to demonstrate the existence of an even narrower category of ‘racing style gaming chair’. The GC confirmed the BoA’s findings.



- 36 In **STANDS**⁽¹⁵⁾, the Board noted that the representation of the design showed more precisely ‘stands for percussion instruments comprising various panels’ and compared the prior design with that.



⁽¹³⁾ 09/09/2019, R 1585/2018-3, Sofas, § 21.

⁽¹⁴⁾ 15/03/2021, R 1275/2020-3, Armchairs, § 24 (confirmed, 18/05/2022, T-256/21, Armchairs, EU:T:2022:297).

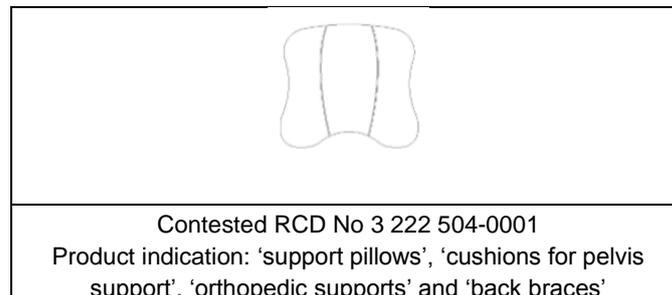
⁽¹⁵⁾ 18/05/2021, R 492/2020-3, Stands, § 18.

- 37 In **Welding torches (part of-)**⁽¹⁶⁾, the product indication read ‘Welding torches (part of-)’, but the contested design represented their particular element, namely an electrode which is incorporated in a welding torch. The identification of the product was not disputed between the parties. The Board considered the product accordingly to be an electrode which corresponded to the representation of the design.



(b) several product indications have been registered

- 38 In **SUPPORT PILLOWS**⁽¹⁷⁾, the GC confirmed the BoA’s practice in this scenario. The contested design was registered with several product indications, including ‘support pillows’ and ‘cushions for pelvis support’.



- 39 The design holder claimed that the relevant products were ‘inflatable healthy sitting pillows and cushions’. The Board only took ‘support cushions and pillows’ into account though as it found that the conflicting designs *‘bear the same product indication, namely “support pillows”, and that the design holder’s definition does not substantially change that indication’*⁽¹⁸⁾. The GC clarified that it was not bound by the declaration of the parties but had to take the relevant product indication into account as well as the design itself. It confirmed the Board’s decision that it could not be deduced from the product indication or from the representation of the contested design that the relevant products belonged to a specific category of products that was distinguishable from *‘support cushions and pillows’* in general, owing to their nature, intended purpose and/or function⁽¹⁹⁾.
- 40 In **BOTTLES WITH WOODEN FASTENERS**⁽²⁰⁾, where the product indication read ‘Bottles with wooden stoppers, Scent diffusers’ the Board noted that the representation

⁽¹⁶⁾ 16/07/2021, R 2843/2019-3, Welding torches (part of-).

⁽¹⁷⁾ 15/10/2020, T-818/19, Support pillows, EU:T:2020:486.

⁽¹⁸⁾ 10/09/2019, R 513/2018-3, Support pillows, § 17-19.

⁽¹⁹⁾ 15/10/2020, T-818/19, Support pillows, EU:T:2020:486, § 31-40.

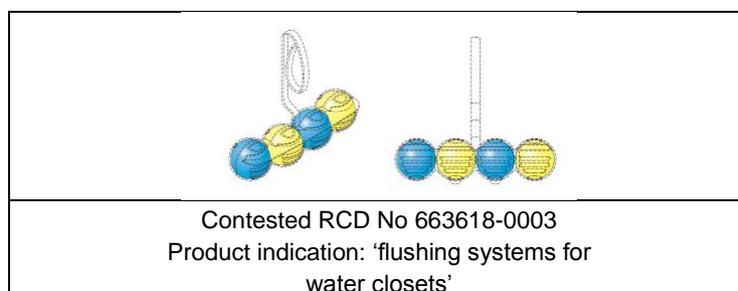
⁽²⁰⁾ 12/01/2021, R 590/2020-3, Flaschen mit Holzverschlüssen, § 19.

did not concern an individual wooden ball but a carafe closing with a wooden ball, which corresponded to the product indication ‘bottles with wooden closures’. It further considered that the representation did not show a scent dispenser and it could not be gathered from the representation how the carafe would perform that function.



(c) the representation of the design does not match the product indication

- 41 In **SPÜLUNGEN FÜR W.C. (WASSER-)**⁽²¹⁾, the product indication of the contested design read ‘(water) flushing systems for toilets’. The Board noted that it was obviously incorrect and that the contested design related to the appearance of a cleaning preparation for toilets in the form of so-called toilet rim blocks.



- 42 Likewise, in **TENTS**⁽²²⁾, the product indication of the contested design read ‘Tents’ but the representation clearly showed a sun sail pavilion. The Board, therefore, considered that the products at issue were ‘sun sail pavilions’.



⁽²¹⁾ 08/03/2017, R 2113/2015-3, Spülungen für W.C. (Wasser-), § 14.

⁽²²⁾ 20/01/2020, R 19/2018-3, Tents, § 20.

3.1.2.2 Identification of the product of the prior design

- 43 Where relevant, the principles set out with regard to the identification of the product of the contested design equally apply to the identification of the product of the **prior design**.
- 44 If the invalidity applicant is relying on a prior design disclosed by means **other than a Design Bulletin**, the identification of the product is, as a rule, based on the **reproduction** of the prior design provided by the invalidity applicant.

3.2 Importance of the identification of the product in invalidity proceedings

- 45 Case-law shows that the identification of the product is particularly relevant in the assessment of the **individual character** and **technical function** of a design.

3.2.1 Identification of the product and assessment of the individual character of a design

- 46 The relevance of the identification of the product in the assessment of individual character results from the definitions provided by case-law of the **informed user** (Article 6(1) CDR) and of the **degree of the designer's freedom** (Article 6(2) CDR).
- 47 In accordance with established case-law, the **informed user** is neither the manufacturer nor a seller of the products in which the design at issue is intended to be incorporated or to which it is intended to be applied. They are particularly observant and have some awareness of the designs relating to the product in question that have been disclosed on the filing date (or, where appropriate, the priority date) of the contested design⁽²³⁾. The status of '**user**' implies that the person concerned uses the product in which the design is to be incorporated, in accordance with the intended purpose of this product. The qualifier '**informed**' suggests that, '*without being a designer or 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*'⁽²⁴⁾.
- 48 The **degree of the designer's freedom** in developing its design is established, inter alia, by the constraints of the features imposed by the technical function of the product or an element thereof, or by statutory requirements applicable to the product⁽²⁵⁾.
- 49 It follows from these definitions that they necessarily require, as a preliminary step, the identification of the product. The GC refers to the identification of 'the sector of product' as the first step in the assessment of individual character⁽²⁶⁾.

⁽²³⁾ 18/03/2010, T-9/07, Metal rappers, EU:T:2010:96, § 62.

⁽²⁴⁾ 20/10/2011, C-281/10 P, Metal rappers, EU:C:2011:679, § 59.

⁽²⁵⁾ 18/03/2010, T-9/07, Metal rappers, EU:T:2010:96, § 67.

⁽²⁶⁾ 10/11/2021, T-193/20, Panels, EU:T:2021:782, § 22.

- 50 Previous case-law did not distinguish between the product of the contested design and the product of the prior design, referring instead to ‘the products at issue’⁽²⁷⁾. The GC has recently clarified that the point of reference for determining the informed user and the degree of design freedom is the **contested design**⁽²⁸⁾. Nevertheless, the identification of the product of the prior design may be relevant when assessing the overall impression produced on the informed user⁽²⁹⁾.
- 51 Case-law analysis shows that the Boards tend to rely on the product indication together with the representation of the design in general, in particular when the parties agree on the product concerned. A detailed reasoning is only provided when the relevant product is in dispute (i.e. when the design holder is trying to establish a **very narrow product category** in order to argue that the design freedom is limited and that the informed user is therefore attentive even to minor differences⁽³⁰⁾. In turn, the invalidity applicant may argue that the product category is **very broad** and only substantial differences will suffice to produce a different overall impression on the informed user.
- 52 In **LAUTSPRECHER**⁽³¹⁾, the design holder claimed the product category of ‘ultra light compact loudspeakers of public address systems’ and submitted various publications regarding public address systems and their technical specificities. The invalidity applicant relied on the product indication ‘loudspeakers’ of the contested design. Taking the evidence submitted by the design holder into account, the Board identified the relevant products as ‘loudspeakers of public address systems’ which formed an independent sub-category within the broad category of loudspeakers, but rejected the argument of a further, ‘ultra light compact’ sub-category.
- 53 Where the parties disagree on the product, the Office is restricted in its assessment to the arguments and evidence provided by the parties, see Article 63(1) CDR. It is for them to establish that the product belongs to a more specific or a broader product category by means of, for instance, documents showing that the product concerned (as depicted in the design representation) differs in nature, intended purpose, or function, from the broader category that corresponds to the product indication⁽³²⁾.
- 54 An analysis of the case-law also shows a difference in terminology. Some judgments and BoA decisions refer to ‘the product covered by the design at issue’ and others to ‘the sector concerned’. According to Recital 14 CDR, for the assessment of individual character, ‘**the nature of the product to which the design is applied or in which it is incorporated, and in particular the industrial sector to which it belongs and the degree of freedom of the designer in developing the design**’ should be taken into account. It appears that, in practice, the terms are used as synonyms without any clear distinction. For instance, in **PANELS**⁽³³⁾, the GC held that the representation of the contested

⁽²⁷⁾ 18/03/2010, T-9/07, Metal rappers, EU:T:2010:96, § 62.

⁽²⁸⁾ 10/11/2021, T-193/20, Panels, EU:T:2021:782, § 23-24.

⁽²⁹⁾ This report does not cover the scenario where the product of the prior design is clearly distinct from that of the contested design.

⁽³⁰⁾ For example 15/03/2021, R 1275/2020-3, Armchairs, § 9 (confirmed, 18/05/2022, T-256/21, Armchairs, EU:T:2022:297); 06/06/2019, T-209/18, Krafffahrzeuge / Krafffahrzeuge, EU:T:2019:377; 10/11/2021, T-193/20, Panels, EU:T:2021:782.

⁽³¹⁾ 16/07/2021, R 1386/2020-3, Lautsprecher, § 23-26.

⁽³²⁾ 15/03/2021, R 1275/2020-3, Armchairs (confirmed, 18/05/2022, T-256/21, Armchairs, EU:T:2022:297, § 49).

⁽³³⁾ 10/11/2021, T-193/20, Panels, EU:T:2021:782, § 35-45.

design did not reveal that the nature of the product was that of façade building panels and concluded that the sector concerned was simply ‘building panels’.

55 Case-law analysis also reveals that the synonymous use of ‘nature of the product’, ‘product category’, and ‘industrial sector’ by the GC does not affect the result of the assessment of individual character. However, the notion of a ‘sector’ seems to be broader than that of the ‘product category’, which creates a certain ambiguity as to the products that are to be taken into account.

56 For reasons of consistency, and given that the word ‘sector’ is also used in the context of disclosure⁽³⁴⁾, it appears preferable to only use the term ‘product category’ when identifying the relevant product for the purposes set out in this report.

3.2.2 Identification of the product and assessment of the technical function

57 When assessing the validity of a registered design in respect of Article 8(1) CDR, as a first step, it is necessary to determine the product to which that design is intended to be applied or in which it is intended to be incorporated, including its technical function⁽³⁵⁾. For that purpose, the relevant product indication as registered should be taken into account. Nevertheless, it may also be necessary to consider the representation of the design insofar as it clarifies the nature, intended purpose, or function of the product concerned, as well as any further material that may be relevant for that purpose⁽³⁶⁾.

58 However, the product indication as such has no bearing on the assessment of the technical function of a design. Therefore, when the product indication does not correspond to the representation of the design itself, in principle, this should not preclude the application of Article 8(1) CDR.

59 In some cases, the product indication contained in the registration of the contested design may not be sufficiently specific and will not allow to identify the product concerned or its function. Therefore, in those cases the design itself and the information on the use of the product are to be taken into consideration.

60 For instance, in **FLUID DISTRIBUTION EQUIPMENT**⁽³⁷⁾, the product indication of the contested design was ‘Fluid distribution equipment’. However, from the representation of the design and the information contained in the patent and promotional documentation provided by the invalidity applicant, it was possible to conclude that the product in question was, actually, a toy that had a purpose of filling with water a number of balloons at the same time so that they could be used for water fights.

61 In other cases, the product indication is sufficiently precise and specific in order to be able to identify, on the basis of the description provided therein, the product concerned and its function.

⁽³⁴⁾ See the reference in Article 7(1) CDR to ‘the circles specialised in the sector concerned’.

⁽³⁵⁾ 18/11/2020, T-574/19, Fluid distribution equipment, EU:T:2020:543, § 23.

⁽³⁶⁾ 19/10/2022, T-231/21, Posts, EU:T:2022:649, § 28-29; see also Case-law Research Report – Proof of technical function of a design under Article 8(1) CDR (January 2022).

⁽³⁷⁾ 18/11/2020, T-574/19, Fluid distribution equipment, EU:T:2020:543.

62 For instance, in **BUILDING BLOCKS FROM A TOY BUILDING SET** (or Lego case)⁽³⁸⁾, the product indication was ‘building block from a toy building set’. Thus, it was clear from the wording used that, first, the product in question was part of a larger set of bricks and, second, that it was intended to be assembled with other products of the set in order to build toys.

63 In any event, the assessment of the technical function of the product under Article 8(1) CDR must be the result of the assessment of all the objective circumstances relevant to each individual case⁽³⁹⁾.

4 Conclusions

64 An analysis of the case-law shows that BoA decision-making practice is consistent with the principles set out in recent judgments⁽⁴⁰⁾, that is, the relevant product category is identified on the basis of the product indication read together with the representation of the design.

65 The following conclusions can be drawn to maintain consistency.

- (i) In examination proceedings, if the representation of the design does not enable the identification of a specific product, the **product indication** may serve to define the subject matter of the protection sought.
- (ii) In invalidity proceedings, the identification of the product of the contested design is necessary for the assessment of individual character or technical function. The relevant product should always be identified **as a first step** before determining the informed user and the degree of the designer’s freedom, or assessing the technical function of the product.
- (iii) When identifying the product, it is preferable to refer to the **relevant product category** and not to the nature of the product or industrial sector concerned.
- (iv) Any **discrepancy** between the product indication(s) and the representation of the design must be specifically addressed, and the relevant product identified, according to the following principles:
 - if the product indication is broader than the product shown in the representation, the relevant product category is to be established based on the representation of the design;
 - if several product indications have been registered, only the product indication(s) that match(es) the representation of the design can be taken into account;

⁽³⁸⁾ 24/03/2021, T-515/19, Building blocks from a toy building set, EU:T:2021:155.

⁽³⁹⁾ 08/03/2018, C-395/16, DOCERAM, EU:C:2018:172, § 36.

⁽⁴⁰⁾ 15/10/2020, T-818/19, Support pillows, EU:T:2020:486; 10/11/2021, T-193/20, Panels, EU:T:2021:782; 18/05/2022, T-256/21, Armchairs, EU:T:2022:297.

- if the representation of the design does not match the product indication, the representation of the design prevails.
- (v) The party that claims a narrower or broader product category than that contained in the design application or registration has to provide **evidence** to demonstrate the specific nature, intended purpose or function of the product category claimed.

Annex List of cases reviewed

Court of Justice and General Court

08/03/2018, C-395/16, DOCERAM, EU:C:2018:172
20/10/2011, C-281/10 P, Metal rappers, EU:C:2011:679
06/03/2014, C-337/12 P – C-340/12 P, Surface covered with circles, EU:C:2014:129
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29/04/2020, T-73/19, Wood splitting tools, EU:T:2020:157
15/10/2020, T-818/19, Support pillows, EU:T:2020:486
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Boards of Appeal

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17/11/2015, R 1842/2015-3, Becher [Mast-Jägermeister SE]
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21/08/2020, R 1925/2019-3, Cheeses
12/01/2021, R 590/2020-3, Flaschen mit Holzverschlüssen
15/03/2021, R 1275/2020-3, Armchairs
18/05/2021, R 492/2020-3, Stands
05/07/2021, R 2400/2018-3, Prodotti di verdura pronti
16/07/2021, R 1386/2020-3, Lautsprecher
16/07/2021, R 2843/2019-3, Welding torches (part of -)
23/08/2021, R 299/2021-3, Staubsaugerbeutel [vacuum cleaner bags]
06/09/2021, R 2202/2020-3, Packaging for foodstuffs
03/10/2021, R 45/2022-3, Carta da origami