



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

OPERATIONS DEPARTMENT - Designs Service

Alicante, 25/02/2015

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Fax number: **00 31-208100288**  
Your reference: **Napco/Auping**  
Community Design concerned: **002094615-0001**  
File number of the Invalidation application: **ICD 9312**  
Language of the proceedings: **English**

**NOTIFICATION OF A DECISION OF THE INVALIDITY DIVISION**  
**COMMUNICATION TO THE APPLICANT**

Please find enclosed the decision of the Invalidation Division in relation to the Invalidation application referred to above.

Please note that the date of fax transmission is considered to be the date of notification of the decision.

Janine ANTON

Attached: Decision of the Invalidation Division

By fax: 00 31-208100288 & by registered mail



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

OPERATIONS DEPARTMENT – DESIGNS SERVICE

**DECISION OF  
THE INVALIDITY DIVISION  
OF 24/02/2015**

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

**FILE NUMBER** ICD 9312  
**COMMUNITY DESIGN** 002094615-0001  
**LANGUAGE OF PROCEEDINGS** English

**APPLICANT** **Napco Beds B.V.**  
Fresualaan 3  
6851 TH Huissen  
Netherlands

**REPRESENTATIVE OF  
THE APPLICANT** **Leopold Meijnen Oosterbaan**  
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Radhuisstraat 52C  
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**HOLDER** **Koninklijke Auping B.V.**  
Laan van Borgele 70  
7415 DK Deventer  
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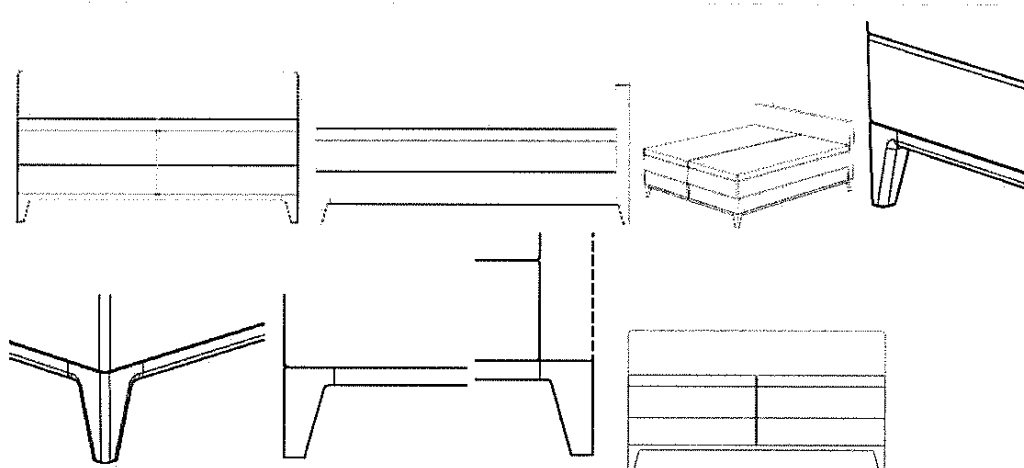
**REPRESENTATIVE OF  
THE HOLDER** **Klos Morel Vos & Schaap**  
Weteringschans 24  
1017 SG Amsterdam  
Netherlands

The Invalidity Division, composed of Alvaro Sesma Merino (rapporteur), Michele M. Benedetti - Aloisi (member) and Natalie Pasinato (member) took the following decision on 24/02/2015:

1. **Registered Community design No 2094615-0001 is declared invalid.**
2. **The holder shall bear the costs of the applicant.**

#### I. FACTS, EVIDENCE AND ARGUMENTS

- (1) Community design No 2094615-0001 (the RCD) was registered in the holder's name with a filing date of 30/08/2012. In the RCD, the indication of products reads *bedsteads, beds, composite beds, beds (part of -)* and the design was published in the Community Designs Bulletin with the following views:

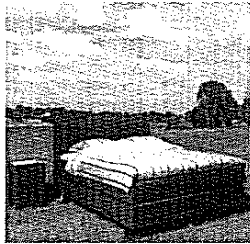


(<https://oami.europa.eu/eSearch/#details/designs/002094615-0001>)

- (2) On 15/11/2013, the applicant filed an application for a declaration of invalidity (the application). The application fee was paid by bank transfer.
- (3) The applicant requested a declaration of invalidity of the RCD on the grounds that the RCD did not fulfil the requirements of Article 25(1)(b) and Articles 4 to 9 CDR<sup>1</sup>. It stated that the design lacked novelty and individual character due to the existence of the earlier disclosed designs. On 04/09/2014, the applicant withdrew its initial claim that the RCD design was solely dictated by its technical function.

<sup>1</sup> Commission Regulation (EC) No 6/2002 of 12 December 2001 on Community designs

- (4) As evidence, the applicant provided, inter alia, the following design views (D1 and D2) from a brochure dated 2012. These designs were identified as 'avek model noflik fjild' and as 'avek model noflik stripe' respectively.



Avek model noflik fjild (D1)



Avek model noflik stripe (D2)

The 'Wayback Machine' in [www.archive.org](http://www.archive.org) shows that the Avek brochure was available as early as 03/07/2012.

See <https://web.archive.org/web/20120703131650/http://www.avek.nl/pdf/noflik.pdf>. The attached screenshots of the views can be found in this URL.

As regards other invoked prior designs, reference is made to the file.

- (5) In reply, the holder pointed out that it had not been proven that the prior designs were disclosed and it indicated the differences between the prior designs and the contested RCD. It considered the registered designs clearly different to its RCD.
- (6) For further details of the facts, evidence and arguments submitted by the parties, reference is made to the documents on file.

## II. GROUNDS OF THE DECISION

### Admissibility

- (7) The application complies with the formal requirements prescribed in the CDR and the CDIR<sup>2</sup>, in particular it complies with Article 28 CDIR. The application is therefore admissible.

### B. Substance

#### B.1 Disclosure

- (8) Challenging the validity of a Community design on account of its lack of novelty or of individual character requires proof that an earlier identical design or one that produces a similar overall impression has been made available to the public before the filing date of the application for registration or, if a priority is claimed, the date of priority (Articles 5 and 6 CDR).
- (9) It is assumed that a design made available to the public anywhere in the world and at any point in time as it has been published following registration or otherwise, exhibited, used in trade or otherwise, has been disclosed for the purpose of applying Articles 5 and 6 CDR (Article 7(1) CDR).

<sup>2</sup> Commission Regulation (EC) No 2245/2002 of 21 October 2002 implementing Council Regulation (EC) No 6/2002 on Community designs

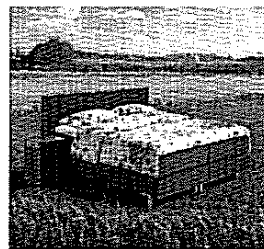
- (10) As a matter of principle, internet disclosures form part of the prior art. Information disclosed on the internet or in online databases is considered publicly available as of the date it was posted. Websites often contain highly relevant information. Certain information may even only be available on these websites. This includes, for example, online publications of design registrations by industrial property offices.
- (11) Due to internet's nature it can be difficult to establish the actual date on which information was in fact made available to the public. For instance, it is not mentioned on all web pages when they were published. In addition, websites are easily updated, yet most do not provide any historical archive of previously displayed material, nor do they display records that enable the public to establish precisely what was published and when.
- (12) In this context, the disclosure date on the internet will be considered reliable in particular where:
- the website provides timestamp information relating to the history of modifications applied to a file or web page (i.e., as available for Wikipedia or as automatically appended to forum messages, blogs, etc.); or
  - indexing dates are given to the web page by search engines (e.g. from the Google cache); or
  - a screenshot of a webpage bears a given date; or
  - information relating to the updates of a web page is available from an internet archiving service.
- (13) Neither restricting access to a limited circle of people (e.g. by password protection) nor requiring payment for access (analogous to purchasing a book or subscribing to a journal) prevent a webpage from forming part of the state of the art. It is sufficient if the web page is available without any bar of confidentiality and the accessibility requirements can reasonably be met by the European professionals of the circles concerned.

The 'Wayback Machine' in [www.archive.org](http://www.archive.org) showed that the Avek brochure was available from 03/07/2012. This can be seen in <https://web.archive.org/web/20120703131650/http://www.avek.nl/pdf/noflik.pdf>. The attached screenshots can be found in this URL.

- (14) Therefore, designs D1 and D2 as shown below



Avek model noflik fjild (D1)



Avek model noflik stripe D(2)

have been disclosed.

For reasons of procedural economy the Invalidity Division has selected among the prior designs claimed the ones it considers justifies sufficiently the application for invalidity on the basis of lack of novelty and individual character.

## **B.2 Assessment of novelty and individual character**

### **General principles**

#### Global comparison

- (15) The Community design must be compared with each and every earlier design relied on by the applicant, individually. Novelty and individual character of a Community design cannot be defeated by combining earlier designs or parts of earlier designs (judgment of 22/06/2010, T-153/08, 'Communication equipment', paras 23-24).
- (16) A combination of already disclosed features is, therefore, eligible to protection as a Community design provided this combination, as a whole, is novel and has individual character.
- (17) As a matter of principle, all the features of a Community design must be taken into consideration when examining its novelty and individual character. There are, however, a number of exceptions to this general principle.

#### Features dictated by a function and features of interconnection

- (18) Features which are solely dictated by a technical function and features which must necessarily be reproduced in their exact form and dimensions in order to allow interconnection with another product cannot contribute to the novelty and individual character of a Community design. Such features must therefore be disregarded when comparing the Community design with the relevant prior art. (Article 8 CDR).

#### The visibility requirement

- (19) Features of a Community design applied to, or incorporated in a 'component part of a complex product', will be disregarded if they are invisible during normal use of the complex product in question (Article 4(2) CDR).
- (20) 'Complex product' means a product which is composed of multiple components which can be replaced, permitting disassembly and re-assembly of the product (Article 3(c) CDR). For instance, the visibility requirement does not apply to a Community design representing the appearance of a garbage container as a whole since garbage containers may be complex products as such, but not component parts of complex products (decision of 23/06/2008 (ICD 4919)).
- (21) 'Normal use' means use by the end user, excluding maintenance, servicing or repair work (Article 4(3) CDR). 'Normal use' is the use made in accordance with the purpose for which the complex product is intended.

### Clearly discernible features

- (22) Features of the Community design which are not clearly discernible in its graphical representation cannot contribute to its novelty or its individual character (Directive 98/71/EC of the European Parliament and the Council of 13 October 1998 on the legal protection of designs, Recital 11). Likewise, features of the prior design which are not of a sufficient quality allowing all the details to be discerned in the representation of the prior design cannot be taken in consideration for the purpose of Articles 5 and 6 CDR (decision of 10/03/2008, R 586/2007-3, 'Barbecues', paras 23-26).

### Disclaimed features

- (23) Features of a Community design which are disclaimed are disregarded for the purposes of comparing the designs. This applies to the features of a Community design represented with dotted lines, boundaries or colouring or in any other manner making clear that protection is not sought in respect of such features (judgment of 14/06/2011, T-68/10, 'Watch attached to a lanyard', paras 59-64).

## **B.3 Novelty**

- (24) The design disclosed in views D1 and D2 is not identical to the contested RCD's design. Therefore, the applicant's submission that the RCD lacks novelty is not founded.
- (25) The following differences exist: In the RCD the headboard is directly supported by the bedframe. The legs are part of the bedframe and have a clearly different shape because, seen from one angle, they follow a diagonal line towards the frame. The legs are right below the four corners of the bedframe.
- (26) On the contrary in the earlier designs the headboard and frame are separate. The legs and bedframe do not form one unique element, as they do in the contested RCD, but rather two separate elements. The legs are then fixed to the bedframe but not in line with the corners of the bed(frame).

## **B.4 Individual Character**

- (27) According to Article 6 CDR, the RCD lacks individual character if the overall impression produced on the informed user is the same as the overall impression produced on such a user by any design which has been made available to the public before the date of filing of the RCD or the date of the priority claimed. In assessing individual character of the RCD, the degree of freedom of the designer in developing the design shall be taken into consideration.
- (28) According to the established case-law, the informed user is particularly observant, is aware of the state of the art in the sector concerned, and uses the product related to the RCD in accordance with the purpose for which the product is intended (see judgment of 09/09/2011, T-10/08, 'Internal combustion engine', paras 23 to 25).

- (29) In the present case, the informed user is familiar with designs of *bedsteads, beds, composite beds, beds (part of -'*. The informed user is aware of the designs of products which were available before the date of filing of the contested RCD, and they are aware of the considerably large freedom of the designer of this kind of products.
- (30) The overall impression given by the earlier designs is the same as that given by the contested RCD. This is despite some minor differences that for the informed consumer do not deviate sufficiently from the previous designs even when making a direct comparison. Both the RCD and the earlier designs have a bedframe, a headboard, and at the corners or close to them four supporting legs. The RCD and the earlier designs have two thick and one thin rectangular element, on a visible, thin bedframe. The bedframe also has a rectangular shape, following the lines of the elements on it. The RCD does not have individual character in the light of D1 and D2.

### **C. Conclusion**

- (31) The RCD does not fulfil the requirements of individual character as stated in Article 6(1) CDR. The RCD is to be declared invalid according to Article 25(1)(b) CDR. There is no need to assess the disclosure of the other claimed earlier designs as the RCD is declared invalid taking into account the aforementioned designs D1 and D2.

### **II. COSTS**

- (32) Pursuant to Article 70(1) CDR and Article 79(1) CDIR, the holder bears the fees and costs of the applicant.
- (33) The costs to be reimbursed by the holder to the applicant are fixed to the amount of EUR 750, composed of EUR 400 for the costs of representation and EUR 350 for the reimbursement of the invalidity fee.

### **IV. Right to Appeal**

- (34) 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**

Alvaro Sesma Merino

Michele M Benedetti -  
Aloisi

Natalie Pasinato



