



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

The Boards of Appeal

**DECISION**  
**of the Third Board of Appeal**  
**of 14 October 2009**

In Case R 316/2008-3

**Euro Fire AB**

Box 16

SE-260 61 Hyllinge

Sweden

Invalidity applicant / Appellant

represented By Advokatbyrån Gulliksson AB, Järnvägsgatan 3,  
SE-252 24 Helsingborg, Sweden

v

**TARNAVVA Sp. z o.o.**

Wietrzychowice 191

PL-33-270 Wietrzychowice

Poland

RCD proprietor / Respondent

represented by Kancelaria Patentowa Klar Mirosław, ul. Biernackiego 1/29,  
PL-39-300 Mielec, Poland

APPEAL relating to Invalidity Proceedings No 3184 (registered Community design  
No 000434 782-0001)

**THE THIRD BOARD OF APPEAL**

composed of Th. Margellos (Chairperson), H. Salmi (Rapporteur) and C. Rusconi  
(Member)

Registrar: J. Pinkowski

gives the following

## Decision

### Summary of the facts

- 1 By application received on 18 November 2005 TARNAVVA Sp. z o.o., formerly ANWIKOM Sp. z o.o. (hereinafter, 'the RCD proprietor') sought to register a Community Design whose seven views are represented hereunder



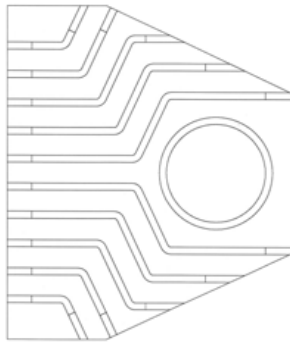
in respect of the following goods:

‘Stoves [heating, Fireplaces (indoor)]’ in Class 23-03 of the Locarno Classification.

- 2 The Community Design was registered under No 000 434 782-0 001 and published in the Bulletin 2005/118 of 13 December 2005.
- 3 By application received on 27 September 2006, Euro Fire AB (hereinafter, ‘the invalidity applicant’) sought a decision whereby the Office declares the invalidity of the Community Design (hereinafter, the ‘contested design’) on the ground that it does not fulfill the requirements of Articles 4 to 9 of Council Regulation (EC)

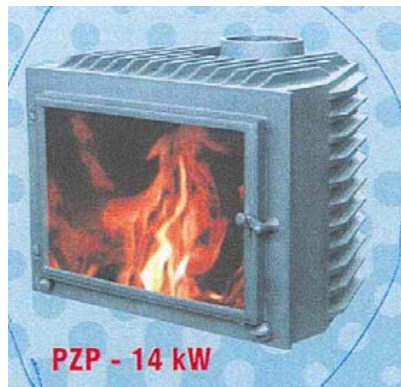
No 6/2002 of 12 December 2001 on Community Designs ('CDR') (OJ EC 2002 No L 3, p 1).

- 4 In the statement of grounds attached to the application it indicated the following:
- The contested design lacks novelty and individual character. The view 0001.1 of the RCD 000434782-0001 is identical to the design of the RCD 000395744-0001. The other views of the RCD 000434782-0001 contain the design of the RCD 000395744-0001. As the last mentioned design has been made available to the public before the RCD 000434782-0001, the novelty requirement is not fulfilled regarding the RCD 000434782-0001.
  - As evidence the invalidity applicant provided documents including:
    - a copy of a publication of the RCD 395744-0001 (D1) filed on 5 September 2005 and published on 01 November 2005. The indication of products is 'flued stoves'.



(D1)

- an 'excerpt' from the applicant's [website www.eurofire.se](http://www.eurofire.se), bearing the date 22 September 2005, translated into English (D2);
- a copy of the catalogue 'Cast Iron Fireplace Inserts' TARNAVVA (D3) depicting fireplaces produced in 2002, as claimed by both the applicant and the holder.



(D3)

- The invalidity applicant argues that the RCD lacks novelty and individual character. It states that the view 0001.1 of the RCD is identical to the design in document D1 whereas the other views of the RCD contained D1. It claims that the RCD is also identical to the design incorporated in document D2.
  - The invalidity applicant argues that ‘the characteristic flanges are identical in both designs and the shape and the proportions of the stoves are very similar. The very small differences that may occur do not influence the overall impression of the informed user’. It is obvious that ‘the actual fireplace insert, disregarding the Z-flanges, lacks both novelty and individual character in relation to prior fireplace inserts’ and that ‘the applicant has a previous right to the Z-flange design’.
  - The difference between the two designs concerning the continuous line of the flanges ‘does not lead to a different overall impression on the informed user as the shape and the proportions of the design are identical’, whereas ‘the faceplate of the prior design is flat and does not have the shape of a triangle but the same shape as the design in D1’. In addition to that he claims that ‘the top and the sides are often visible in normal use’. As regards the credibility of the document D2, the Applicant claims that ‘it is clear from the dates of the printouts and the text on the copies that the information actually did appear on the website [www.eurofire.se](http://www.eurofire.se) on 22 September 2005.’
- 5 On 21 December 2006, the RCD proprietor argued that:
- The RCD fulfils the criteria of novelty and individual character according to Article 5 and 6 CDR and asks for the rejection of the application for invalidity of RCD.
  - The RCD proprietor points out the following alleged differences between the opposing designs:
    - The subject of the RCD is the whole insert of a fireplace, as shown in figures 0001.1 to 0001.7 whereas D1 presents only the view from above.
    - The ribs of D1 have the shape of a continuous broken line, whereas the ribs of the fireplace according to the RCD are separated segments.
    - The fireplace according to the RCD has vertical ribs on vertical side walls, located perpendicularly to the plane of vertical walls of the fireplace, whereas the ribs of the fireplace depicted in D2 have the shape of a triangle, while the fireplace according to the RCD has a shape of a pentagon.
    - The face plate of the RCD is flat, whereas the face plate depicted in D2 is convex.
    - The RCD differs also to the extent that a decoration element, representing the shape of sun, is located on the inner side of fireplace back wall.

- Based on the aforementioned alleged differences the RCD proprietor states that the fireplace of the RCD is different in so many aspects from the design presented in the application for declaration of invalidity, that it produces a different impression on the informed user. Moreover, it claims that the fireplace according to the RCD was created in August 2005 and that the fireplace with a similar shape and proportions, but with different configuration ribs, was produced by the firm Tarnavva since 2002. In support of its claim it provided a copy of the catalogue ‘Cast Iron Fireplace Inserts’ TARNAWA, as illustrated in D3, which is also presented as evidence by the applicant.
  - The holder calls in question the credibility of D2 because they are only printouts, which cannot be seen on the present website of Euro Fire AB. It also claims that in normal use, fireplaces are so installed, that only the face plate is visible, which in the case of the RCD is flat, whereas in the presented materials it is convex.
  - Responding to the arguments of the invalidity applicant with regard to Article 5 CDR the RCD proprietor denies that the contested design is identical to the opposing designs; parts of the contested design are different and the ornamentation is different, too. For the same reason, it disagrees that there is a case for invalidity in accordance with Article 6. It claims that the contested design also has individual character.
- 6 By decision of 11 December 2007 (hereinafter, ‘the contested decision’) the Invalidity Division rejected the application for invalidity. The main contents of the decision are the following:

*On evidence*

- The ‘excerpt’ of the applicant’s website (D2) is not accompanied by evidence certifying the correctness of the contents and the date of the excerpt. Since the website [www.eurofire.se](http://www.eurofire.se) has changed since 2005, there are no means of verifying today what it looked like in 2005. Therefore, the Invalidity Division finds that the applicant failed to provide proof that the website has included views of the prior designs.
- D1 is as such a valid means of evidence within the meaning of Article 7(1) CDR because it is a registered Community design and all the data such as the date of publication are known to the Office.
- D3 is accepted as evidence because both parties to the proceedings agree to its credibility and to the fact that the products disclosed in it were available on the market since 2002.

*On novelty*

- According to Article 5 CDR the RCD lacks novelty when an identical design has been made available to the public prior to the date of filing of the

contested design. Designs shall be deemed to be identical if their features differ only in immaterial details.

- The RCD and the prior designs in D1 and D2 concern stoves. However, the features of the RCD shown in the views 0.0002 – 0.0007 are not disclosed in the prior design of D1. Subject-matter not disclosed in the prior art cannot be taken into account when assessing the requirements of protection of the contested RCD. Therefore, D1 is not an obstacle to the novelty of the RCD.
- The RCD and the prior design as disclosed in D3 differ at least in the following features:
  - The flanges situated on the upper side of the RCD have a ‘Z’ form, whereas D3 has straight flanges on the top of the cassette. As the applicant admits, the views of the Z-flanges are a new element which does not appear in D3.
  - The ribs on the side wall of the RCD are located vertically to its walls, whereas the ribs of the fireplace depicted in D3 are located horizontally to the vertical walls of the fireplace.
  - A pedestal with a drawer as depicted in the RCD is not present in D3.
- The contrasting features between the RCD and the earlier design of D3 do not concern immaterial details given their size in relation to the overall dimensions of the stove. The RCD and the prior designs are not identical within the meaning of Article 5 CDR.

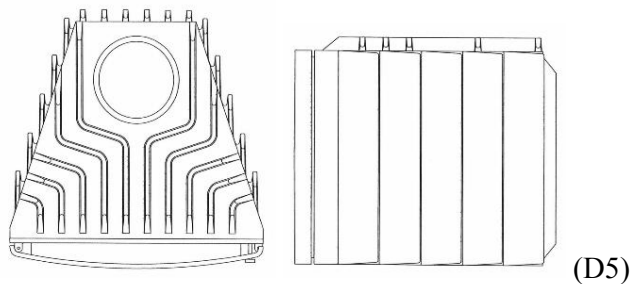
*On individual character*

- A design has an individual character if the overall impression it produces on the informed user differs from the overall impression produced on such a user by any prior design which has been made available to the public.
  - The informed user is familiar with heating stoves as shown in the RCD. It is aware that the degree of freedom of a designer of stoves is limited only in so far as that it must be an item designed according to safety rules, where fire is lit.
  - The combination of ‘Z’ shaped flanges on the top of the cassette, flanges on its sidewalls and the pedestal define the overall impression produced by the RCD on the informed user. None of the prior designs disclose such combination. Therefore, none of the prior designs produce the same overall impression as the RCD.
- 7 On 5 February 2008, the invalidity applicant filed a notice of appeal against the contested decision. It submitted a statement of grounds on 11 April 2008.
- 8 On 1 October 2008, after an agreed extension, the RCD proprietor submitted its observations.

- 9 On 4 January 2009, the invalidity applicant filed its reply.
- 10 The RCD proprietor did not file a rejoinder.

### **Submissions and arguments of the parties**

- 11 The invalidity applicant requests that the contested decision be dismissed and the contested design be declared invalid. These are the grounds:
  - The invalidity applicant claims that it is the holder of RCD 000395744-0001 (depicted in D1) and RCD 000408778-0001 (depicted in: D5). D1 was registered on 5 September 2005 and published on 1 November 2005 and D5 was registered on 29 September 2005 and published on 15 November 2005.



- The RCD 000434782-0001 (the contested design) was registered on 18 November 2005 and published on 13 December 2005. The contested design lacks novelty and individual character.
- The market of fireplace inserts has since 2002 consisted of products of the type presented in a catalogue from TARNAVVA ‘Cast Iron Fireplace Inserts’ produced in 2002 (claimed by both the invalidity applicant and the holder and depicted in D3). In September 2005 the invalidity applicant had developed a new design regarding the top flanges, namely the ‘Z-flanges’, and the specific flanges on the sides namely ‘streamline-flanges’, of the cassettes, which were protected by RCD’s in 2005. D5 also shows the earlier known vertical flanges in the back of the cassette.
- The invalidity applicant and the holder of the contested design have been business associates in the past. The invalidity applicant showed the new ‘Z-flange’ design to the RCD proprietor. After this, without informing the invalidity applicant, the RCD proprietor filed the contested design.
- The view 0001.1 of the contested design is identical to the design of D1 and D5. The other views of the contested design contain the designs D1 and D5. As the mentioned designs have been made available to the public before the contested design, the novelty requirement is not fulfilled regarding the contested design.
- The view of the contested design is identical to the design occurred on the website [www.eurofire.se](http://www.eurofire.se) on 22 September 2005, (depicted in: D2). D2 show

also the vertical flanges on the sides of the cassette. It is clear from the Swedish website that the design has been shown 102 times up till 22 September 2005.

- The Design Invalidity Division has noted that the excerpts from [www.eurofire.se](http://www.eurofire.se) have not been authenticated by notifications from any public server. The invalidity applicant must provide clear evidence that they have investigated the public servers showing [historical](#) web-pages. It has been impossible to access information on [www.eurofire.se](http://www.eurofire.se) for the relevant period on public servers such as [www.archive.org](http://www.archive.org), and the invalidity applicant therefore complemented its evidence with a written affidavit from Mr Patrik Svensson (D6) the person who was responsible for the updating of [www.eurofire.se](http://www.eurofire.se) during the that period .



(D2)

- As the prior design, evident from the website and D6, has been made available to the public before the contested design, the novelty requirement regarding the contested design is also not fulfilled for this reason.
- The overall impression that the contested design produces on the informed user does not differ from the overall impression produced on such user by D3, the D2, the D1, the D5 and the design that appeared on the website [www.eurofire.se](http://www.eurofire.se) on 22 September 2005. The differences between the opposing designs are very limited and it is clear that the holder of the contested design has taken the idea for its design from the invalidity applicant and other well-known designs. The characteristic flanges are identical on both designs and the shape and the proportions of the stoves are very similar. The very small differences that occur do not influence the overall impression of the informed user. In this respect it is pointed out that the informed user should not examine the details of the designs in question, as it is the overall impression that is decisive. The only new elements in the contested design are the Z-flanges on the top of the cassette, but these are in fact not new as they appear in the previous designs (D1, D2 and D5). Since the designs in D1, the D2 and D5 were filed before the contested design the invalidity applicant has a previous right to the Z-flange design.



- Furthermore, the holder of the contested design has emphasized that the design of the invalidity applicant has, contrary to the design of the holder, a continuous line. This does not lead to a different overall impression on the informed user as the shape and the proportions of the designs are identical.

12 The RCD proprietor replied as follows:

- The invalidity applicant presented a declaration of the person involved for updating the website [www.eurofire.se](http://www.eurofire.se) in September 2005 as new evidence. This declaration (D6) is, according to invalidity applicant, not trustworthy, because it is very doubtful that the person doing the update of the website in the year 2005 could after 3 years remember exactly which photos had been displayed on the website.
- The fireplace represented on the website [www.eurofire.se](http://www.eurofire.se) on 22.09.2005 (D2) differs significantly from the fireplace of the design RCD 000434782-0001. First of all the front wall of contested design is finished with flat doors and at the top has the shape of a polygon, whereas the fireplace in the D2 document has half-rounded doors and at the top has a trapezoid shape.
- Elements on the side walls of fireplace depicted in the document D2 are barely visible, but despite that the shape is suggesting vertical configuration, which practically constitutes the flat external side surface.
- The fireplace represented in the RCD 000434782-0001 design has visible vertical ribs on the side walls.
- Moreover, the design of the fireplace depicted in the document D2, where the straight section on the side walls is missing, has no technical reason, what could be understood after producing that product. The design according to the document D2 has no space in the trunk for air ducts and there is no possibility of installing elements to control the door of the fireplace. The invalidity applicant is inconsistently showing in the bottom, extreme, right and left part of the doors, grooves where the knobs for controlling the elements in air ducts are located.
- In conclusion, the RCD proprietor claims that the RCD 000434782-0001 meets the novelty criteria and has individual character according to Article 5 and 6 CDR.

### **Reasons**

- 13 The appeal complies with Articles 56 and 57 CDR and Article 34 of Commission Regulation (EC) No 2245/2002 of 21 October 2002 implementing Council Regulation (EC) No 6/2002 on Community designs ('CDIR') (OJ EC L 341, 17.12.2002, p. 28–53). It is therefore admissible.

### *Preliminary remarks*

- 14 As the basis of the invalidity action the invalidity applicant argued that the contested RCD lacked novelty and individual character and that it should be refused under Article 25(1)(b) CDR based on the previous RCD No 000395744 – 0001. During the invalidity proceedings and in the statement of grounds before the Board of Appeal, the invalidity applicant also referred to RCD No 000408778 – 0001, which was filed on 29 September 2005 and published on 15 November 2005 (D5).
- 15 Even though RCD No 000408778 – 0001 was not the main basis for the invalidity action, in the opinion of the Board this earlier design must also be taken into account in the evaluation of novelty and individual character. This is due to the fact that pursuant to Article 5 CDR a design shall be considered to be new if *no identical design* has been made available to the public and pursuant to Article 6 CDR a design shall be considered to have individual character if the overall impression it produces on the informed user differs from the overall impression produced on such a user by *any design* which has been made available to the public (emphasis added).
- 16 For the same reason, all of the fireplace inserts (cassettes) produced by the RCD proprietor which are shown in the copy of the catalogue ‘Cast Iron Fireplace Inserts’ TARNAVVA (D3) depicting fireplace inserts produced in 2002 must be taken into account as prior art because both parties to the proceedings agree to the credibility of the document and to the fact that the products disclosed in it have been available on the market since 2002.

*Admissibility of the new evidence*

- 17 During the appeal proceedings, i.e. together with the statement of grounds, the invalidity applicant also submitted some new evidence in support of its previous assertion that an identical design has been made available to the public prior to the date of filing of the RCD and/or that the overall impression that the contested design produces on the informed user does not differ from the overall impression produced on such a user by a prior design which has been made available to the public. The evidence consists of a written affidavit from Mr Patrik Svensson, a consultant to the invalidity applicant, who was the person who was responsible for the updating of the website [www.eurofire.se](http://www.eurofire.se) during the relevant period, confirming that the copy of the printout of the website from 22 September 2005 (D2) is correct and genuine.
- 18 In accordance with Article 63(2) CDR the Office may disregard facts or evidence which are not submitted in due time by the parties concerned. However, the Office is not prohibited from taking into account facts and evidence which are submitted or produced late.
- 19 The Board considers that, in the case at hand, the further evidence is admissible for the following reasons. Firstly, the new evidence was systematically notified to the RCD proprietor and the holder has given its comments on it. The RCD proprietor did not explicitly dispute the filing of further evidence, but merely argued that the affidavit was not trustworthy.

- 20 Secondly, there is no time-limit for bringing an invalidity action before the Office and therefore taking into account facts and evidence submitted late by the invalidity applicant, could contribute to ensuring that a RCD whose use could later successfully be challenged by means of further invalidity proceedings does not stay on the register.
- 21 The Board also finds it appropriate to admit at this stage the new evidence since it is supplementing evidence to the evidence already provided by the invalidity applicant during the invalidity proceedings and seems, *prima facie*, to support the invalidity applicant's previous assertion that an identical design has been made available to the public prior to the date of filing of the RCD and/or that the overall impression that the contested design produces on the informed user does not differ from the overall impression produced on such a user by a prior design which has been made available to the public. This evidence might prove the invalidity applicant's assertion and it is, on the face of it, likely to be relevant to the outcome of the invalidity case it has filed. The Board stresses that a *prima facie* relevance of the evidence does not imply that it is conclusive to the outcome of the present case.
- 22 In view of the above, the Board deems it appropriate to admit the additional evidence filed with the statement of the grounds of the appeal, by exercising its discretionary power, under Article 63(2) CDR. In addition, the Board sees no specific reason why the affidavit would not be trustworthy. The person signing the affidavit is not an employee of the invalidity applicant and the Board finds it entirely feasible that that the person responsible for the update of the website in 2005 could confirm, even three years later, that the photos shown to him were the ones depicted on the website at that time; furthermore, there is no evidence to the contrary.

### *Novelty*

- 23 Novelty is defined in Article 5 CDR in the following terms:
- '1. A design shall be considered to be new if no identical design has been made available to the public:
    - (a) ...
    - (b) in the case of a registered Community design, before the date of filing of the application for registration of the design for which protection is claimed, or, if priority is claimed, the date of priority.
  - 2. Designs shall be deemed to be identical if their features differ only in immaterial details.'
- 24 The Board notes that the contested design displays seven different views from different angles so that the product is visible from the front, sides, back and top. The earlier designs are represented a) in D1 by means of a schematic drawing displaying a single view of the top of the fireplace insert, b) in D5 by means of a schematic drawing displaying a view of the top of the fireplace insert and a view

of the side of the fireplace insert and c) in D2 and D3 by means of photographs where the front, side and top of the fireplace inserts can be seen.

- 25 The RCD proprietor claims that in normal use fireplace inserts are installed so that only the face plate is visible, as shown in Fig. 7 of the RCD proprietor's observations of 20 December 2006 and which can also be seen on the cover page of the catalogue referred to in D3. The invalidity applicant does not appear to refute that fireplace inserts are installed into fireplaces, but claims that the top and sides are also often visible in normal use. However, it has not provided any evidence of this. In the absence of any evidence to the contrary, the Board concludes that the claim of the RCD proprietor is correct.
- 26 A feature of fireplace inserts is that they are 'component parts' – within the meaning of Article 4 (2) CDR – of a 'complex product'; the 'complex product' being the fireplace itself. Another feature of fireplace inserts is that, in accordance with what has been concluded in the previous paragraph, they are installed into fireplaces so that only the front side is visible and the rest of the insert is hidden inside the fireplace. Therefore, in accordance with Article 4 CDR, the decision on the question of novelty and individual character has to be based on whether the visible features, that is what is visible in normal use for the end user, are new or have individual character. In the case at hand, these visible features consist only of the front side of the fireplace inserts.
- 27 Taking into account the above, the Board must evaluate the novelty of the contested design with all of the previous designs mentioned above, including all the designs that can be found in the pages of the catalogue referred to as D3. When taking into account only the visible features, that is the front side of the fireplace inserts, the Board is of the opinion that the contested design is closest in comparison to the fireplace insert indicated as the model PZPOS – 16 kW i 18 kW in the catalogue D3, as shown below:



- 28 Both the contested design and the design of the prior art (D3) show: a) a flat face plate in the form of a rectangle, b) a pedestal with a drawer (the ash box) in the form of a rectangle with knobs on both sides, c) a knob for opening the face plate on the right side of the plate and d) a wave-shaped plate on the bottom part of the face plate. The overall shape and the proportions of the details of the fireplace inserts appear to be identical in both designs. The only differences are that in the contested design, there are no air ducts on either side of the ash box and that the wave-shaped plate on the contested design has four waves, whereas the prior design has three. The Board is of the opinion that these amount to no more than barely noticeable differences in details.

- 29 Therefore, the contested design only differs from the prior design in immaterial details. Since the contested design reproduces all the characteristic features of the prior design and its features differ only in immaterial details, the designs must be deemed to be identical within the meaning of Article 5(2) CDR.

*Individual character*

- 30 The Board further notes that, even if, in contrast to what has been concluded above, the comparison of the designs in the case of fireplace inserts would have to be based on the comparison of the inserts as a whole, and not only on the front side, the contested design would still have to be invalidated based on lack of individual character for the following reasons.
- 31 Individual character is defined in Article 6 CDR:
- ‘1. A design shall be considered to have individual character if the overall impression it produces on the informed user differs from the overall impression produced on such a user by any design which has been made available to the public:
    - (a) ...
    - (b) in the case of a registered Community design, before the date of filing of the application for registration or, if a priority is claimed, the date of priority.
  - 2. In assessing individual character, the degree of freedom of the designer in developing the design shall be taken into consideration.’
- 32 The issue therefore is whether the two designs produce the same overall impression on the informed user, taking into consideration the designer’s degree of freedom in developing the design. When comparing the fireplace inserts as a whole and not only from the front side, the Board is of the opinion that the contested design is closest in comparison to the fireplace insert that can be seen in the excerpt from [www.eurofire.se](http://www.eurofire.se) (D2), as shown below:



- 33 The informed user against whom individual character of the contested RCD should be measured is whoever habitually purchases the item in question and puts it to its intended use and has become informed on the subject by browsing through catalogues, visiting the relevant stores, such as household and garden centers, downloading information from the internet, etc. (see, by analogy, decision of the Third Board of Appeal of 18 September 2007 in case R 250/2007-3 - 'tavoli').
- 34 The informed user is generally not technically experienced or particularly interested in the technical design of fireplace inserts. S/he will therefore not pay attention to every detail of the device. Instead, s/he will undertake an overall view, including, *inter alia*, the attractiveness of the design and the practicability of the device.
- 35 In the Board's opinion, the contested RCD and the earlier design share numerous elements which display strong similarities as follows: a) a face plate in the form of a rectangle, b) a knob for opening the face plate on the right side of the plate, c) flanges on the top of the inserts in a Z-type form, d) vertically located ribs on the side walls of the inserts and e) the hole and top side of the inserts are at the same height as the top part of the front side. The overall shape and the proportions of the details of the fireplace inserts are very similar in both designs.
- 36 There are also differences in the designs as follows: a) the face plate in the form of a rectangle is flat in the contested design and slightly convex in the prior

design, b) the contested design has an ash box with knobs on both sides, c) the contested design has a wave-shaped plate on the bottom part of the face plate, d) the flanges on the top of the inserts in a Z-type form are slightly separated in the contested design and e) the top side of the contested design is a pentagon, while the prior design is a quadrilateral.

- 37 However, the informed user is more likely to be impressed by the overall aspect of the fireplace inserts rather than the various slight details that may be included in them. This means that the designs of fireplace inserts will produce the same overall impression if they globally display the same arrangement of the various parts of the fireplace insert and these components have similar shapes and sizes relative to each other, as is the case here.
- 38 The fact that the elements mentioned in paragraph 35 above are identically or at least very similarly laid out in the two fireplace inserts' designs contributes to producing the same visual impression. It must be noted in this regard that no technical necessity obliges a designer to place, for example, flanges on the top of the inserts in a Z-type form. Various options exist, as can also be seen from the other designs taken into account in these proceedings. In fact, none of the elements described in paragraph 35 above are technically necessary.
- 39 The Board notes that, as concluded above, there are also differences in the details of the designs. However, the Board is of the opinion that these are not features that play a significant role in the overall impression of the designed product. Fireplace inserts are products for which safety considerations – ease of use, protection against hazards – are of such importance that the informed user's overall impression of the aspect of the product is more likely to be influenced by the general appearance (arrangement of component parts, size, overall shape of components) than by relatively immaterial details.
- 40 The Board takes the view that the differences between the designs are not of a type that would attract the attention of the informed user. They are not features which attract the attention of the informed user as clear differences when the design is observed in its entirety. The overall shape, configuration and general appearance of the designs is very similar. The differences do not significantly affect the overall impression produced by the devices since they are details which, although not insignificant, relate to what are essentially marginal elements of the two products. A close examination – going much further than the general comparison required by the regulation – would be needed before the informed user could distinguish the two devices. The differences noted by the RCD proprietor may be enough for the contested RCD to survive the strict novelty test under Article 5 CDR when compared to D2, but do not assist it in the framework of Article 6 CDR. The Board concludes that the designs produce the same overall impression.
- 41 The designer's degree of freedom in developing the design is relatively wide. Certain features must be present in a fireplace insert for it to provide heat and to be safe at the same time, but it is difficult to see any reason why the holder's design needs to resemble the appearance of the earlier design to such an extent. A fireplace insert could surely look significantly different but still function perfectly

well, as can also be seen from the examples produced during these invalidity proceedings. Each device must fulfil a certain basic function, but in the present case this does not extend so far that the designer is deprived of all design options. This results in allowing for a variety of design options in order to stand out from competitors. It follows that the RCD proprietor could have distanced itself much more from the prior design, rather than by merely incorporating slight differences, which is what the changes it has mentioned to its design amount to.

- 42 The Board concludes that the contested RCD is also invalid for lack of individual character. The appeal must be upheld and the contested decision annulled.

### **Costs**

- 43 In accordance with Article 70(1) CDR, the RCD proprietor, as the losing party, shall bear the costs incurred by the invalidity applicant both in the invalidity and in the appeal proceedings.



## **Order**

On those grounds,

THE BOARD

hereby:

- 1. Annuls the contested decision;**
- 2. Declares the registered Community design No 000434782-0001 invalid;**
- 3. Orders the RCD proprietor to bear the fees and costs incurred by the invalidity applicant.**

Th. Margellos

H. Salmi

C. Rusconi

Registrar:

J. Pinkowski