



Reports of Cases

ORDER OF THE COURT (Chamber determining whether appeals may proceed)

24 October 2019*

(Appeal — Community design — Determination as to whether appeals should be allowed to proceed — Article 170b of the Rules of Procedure of the Court — Request failing to demonstrate a significant issue with respect to the unity, consistency or development of EU law — Appeal not allowed to proceed)

In Case C-613/19 P,

APPEAL under Article 56 of the Statute of the Court of Justice of the European Union, brought on 14 August 2019,

Dr. Ing. h.c. F. Porsche AG, established in Stuttgart (Germany), represented by C. Klawitter, Rechtsanwalt,

appellant,

the other parties to the proceedings being:

European Union Intellectual Property Office (EUIPO),

defendant at first instance,

Autec AG, established in Nuremberg (Germany),

intervener at first instance,

THE COURT (Chamber determining whether appeals may proceed),

composed of R. Silva de Lapuerta, Vice-President of the Court, J. Malenovský (Rapporteur) and F. Biltgen, Judges,

Registrar: A. Calot Escobar,

having regard to the proposal from the Judge-Rapporteur and after hearing the Advocate General, M. Szpunar,

makes the following

* Language of the case: German.

Order

1 By its appeal, Dr. Ing. h.c. F. Porsche AG asks the Court to set aside the judgment of the General Court of the European Union of 6 June 2019, *Porsche v EUIPO — Autec (Motor vehicles)* (T-209/18, EU:T:2019:377; ‘the judgment under appeal’), whereby the General Court dismissed its action seeking annulment of the decision of the Third Board of Appeal of the European Union Intellectual Property Office (EUIPO) of 19 January 2018 (Case R 945/2016-3), in relation to invalidity proceedings between Autec AG and Dr. Ing. h.c. F. Porsche AG.

Whether the appeal should be allowed to proceed

- 2 Pursuant to the first paragraph of Article 58a of the Statute of the Court of Justice of the European Union, an appeal brought against a decision of the General Court concerning a decision of an independent Board of Appeal of EUIPO is not to proceed unless the Court first decides that it should be allowed to do so.
- 3 In accordance with the third paragraph of Article 58a of that statute, an appeal is to be allowed to proceed, wholly or in part, in accordance with the detailed rules set out in the Rules of Procedure of the Court, where it raises an issue that is significant with respect to the unity, consistency or development of EU law.
- 4 Under Article 170a(1) of the Rules of Procedure, in the situations referred to in the first paragraph of Article 58a of that statute, the appellant is to annex to the appeal a request that the appeal be allowed to proceed, setting out the issue raised by the appeal that is significant with respect to the unity, consistency or development of European Union law and containing all the information necessary to enable the Court of Justice to rule on that request.
- 5 In accordance with Article 170b(3) of those rules, the Court is to rule on the request that the appeal be allowed to proceed in the form of a reasoned order.
- 6 In the present case, in support of its request that the appeal be allowed to proceed, the appellant asserts, by putting forward six arguments, that that appeal raises issues that are significant with respect to the unity, consistency or development of EU law.
- 7 By its first argument, it complains that the General Court failed to have regard to the relevant case-law of the Court, by holding that the individual character of a design must result from a lack of ‘déjà vu’. It argues that the question of whether the ‘déjà vu’ criterion is a relevant factor for the purposes of assessing individual character is significant with respect to the unity, consistency or development of EU law.
- 8 As regards the second argument, the appellant complains that, by excluding less significant or less marked characteristics of a design from the assessment of its individual character, the General Court failed to have regard to the relevant case-law of the Court. The appellant asserts that that error of law therefore raises an issue that is significant with respect to the unity and consistency of EU law.
- 9 As regards the third argument, the appellant submits that, contrary to the position taken by the General Court, the examination of the individual character of a design requires, in accordance with Article 6 of Council Regulation (EC) No 6/2002 of 12 December 2001 on Community designs (OJ 2002 L3, p. 1), that first, the overall impression produced by one design is established, followed by the overall impression produced by the other design. It maintains that the position of the General Court therefore undermines the consistency and unity of EU law.

- 10 As regards the fourth argument, the appellant asserts that the General Court erred in law by defining the informed user independently of specific designs or products and without taking into account the actual characteristics of the relevant market. According to the appellant, the question of whether such an approach is correct concerns the unity and consistency of EU law.
- 11 By its fifth argument, the appellant submits that an informed user makes a decision based on a preference for one model over another depending on his level of information and attention. It therefore wishes to know whether, in the present case, the individual character according to the product indication of the design in question can be substantiated by reference to motor vehicles in general, or whether, at least as regards motor vehicles which, as the case may be, have been on the market for decades, the informed user must be defined more narrowly, in the light of the actual characteristics of the market. According to the appellant, it seems that the Court has not yet had the opportunity to state its position on such an issue and that, consequently, that issue concerns the development of EU law.
- 12 By its sixth and final argument, the appellant asserts, relying on the European Commission's Green Paper on the Legal Protection of Industrial Design, that the freedom of the designer, which, in accordance with Article 6 of Regulation No 6/2002, must be taken into consideration when assessing the individual character, may also be limited by 'marketing constraints' and 'deep-rooted marketing requirements by the clients', which means, depending on the circumstances, that small differences between the designs, as compared with already-known forms, may be sufficient to justify the individual character of a design. According to the appellant, the Court has not yet stated its position on such an issue which is therefore significant with respect to the development of EU law.
- 13 First, it must be observed that it is for the appellant to demonstrate that the issues raised by its appeal are significant with respect to the unity, consistency or development of EU law (order of 16 September 2019, *Kiku v CPVO*, C-444/19 P, not published, EU:C:2019:746, paragraph 11).
- 14 Further, as is apparent from the third paragraph of Article 58a of the Statute of the Court of Justice of the European Union, read together with Article 170b(4) of the Court's Rules of Procedure, the request that an appeal be allowed to proceed must contain all the information necessary to enable the Court to give a ruling on whether the appeal should be allowed to proceed and to specify, where the appeal is allowed to proceed in part, the pleas in law or parts of the appeal to which the response must relate. Given that the objective of the mechanism provided for in Article 58a of that statute whereby the Court determines whether an appeal should be allowed to proceed is to restrict review by the Court to issues that are significant with respect to the unity, consistency and development of EU law, only grounds of appeal that raise such issues and that are established by the appellant are to be examined by the Court in an appeal (order of 10 October 2019, *KID-Systeme v EUIPO*, C-577/19 P, not published, EU:C:2019:854, paragraph 12 and the case-law cited).
- 15 Accordingly, a request that an appeal be allowed to proceed must, in any event, set out clearly and in detail the grounds on which the appeal is based, identify with equal clarity and detail the issue of law raised by each ground of appeal, specify whether that issue is significant with respect to the unity, consistency or development of EU law and set out the specific reasons why that issue is significant according to that criterion. As regards, in particular, the grounds of appeal, the request that an appeal be allowed to proceed must specify the provision of EU law or the case-law that has been infringed by the judgment under appeal, explain succinctly the nature of the error of law allegedly committed by the General Court, and indicate to what extent that error had an effect on the outcome of the judgment under appeal (order of 10 October 2019, *KID-Systeme v EUIPO*, C-577/19 P, not published, EU:C:2019:854, paragraph 13 and the case-law cited). Where the error of law relied on results from an infringement of the case-law, the request that the appeal be allowed to proceed must explain, in a succinct but clear and precise manner, first, where the alleged contradiction lies, by identifying the paragraphs of the judgment or order under appeal which the appellant is calling into question as well as those of the ruling of the Court or the General Court alleged to have been infringed, and secondly,

the concrete reasons why such a contradiction raises an issue that is significant with respect to the unity, consistency or development of EU law (see, to that effect, order of 7 October 2019, *L'Oréal v EUIPO*, C-586/19 P, not published, EU:C:2019:845, paragraph 16).

- 16 A request that an appeal be allowed to proceed which does not contain the information mentioned in the preceding paragraph of the present order cannot, from the outset, be capable of demonstrating that the appeal raises an issue that is significant with respect to the unity, consistency or development of EU law that justifies the appeal being allowed to proceed (order of 10 October 2019, *KID-Systeme v EUIPO*, C-577/19 P, not published, EU:C:2019:854, paragraph 14).
- 17 In the first place, as regards the arguments set out in paragraphs 7 and 8 of the present order that the General Court has departed from the relevant case-law of the Court, it must be noted that, in accordance with the burden of proof which lies with the appellant requesting that the appeal be allowed to proceed, such arguments are not, in themselves, sufficient to establish that that appeal raises an issue that is significant with respect to the unity, consistency or development of EU law, the appellant having to comply to that end with all the requirements set out in paragraph 15 of the present order (see, to that effect, order of 7 October 2019, *L'Oréal v EUIPO*, C-586/19 P, not published, EU:C:2019:845, paragraph 16). In the present case, however, the appellant, without complying with such requirements, merely asserts that the General Court infringed the relevant case-law of the Court.
- 18 In the second place, as regards the arguments set out in paragraphs 9 and 10 of the present order, relating to errors of law alleged to have been committed by the General Court, it must be noted that the present request that the appeal be allowed to proceed is vitiated by lack of precision as regards the provision of EU law or case-law alleged to have been infringed by the General Court when it defined the informed user independently of specific designs or products and without taking into account the actual characteristics of the relevant market. In any event, the fact that an appeal raises certain issues of law specific to the judgment under appeal does not in itself allow the view to be taken that the Court must allow the appeal to proceed. The appellant must demonstrate that, independently of the issues of law invoked in its appeal, that appeal raises one or more issues that are significant with respect to the unity, consistency and development of EU law, the scope of this criterion going beyond the judgment under appeal and, ultimately, its appeal (see, to that effect, order of 7 October 2019, *L'Oréal v EUIPO*, C-586/19 P, not published, EU:C:2019:845, paragraphs 11 and 12). However, such a demonstration does not emerge from the present request.
- 19 In the third and last place, as regards the arguments set out in paragraphs 11 and 12 of the present order that the appeal raises novel issues of law with respect to the case-law of the Court, it must be noted that the present request that the appeal be allowed to proceed is vitiated by lack of precision as regards both the provision of EU law and case-law alleged to have been infringed by the General Court when it held that motor vehicles in general can be used as the basis for substantiating the individual character according to the product indication of the design. Further, it must be stated that the fact that an issue of law has not been examined by the Court does not thereby mean that that issue is necessarily one of significance with respect to the development of EU law, and the appellant remains bound to demonstrate that significance by providing detailed information not only on the novelty of that issue, but also on the reasons why that issue is significant in relation to the development of EU law (order of 30 September 2019, *All Star v EUIPO*, C-461/19 P, not published, EU:C:2019:797, paragraph 16). In the present case, the appellant merely claims that the issues of law relied on in connection with those arguments are relevant with respect to the development of EU law and refers to the absence of any case-law of the Court in that regard, without, however, providing any other information.
- 20 It follows that the appellant has failed to prove, as it is required to do, that the issues raised by its appeal are significant with respect to the unity, consistency or development of EU law.

- 21 In the light of all the foregoing considerations, the request that the appeal be allowed to proceed must be dismissed.

Costs

- 22 Under Article 137 of the Rules of Procedure, applicable to the procedure on appeal pursuant to Article 184(1) of those rules, a decision as to costs is to be given in the order which closes the proceedings.
- 23 Since the present order was adopted before the appeal was served on the other parties to the proceedings and, therefore, before they could have incurred costs, it is appropriate to decide that the appellant is to bear its own costs.

On those grounds, the Court (Chamber determining whether appeals may proceed) hereby orders:

- 1. The appeal is not allowed to proceed.**
- 2. Dr. Ing. h.c. F. Porsche AG shall bear its own costs.**

[Signatures]