

02/10/2024

Comments of the GRUR Committee for Design Law on the Request for a Preliminary Ruling in Case C-211/24 – *LEGO A/S v. Pozitív Energiaforrás Kft**

The German Association for Intellectual Property Law (hereinafter the ‘GRUR Association’), established in 1891, is a recognized non-profit scientific association of members of all professional groups and organizations active in the field of intellectual property law; these are, in particular, academics, judges, civil servants, lawyers, patent attorneys and representatives of associations and companies. The GRUR Committee for Design Law (hereinafter the ‘GRUR Committee’) has been established to determine the positions of the GRUR Association and is made up of design law experts from academia, the judiciary, the legal profession and industry. No member of the GRUR Association or the GRUR Committee who participated in or was involved in the proceedings preceding the request for a preliminary ruling participated in the present comments. The same is true for any member who is a party or participant in the proceedings. Participation in comments is reserved exclusively to members of the GRUR Association.

A. EXECUTIVE SUMMARY

- [1] The GRUR Committee has analysed the request made by the Fővárosi Törvényszék, Hungary (hereinafter the ‘referring court’), for a preliminary ruling by the Court of Justice of the European Union (CJEU) on a question on the

* Authors: Dr. Henning Hartwig and Oliver Nilgen (both attorneys-at-law, Munich).

interpretation of provisions of Council Regulation (EC) No 6/2002 of 12 December 2001 on Community designs (hereinafter ‘CDR’), and specifically provisions in Arts. 10 and 89 CDR.

- [2] Overall, the GRUR Committee considers that the referring court has misinterpreted established requirements and standards for finding design infringement under EU law and practice.
- [3] In addition, the questions referred to the CJEU have already been answered by the CJEU, at least to a large extent.
- [4] It appears to the GRUR Committee that the referring court failed to take into account pertinent case law but instead proceeded from a ‘clean slate’. For example, the referring court, in the first question, submits that a design may be ‘protected’ under Art. 8(3) CDR whereas Art. 8(3) CDR is merely a corrective to Art. 8(2) CDR, which serves as an obstacle to protection.
- [5] The first question seeks an interpretation of Art. 10(1) CDR and specifically asks whether, in judging the individual character of a design qualifying for protection under Art. 8(3) CDR, the ‘informed user’ must be a person with technical expertise regarding the products at issue.
- [6] The GRUR Committee considers that the ‘informed user’ must be determined according to established case law and that there is no reason to establish different criteria when the infringement of a design protected under Art. 8(3) CDR is at issue.
- [7] Therefore, the first question raised by the referring court should be answered as follows:

In a case in which the holder relies on the exception under Art. 8(3) CDR, when determining the scope of protection under Art. 10(1) CDR, the informed user does not possess, in respect of the function of the design and that of the product, the technical knowledge to be expected of a sectoral expert. Furthermore, the informed user does not compare the claimed design and the accused product by carrying out a thorough, technical, and methodical examination. Finally, the informed user’s overall impression produced by the claimed design and the accused product, within the meaning of Art. 10(1) CDR, is not primarily formed of a technical opinion.

- [8] The second question seeks an interpretation of Art. 89(1) CDR. In the opinion of the referring court a prohibition of use in the present case could be disproportionate in view of the fact that the infringing building blocks in the defendant's sets constitute only a small part of the total elements of these sets.
- [9] The GRUR Committee is of the opinion that, in view of the case law of the CJEU, a refusal to award injunctive relief should be considered only if the likelihood of a continuing infringement is essentially non-existent, such as if the defendant issues a cease-and desist declaration subject to a penalty, but that there is no basis for accepting continuing infringements under a *de minimis* rule when, as in the present case, the infringing situation could easily be avoided by removing the infringing elements from the defendant's sets.
- [10] In conclusion, the second question raised by the referring court should be answered as follows:

In an action for infringement or for threatened infringement, where a Community design court finds that the defendant has infringed or threatened to infringe a design, with the infringing products being part of sets of products including other non-infringing products and amounting to a small number of pieces of products, the number of which being small in relation to the total number of products, the court shall order the measures provided under Art. 89(1) CDR, including ordering the prohibition of continuing the infringing activity, unless there are 'special reasons' for not doing so, which it is for the Community design court to assess, having regard to the circumstances of the case before it and taking into consideration in particular the principles of proportionality and effectiveness. The Community design court may limit the corrective measures under Art. 89(1) CDR to the infringing pieces, such as by ordering their removal, without limiting the distribution of the products not including infringing pieces.

B. FACTS OF THE CASE

- [11] The Hungarian company Pozitív Energiaforrás Kft. (the defendant) sought to import into Hungary toy building sets consisting of prefabricated plastic elements under the trademark 'Qman'.
- [12] The toy building sets contained, among other components, one or more building blocks as shown in the following illustration:



[13] LEGO A/S (the claimant) is the holder of the following two Community design registrations ('RCD') for 'building blocks from a toy building set' in Locarno class 21.01:

- RCD No. 1950981-0001, filed and registered on November 22, 2011, and published on November 25, 2011



- RCD No. 2137190-0002, filed and registered on November 16, 2012, and published on November 27, 2012



- [14] The Hungarian National Tax and Customs Administration ordered the defendant's product to be placed under customs supervision and instituted administrative penalty proceedings against the defendant based on alleged design infringement.
- [15] The Kúria (Supreme Court, Hungary) as final instance ordered that the defendant's products be detained.
- [16] The claimant brought an infringement action against the defendant asking the referring court to declare that RCD No. 1950981-0001 and RCD No. 2137190-0002 have been infringed.
- [17] It seems that no counterclaim for a declaration of invalidity of RCD No. 1950981-0001 and RCD No. 2137190-0002 has been brought by the defendant.

C. QUESTIONS REFERRED FOR A PRELIMINARY RULING

- [18] The referring court referred the case to the CJEU posing two questions, the first question being divided into three sub-questions.
- [19] The first question is as follows:

In a case such as that in the main proceedings, in which the holder relies on a design protected under Art. 8(3) CDR in connection with one or more building blocks from a toy building set made by the defendant which perform the same assembly function as the blocks in the applicant's design, is it compatible with EU law for the courts, when determining the scope of protection, within the meaning of Art. 10 CDR, of the applicant's design,

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

- to consider an informed user to be one who compares the applicant's design and the defendant's product by carrying out a thorough, technical and methodical examination, and
- to assume that the informed user's overall impression of the design and of the product is formed primarily of a technical opinion?

[20] The second question is as follows:

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

D. THE APPLICABLE LAW

[21] Art. 4(1) CDR provides that a design shall be protected by a Community design to the extent that it is new and has individual character.

[22] Art. 8(1) CDR provides that a Community design shall not subsist in features of appearance of a product which are solely dictated by its technical function.

[23] According to Art. 8(2) CDR, a Community design shall not subsist in features of appearance of a product which must necessarily be reproduced in their exact form and dimensions in order to permit the product in which the design is incorporated or to which it is applied to be mechanically connected to or placed in, around or against another product so that either product may perform its function.

[24] Art. 8(3) CDR provides that notwithstanding paragraph 2, a Community design shall under the conditions set out in Arts. 5 and 6 subsist in a design serving the purpose of allowing the multiple assembly or connection of mutually interchangeable products within a modular system.

- [25] Art. 10(1) CDR provides that the scope of the protection conferred by a Community design shall include any design which does not produce on the informed user a different overall impression.
- [26] Art. 10(2) CDR provides that in assessing the scope of protection, the degree of freedom of the designer in developing his design shall be taken into consideration.
- [27] Art. 89(1) CDR provides that where in an action for infringement or for threatened infringement a Community design court finds that the defendant has infringed or threatened to infringe a Community design, it shall, unless there are special reasons for not doing so, order various measures, in particular an order prohibiting the defendant from proceeding with the acts which have infringed or would infringe the Community design and/or an order to seize the infringing products.

E. THE REFERRING COURT'S OPINION

- [28] As can be taken from the English language Summary of the reference, the referring court explicitly referred to US utility patent 3,005,282, with an application date of July 28, 1958 (Summary, para. 7).
- [29] The referring court concluded that the technical function as described in the patent, namely 'to provide improved coupling means for clamping such building bricks together in any desired relative position thus providing for a vast variety of combinations of the bricks for making toy structures of many different kinds and shapes' conferred technical protection on modular toy building sets the components of which also include the claimant's Community designs under examination. According to the referring court, the patent's 'technical objective is achieved through the appropriate (functional) design of the external appearance (shape) of the product' (Summary, para. 7).
- [30] First, it is true that Art. 8(1) CDR aims at delimiting the scope of protection of a design from that of a patent by excluding features of the appearance of a product solely dictated by its technical function. According to the CJEU, appearance is the decisive factor for a design (C-395/16, para. 25).
- [31] Furthermore, provisions limiting the rights granted to the holder of a design must be interpreted strictly, without, however, such an interpretation undermining the effectiveness of the limitation thereby established and disregarding its purpose (Joined Cases C-24/16 and C-25/16, para. 74). Therefore, given that

Art. 8(1) CDR excludes designs from protection, that provision must be interpreted narrowly.

[32] A further exclusion from design protection is provided under Art. 8(2) CDR. The so called ‘must-fit’ provision excludes features of a design from protection if they constitute ‘features of interconnection’ (T-537/22, para. 29).

[33] Art. 8(3) CDR is an exception to the ‘must-fit’ clause applying to modular systems. This provision allows a product to be covered by design protection if it serves the purpose of allowing the multiple assembly or connection of mutually interchangeable products within a modular system.

[34] None of these requirements is examined *ex officio* during the application proceedings. Rather, it is up to any third party to bring a request for a declaration of invalidity before the EUIPO or by way of a counterclaim in an infringement action and to demonstrate that the requirements for the exclusion of a design from protection according to Art. 8(1) or (2) CDR are met.

[35] In contrast, the burden of proof in such a case lies with the design holder to prove that, under Art. 8(3) CDR, the design serves the purpose of allowing the multiple assembly or connection of mutually interchangeable products within a modular system.

[36] With respect to the relation between Art. 8(3) CDR on the one hand and Art. 8(1) and (2) CDR on the other, the General Court decided (T-515/19, para. 53) that

(...) in order to determine whether Art. 8(3) CDR was applicable to the contested design, it is necessary to assess whether that design, in the light of its features, is covered by other provisions of that art., in order, if necessary, to examine whether those other provisions preclude the application of Art. 8(3) CDR.

[37] Furthermore, the General Court decided (T-515/19, para. 80) that

(...) in order to preserve the effectiveness of Art. 8(3) CDR, where EUIPO, when examining an application for a declaration of invalidity based on Art. 25(1) lit b CDR, read in conjunction with Art. 8(1) CDR, finds that the features of appearance of the product concerned by the contested design fall within both Art. 8(1) and Art. 8(2) CDR, and where the proprietor of the contested design relies on the benefit of Art. 8(3) CDR, it must examine whether those features are capable of benefiting from the protection of modular systems for the purposes

of that latter provision, including when the applicant for a declaration of invalidity did not rely on Art. 8(2) CDR.

[38] These findings have been confirmed (T-537/22, paras. 31 *et seq.*).

[39] Interestingly, the referring court's findings on Art. 8(1) and (3) CDR (Summary, para. 6 *et seq.*) are not reflected in the wording and structure of the first question.

F. THE FIRST QUESTION REFERRED FOR A PRELIMINARY RULING

[40] Firstly, the referring court seeks guidance as to whether in a case

(...) in which the holder relies on a design protected under Art. 8(3) CDR in connection with one or more building blocks from a toy building set made by the defendant which perform the same assembly function as the blocks in the applicant's design, is it compatible with EU law for the courts, when determining the scope of protection, within the meaning of Art. 10 CDR, of the applicant's design, to take as their point of reference an informed user who, in respect of the function of the design and that of the product, possesses the technical knowledge to be expected of a sectoral expert?

[41] The referring court is of the opinion that the degree of creative freedom must be examined from the point of view of what other alternative shapes specifically make it possible to attain the assembly objective that is pursued by the claimant's designs in the modular system (Summary, para. 13).

[42] According to the CJEU (C-281/10 P, para. 53), the concept of the informed user

(...) must be understood as lying somewhere between that of the average consumer, applicable in trademark matters, who need not have any specific knowledge and who, as a rule, makes no direct comparison between the trademarks in conflict, and the sectoral expert, who is an expert with detailed technical expertise. Thus, the concept of the informed user may be understood as referring, not to a user of average attention, but to a particularly observant one, either because of his personal experience or his extensive knowledge of the sector in question.

[43] The status of 'user' implies that the person concerned is neither a manufacturer nor a seller of the products in which the designs at issue are intended to be incorporated or to which they are intended to be applied but a person who uses

these products in accordance with their purpose (C-281/10 P, para. 26; T-9/07, para. 62).

[44] The qualifier ‘informed’ means that, without being a designer or technical expert, the user is particularly observant and is aware of the existing design corpus, *i.e.*, the designs available on the market prior to the filing or priority date of the contested design (C-281/10 P, para. 59).

[45] In a case in which the holder relies on the exception under Art. 8(3) CDR, in the determination of the scope of protection within the meaning of Art. 10(1) CDR, the informed user does not possess, in respect of the function of the design and that of the product, the technical knowledge to be expected of a sectoral expert (see C-281/10 P, para. 53). In particular, the informed user is not a designer or a technical expert (see C-281/10 P, para. 59; T-652/21, para. 87; T-779/16, para. 19).

[46] Consequently, the informed user is unable to distinguish, beyond the experience gained by using the product concerned, the aspects of the appearance of the product which are dictated by the product’s technical function from those which are arbitrary (see T-153/08, para. 48; T-74/18, para. 69).

[47] Secondly, the referring court seeks guidance as to whether in a case

(...) in which the holder relies on a design protected under Art. 8(3) CDR in connection with one or more building blocks from a toy building set made by the defendant which perform the same assembly function as the blocks in the applicant’s design, is it compatible with EU law for the courts, when determining the scope of protection, within the meaning of Art. 10 CDR, of the applicant’s design, to consider an informed user to be one who compares the applicant’s design and the defendant’s product by carrying out a thorough, technical and methodical examination?

[48] The referring court is of the opinion that such assessment requires a specialist design or technical knowledge and is to be reached by means of an analytical and detailed procedure, rather than being solely based on the rough overall impression of a user who is informed on the subject but does not possess such knowledge (Summary, para. 17).

[49] According to the CJEU, the concept of the informed user refers not to a user of average attention but to a particularly observant one, either because of his personal experience or his extensive knowledge of the sector in question (C-281/10 P, para. 53).

- [50] Consequently, the informed user's degree of attention is, in principle, relatively high as a result of their interest in the product concerned (T-193/20, paras. 15 and 49). However, the concept of 'informed user' does not refer to a professional quality linked to the product concerned (T-654/22, para. 27).
- [51] It follows that there is no need to determine the degree of the informed user's attention on a case-by-case basis. As the informed user's degree of attention is, by definition, determined by their experience and interest in using the products concerned and their knowledge of the relevant product category, it does not vary according to the products to which the design under examination relates.
- [52] In fact, according to established case law, the 'informed user' relates not to a real person but to a 'hypothetical' person. It also follows from the qualifier 'informed' that a distinction of whether a product is used by end consumers and/or professionals cannot result in a difference in the overall impression produced by a specific design on that informed user (T-337/12, paras. 30, 43-54; T-367/17, para. 32). Even where case law identified a specific category of persons involved as informed user, this did not affect the assessment of the overall impression of the design on this specific user (T-9/07, paras. 64-65).
- [53] Rather, the informed user is anyone who habitually purchases the product at issue, puts it to its intended use, and possesses a certain degree of knowledge with respect to the features that this design normally includes (T-339/12, para. 13; T-357/12, para. 14).
- [54] Consequently, the informed user within the meaning of Art. 10(1) CDR does not compare the claimed design and the accused product by carrying out a thorough technical and methodical examination. In fact, the informed user is not an expert or specialist capable of observing in detail the minimal differences that may exist between the designs in conflict, even though they know the various designs which exist in the sector concerned, possess a certain degree of knowledge with regard to the features which those designs normally include, and as a result of their interest in the products concerned show a relatively high degree of attention when using them (see C-281/10 P, para. 59; T-193/20, paras. 15 and 49).
- [55] Finally, the referring court seeks guidance as to whether in a case
(...) in which the holder relies on a design protected under Art. 8(3) CDR in connection with one or more building blocks from a toy building set made by the defendant which perform the same assembly function as the blocks in the applicant's design, is it compatible with EU law for the courts, when determining the scope of protection,

within the meaning of Art. 10 CDR, of the applicant's design, to assume that the informed user's overall impression of the design and of the product is formed primarily of a technical opinion?

- [56] More particularly, the referring court is of the opinion that the visual impression created by a design registered on the basis of Art. 8(3) CDR is of entirely secondary importance to the functional characteristics of that design, which is to say that the similarities and differences between such designs are capable of being revealed not on a visual basis or by methods that describe a visual impression, but by means of technical analysis and argument (Summary, para. 19).
- [57] To start with, as already discussed above (para. 27), Art. 8(3) CDR is an 'exception to the exception' of Art. 8(2) CDR. Therefore, Art. 8(3) CDR is neither a basis for a registration of the design nor is it subject to examination during the application proceedings. Rather, these provisions only serve as a ground for invalidity according to Art. 25(1)(b) CDR.
- [58] Pursuant to Art. 85(1) CDR, in proceedings in respect of an infringement action or an action for threatened infringement of a registered Community design, the Community design court shall treat the Community design as valid. Validity may be challenged only with a counterclaim for a declaration of invalidity. In the present proceedings, however, it follows from the Summary that the defendant did not bring such a counterclaim. Consequently, the referring court must treat RCD No. 1950981-0001 and RCD No. 2137190-0002 as valid and is not allowed to discuss issues of validity, such as lack of novelty, lack of individual character or presence of features of appearance solely dictated by technical function.
- [59] Apart from that, following established case law, the informed user is not a 'technician' with special knowledge but a user who is a little more attentive and interested than the average consumer, *i.e.*, a user of whose perceptions the General Court is able to form an adequate picture (see Opinion of Advocate General Mengozzi, C-281/10 P, para. 74).
- [60] The overall impression of a design must be assessed from the perspective of an informed user who, although aware of various designs in the commercial sector in question and having particular knowledge enabling them to pay a relatively high level of attention, is neither a technical expert nor a design specialist (T-209/18, para. 95; T-210/18, para. 115).
- [61] In this context, no distinction must be made with respect to the notion of the informed user between Art. 6(1) CDR and Art. 10(1) CDR.

- [62] Likewise, in the present situation, no distinction must be made between a scenario in which the holder relies on the exception under Art. 8(3) CDR and any other situation; rather, the concept of the informed user applies independently of the specific kind of design or product involved.
- [63] In conclusion, the GRUR Committee is of the opinion that the first question raised by the referring court should be answered as follows:

In a case in which the holder relies on the exception under Art. 8(3) CDR, when determining the scope of protection under Art. 10(1) CDR, the informed user does not possess, in respect of the function of the design and that of the product, the technical knowledge to be expected of a sectoral expert. Furthermore, the informed user does not compare the claimed design and the accused product by carrying out a thorough, technical, and methodical examination. Finally, the informed user's overall impression produced by the claimed design and the accused product, within the meaning of Art. 10(1) CDR, is not primarily formed of a technical opinion.

G. THE SECOND QUESTION REFERRED FOR A PRELIMINARY RULING

- [64] Under the condition that the first question is answered in the affirmative, the referring court is seeking guidance as to the scope of discretion when ordering measures following the finding of infringement.
- [65] However, as a preliminary remark, in the GRUR Committee's opinion the second question is independent of the first question and its sub-questions and does not require affirmation of the first question and sub-questions. In fact, the first question and its sub-questions do not address the issue of a finding of infringement or non-infringement (which would also require findings on the existence and quality of the prior art) but is limited to the concept of the informed user. The proposed answers, abstract by nature, may impact, *i.e.*, complicate or facilitate the finding of infringement. However, this factual outcome is not covered by the first question and its sub-questions.
- [66] The GRUR Committee considers that the interpretation given by the CJEU to Art. 98(1) Council Regulation (EC) No 40/94 of 20 December 1993 on the Community trademark (hereinafter 'CTMR'), which is basically identical to Art. 89(1) CDR, also applies to the interpretation of the latter provision.
- [67] According to the CJEU, Art. 98(1) CTMR is to be interpreted as meaning that the mere fact that the risk of further infringement or threatened infringement of

- a Community trademark is **not obvious** or is **otherwise merely limited** does not constitute a special reason for a Community trademark court not to issue an order prohibiting the defendant from proceeding with those acts (C-316/05, para. 36).
- [68] Likewise, the fact that national law includes a **general prohibition** of the infringement of EU trademarks and provides for the **possibility of penalising** further infringements or threatened infringements, whether intentional or due to gross negligence, does not constitute a special reason for a court not to issue an order prohibiting the defendant from proceeding with those acts (C-316/05, para. 45).
- [69] In addition, a court which has issued an order prohibiting the defendant from proceeding with an infringement or threatened infringement of an EU trademark is required to take such measures in accordance with its national law as are **aimed at ensuring that the prohibition is complied with**, even if those measures could not, under that law, be taken in the case of a corresponding infringement of a national trademark (C-316/05, para. 62).
- [70] Overall, the concept of ‘special reasons’ must be **interpreted strictly** (C-316/05, para. 30). In fact, the notion ‘*special reasons*’ relates only to exceptional situations in which, in the light of the specific features of the conduct alleged against the third party, in particular the fact that it is **impossible for him to proceed with the acts** alleged against him which have infringed or threaten to infringe the EU trademark, a court is not required to issue an order prohibiting a third party from proceeding with such acts although an application to that end has been made by the proprietor of the mark (C-280/15, para. 33).
- [71] In conclusion, a prohibition need not be issued if further infringements are **no longer possible** (C-316/05, para. 35). That is the case, for example, where the IP right has been revoked (C-316/05, para. 35), where it has not been renewed, where the infringer no longer exists, where the infringement was possible only in the context of a one-off event or where cumulative circumstances preclude further infringements. For example, in Germany an injunction will not be granted when the defendant has issued a cease-and-desist declaration subject to a penalty clause.
- [72] The GRUR Committee further considers that the general principles applying to the enforcement of intellectual property rights expressed in the Enforcement Directive (Directive 2004/48/EC) also apply to the measures to be taken under Art. 89(1) CDR, including the measure of injunctive relief. Thus, Art. 3 Enforcement Directive provides that measures in the case of an infringement shall

be fair, equitable, not unnecessarily complicated or costly, effective, proportionate, and dissuasive and shall be applied in such a manner as to avoid the creation of barriers to legitimate trade and to provide for safeguards against their abuse.

- [73] Furthermore, Art. 10 Enforcement Directive provides that without prejudice to any damages due to the right holder by reason of the infringement, and without compensation of any sort, Member States shall ensure that the competent judicial authorities may order, at the request of the applicant, that appropriate measures be taken with regard to goods that they have found to be infringing an intellectual property right and, in appropriate cases, with regard to materials and implements principally used in the creation or manufacture of those goods.
- [74] According to Art. 10(3) Enforcement Directive, in considering a request for corrective measures, the need for proportionality between the seriousness of the infringement and the remedies ordered as well as the interests of third parties shall be taken into account.
- [75] Art. 10 Enforcement Directive includes recall from the channels of commerce, definitive removal from the channels of commerce or destruction as available corrective measures.
- [76] In order to prevent infringers mixing non-infringing and infringing products and benefiting from such measure even if the number of infringing products is small, the deciding body may ensure that the products should not be sold and should be removed from the distribution channels, but – for instance – should not be destroyed.
- [77] In that sense, existing law and practice already provide sufficient discretion in the weighing of proportionality between the seriousness of the infringement and the remedies. For example, if the removal of infringing objects and separating them from non-infringing objects is possible, the infringement court may limit the remedies to the infringing objects, leaving the remaining product available for further marketing.
- [78] Consequently, where the infringing products are a part of sets or packages of products containing other products that do not infringe, the prohibition and destruction of the non-infringing products together with the infringing products under Art. 10(1)(c) Enforcement Directive seem disproportionate where the non-infringing products can easily be separated from the infringing products.
- [79] In conclusion, the GRUR Committee is of the opinion that the second question raised by the referring court should be answered as follows:

In an action for infringement or for threatened infringement, where a Community design court finds that the defendant has infringed or threatened to infringe a design, with the infringing products being part of sets of products including other non-infringing products and amounting to a small number of pieces of products, the number of which being small in relation to the total number of products, the court shall order the measures provided under Art. 89(1) CDR, including ordering the prohibition of continuing the infringing activity, unless there are ‘special reasons’ for not doing so, which it is for the Community design court to assess, having regard to the circumstances of the case before it and taking into consideration in particular the principles of proportionality and effectiveness. The Community design court may limit the corrective measures under Art. 89(1) CDR to the infringing pieces, such as by ordering their removal, without limiting the distribution of the products not including infringing pieces.