



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

OPERATIONS DEPARTMENT – DESIGNS SERVICE

**DECISION OF
THE INVALIDITY DIVISION
OF 13/12/2011**

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

FILE NUMBER	ICD 8322
COMMUNITY DESIGN	001137152-0001
LANGUAGE OF PROCEEDINGS	English
APPLICANT	A.C.V. Manufacturing NV Zoning Industriel – Zone C – Rue Henry Becquerel 7180 Seneffe Belgium
REPRESENTATIVE OF THE APPLICANT	Marx – Van Ranst – Vermeersch and Partners Tervurenlaan 270 1150 Brussels Belgium
HOLDER	AIC S.A. Ul. Rdestowi 41 81-577 Gdynia Poland
REPRESENTATIVE OF THE HOLDER	Optimas Kancelaria Prawna Ul. Krakowska 259A 32-080 Zabierzów Poland

The Invalidity Division

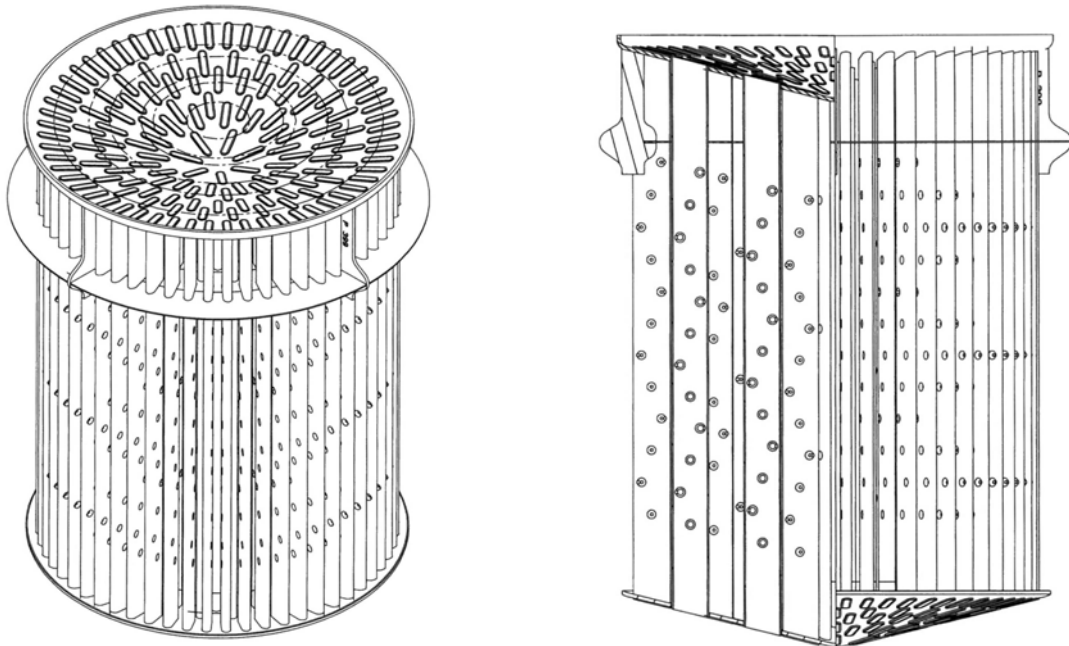
composed of Martin Schlötelburg (rapporteur), Jakub Pinkowski (member) and Natalie Pasinato (member) took the following decision on 13/12/2011:

1. **The registered Community design n° 001137152-0001 is declared invalid.**
2. **The Holder shall bear the costs of the Applicant.**

I. FACTS, EVIDENCE AND ARGUMENTS

- (1) The Community design n° 001137152-0001 (“the RCD”) has been registered in the name of the Holder with the date of filing of 13/05/2009. In the RCD, the indication of products reads “heat exchanger inserts” and the design is published in the Community Designs Bulletin in the following views:

http://oami.europa.eu/bulletin/rcd/2009/2009_152/001137152_0001.htm



- (2) On 07/02/2011, the Applicant filed an application for a declaration of invalidity (“the Application”). The fee for the Application was paid by current account.
- (3) The Applicant requests a declaration of invalidity of the RCD on the grounds of Articles 4 to 8 of the Council Regulation (EC) n° 6/2002 on Community Designs (“CDR”).
- (4) As evidence, the Applicant provided several e-mails, drawings and project reports, depicting designs of heat exchangers inserts, heat exchangers, pipe bundles and fire tubes.

- (5) In its reasoned statement the Applicant argues *inter alia* that “the pipe bundle is not visible during normal use of the boiler by the end user. In order to see the pipe bundle, such user would have to screw open the boiler, remove the heat exchanger, and completely strip the heat exchanger in order to look at the pipe bundle. The pipe bundles have no use as a separate component part and are only a part in the production process of a heat exchanger”. In support of his arguments the Applicant, refers especially to the Community design n° 001203004-0001, presenting elements of the RCD and sharing common parts with the RCD. The Applicant arguments as well on the invalidity of the RCD based on the grounds of the technical function exclusion, the absence of protection of the RCD due to its interconnection and incorporation in another product, the absence of novelty and lack of individual character. Following the arguments of the Application, it is specified that “a pipe bundle is interconnected with the fire tubes. It should be reproduced in its exact form and dimensions in order to permit the fire tubes to be mechanically connected to and placed in the heat exchanger insert”.
- (6) In response to the Application, the Holder states in regard to the invisibility that “heat exchanger can be part of boiler, but also in certain installations it can be a visible element, which is not hidden in the boiler... The claim of the Applicant that the design is a part of a complex product remains meaningless especially that the insert of the heat exchanger has a characteristic shape and it is sold separately”. Moreover, in the Holder’s opinion, the appearance of the RCD is not solely dictated by its technical function, it is not necessarily interconnected while it presents elements of novelty and individual character, since “the Applicant has not attached any documents, which would prove that the design has been revealed before the date of priority... None of the attachments presents a design, which would be identical, but only designs varying in terms of shape and location of details”.
- (7) For further details to the facts, evidence and arguments submitted by the parties reference is made to the documents on file.

II. GROUNDS OF THE DECISION

A. Admissibility

- (8) The Application complies with the formal requirements prescribed in the CDR and the Commission Regulation (EC) No 2245/2002 of 21 October 2002 implementing Council Regulation (EC) No 6/2002 on Community designs (“CDIR”), in particular as laid down in Article 28 CDIR. The Application is therefore admissible.

B. Substance

B.1 Component part of a complex product

- (9) According to Articles 4(2) and 4(3) CDR “a design applied to or incorporated in a product which constitutes a component part of a complex product shall only be considered to be new and to have individual character (a) if the component part, once it has been incorporated into the complex product, remains visible during normal use of the latter (b) to the extent that those visible features of

the component part fulfil in themselves the requirements as to novelty and individual character. Normal use within the meaning of the paragraph (2)(a) shall mean use by the end user, excluding maintenance, servicing or repair work”.

- (10) Moreover, according to Article 3 CDR “for the purposes of this Regulation ...
(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;
(c) "complex product" means a product which is composed of multiple components which can be replaced permitting disassembly and re-assembly of the product”.
- (11) The contested RCD concerns heat exchanger inserts. These products are components embedded in heat exchangers as means for heat transfer enhancement and conservation. The RCD consists of numerous combustion flue profiles forming a cylinder. The flue profiles are rectangular shaped and dispose holes. The upper and lower parts of the cylinder are covered by sieve bottoms. The designed sieve bottoms dispose equally holes and resemble to cones, their base being circular and tapering to the apex.
- (12) Taking into account the aforesaid definitions, it is estimated that the RCD is a necessary part of a heat exchanger. The heat exchangers are used in various applications such as industrial installations, chemical or pharmaceutical industries, oil temperature cooling, liquid and gas cooling or domestic installations, floor heating and, even, waste water heat recovery. Even though they are commonly met as an internal part of a boiler, they are not necessarily included in a boiler box during use. Thereof, it must be considered that the contested RCD constitutes a component part of the complex product (heat exchanger) that can remain visible during normal use, under the condition that the heat exchanger is visible during normal use as well.
- (13) Considering the Community design n° 001203004-0001, registered on 19/03/2010 in OHIM and depicting heat exchangers it is demonstrated that the sieve bottom of the RCD is visible in the bottom part of the heat exchanger. Thus, the end user is in position to have a partial view of an element of the RCD while the heat exchanger insert and the heat exchanger are in motion without the necessity of opening a cover door, screwing up the boiler or disassembling the heat exchanger.
- (14) The incorporation of the RCD into a heat exchanger may serve as basis for determining the visibility of the RCD during normal use of the complex product, by the end user. As far as the invisibility is concerned, the Board of Appeal has already stated that “only one side or part of a single side (of the contactor) would be visible while the other sides disappear in the complex product, which is not sufficient to meet the criterion of visibility”¹.
- (15) In that frame, given the fact that only the bottom part of the heat exchanger insert, is visible during normal use, it is estimated that the contested RCD, incorporated into a complex product, lacks novelty and individual character within the meaning of Article 4 CDR. The RCD is not sufficiently visible during normal use, apart from one side, and therefore does not meet the conditions of protection within the meaning of Article 4(2) CDR.

¹ OHIM 3rd Board of Appeal R1052/2008-3, *Albright France S.A.R.L. Vs Schaltbau GmbH*

C. Conclusion

- (16) The RCD is to be declared invalid on the ground of Article 25(1)(b) CDR in conjunction with Article 4(2) CDR, being, due to lack of novelty and individual character as incorporated part of a complex product.
- (17) The RCD having been found to lack in novelty and individual character, the further examination of other grounds of invalidity, shall be omitted.

III. COSTS

- (18) Pursuant to Article 70(1) CDR and Article 79(1) CDIR, the Holder bears the fees and costs of the Applicant.
- (19) The costs to be reimbursed by the Holder to the Applicant are fixed to the amount of 750€, €, composed of 400€ for the costs of representation and 350 € for the reimbursement of the invalidity fee.

IV. RIGHT TO APPEAL

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

THE INVALIDITY DIVISION

Martin Schlötelburg

Jakub Pinkowski

Natalie Pasinato

