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**Datasheet for the decision
of 30 January 2014**

Case Number: T 1736/09 - 3.4.03

Application Number: 01200301.8

Publication Number: 1111672

IPC: H01L23/498

Language of the proceedings: EN

Title of invention:

Semiconductor chip assemblies, methods of making same and components for same

Patent Proprietor:

TESSERA, INC.

Opponent:

STMicroelectronics, Inc.

Headword:

Relevant legal provisions:

EPC 1973 Art. 76(1), 111(1)
EPC Art. 69(1), 123(2), 123(3)
EPC Prot. Interpretation Article 69

Keyword:

Amendments - relationship between Art. 123(2) and Art. 123(3)
- broadening of claim (no)
Remittal to the department of first instance

Decisions cited:

G 0002/88, G 0001/93, T 1148/97, T 0971/02

Catchword:

In determining whether amendments made in opposition proceedings comply with the requirements of Article 123(3) EPC, the protection conferred by European patent is determined by the claims of the granted patent, the description and drawings of the granted patent being used to interpret the claims in accordance with Article 69(1) EPC and its Protocol (see point 1.1.8).



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Case Number: T 1736/09 - 3.4.03

D E C I S I O N
of Technical Board of Appeal 3.4.03
of 30 January 2014

Appellant:
(Patent Proprietor)

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Decision under appeal:

**Decision of the Opposition Division of the
European Patent Office posted on 26 June 2009
revoking European patent No. 1111672 pursuant to
Article 101(3) (b) EPC.**

Composition of the Board:

Chairman: G. Eliasson
Members: S. Ward
P. Mühlens

Summary of Facts and Submissions

- I. This appeal is against the decision of the Opposition Division revoking European patent EP 1 111 672 on the grounds that the main request did not meet the requirements of Article 123(3) EPC, and that none of the auxiliary requests met the requirements of Article 123(2) EPC.

The contested patent was filed as European patent application EP 01 200 301, a divisional application derived from European patent application EP 91 918 245, which is itself derived from the international application having publication number WO 92/05582.

- II. With the statement of grounds of appeal, the appellant-proprietor (hereinafter referred to as the proprietor) filed a main request and seventeen auxiliary requests, labelled 1 to 4, M.1, 1.1, 2.1, 3.1, 4.1, 1.2, 2.2, 3.2, 4.2, 1.3, 2.3, 3.3 and 4.3.

The proprietor also requested "the opportunity to file further Auxiliary Requests in the event that requests 1.3, 1.4 or 1.5 above are not allowed", and oral proceedings on a conditional basis.

- III. Oppositions filed by the following former opponents have been withdrawn: MICRON Semiconductor Deutschland GmbH (in a letter dated 24 July 2006), Infineon Technologies AG (in a letter dated 7 August 2006) and Koninklijke Philips Electronics N.V. (in a letter dated 4 December 2006). The sole remaining opponent and respondent in the present appeal is therefore STMicroelectronics, Inc. (hereinafter "the opponent").

IV. The Board sent the parties a summons to oral proceedings and a communication under Article 15(1) of the Rules of Procedure of the Boards of Appeal (RPBA) setting out its provisional views. In this communication, the Board expressed the provisional opinion that claims 1 and 29 of the main request comply with the requirements of Article 123(3) EPC.

In relation to the question of alleged added subject-matter, the Board refrained from commenting on the main request, but expressed the provisional view that the occurrence of the term "spacer layer" in certain auxiliary requests did not appear to comply with the requirements of Article 76(1) EPC 1973.

V. At the oral proceedings before the Board, the appellant-proprietor requested that the decision under appeal be set aside and that the patent be maintained on the basis of the main request or on the basis of one of the seventeen auxiliary requests filed with the grounds of appeal.

The respondent-opponent requested that the appeal be dismissed.

Both parties requested that, if the decision were set aside, the case be referred to the department of first instance for further prosecution.

VI. Claim 1 of the main request reads as follows:

*"A semiconductor chip assembly comprising:
a semiconductor chip (28) having a plurality of
surfaces (36, 38); a plurality of contacts (40) on one
of said plurality of surfaces of said semiconductor
chip;*

a sheetlike element (42) abutting [sic] one of said plurality of surfaces of said semiconductor chip; a plurality of terminals (48) for connection to a plurality of contact pads of a substrate to which the assembly is to be mounted, said terminals being arranged spaced-apart on the sheetlike element and at least some of said terminals overlying one of said plurality of surfaces of the semiconductor chip so that these terminals lie within the periphery of the one surface and are insulated and spaced from the chip by the sheetlike element; and a plurality of electrical connections connecting said plurality of terminals to said plurality of semiconductor chip contacts; wherein said plurality of electrical connections comprise flexible leads (50) and wherein the sheetlike element (42) and the flexible leads (50) are arranged to permit movement of said terminals (48) overlying the chip relative to the chip contacts (40) so that such movement compensates for differential thermal expansion of the chip and a substrate upon which the assembly is mounted in service and thereby contributes to the ability of the assembly to withstand thermal cycling when the assembly is mounted on a substrate."

In claim 1 of the granted patent, the term "spacer layer" was used in place of "sheetlike element".

VII. In the contested decision, the Opposition Division argued essentially as follows:

A sheet "implies a self-supporting entity not adhered to any substrate or the like", whereas a layer must be adhered to a larger entity. Hence, a layer may be formed by applying and adhering a material to a substrate, for example by spin coating, or it may be

formed by adhering a pre-existing sheet to a larger entity.

Claim 1 as granted defined a "spacer layer" which therefore implied adhesion. Claim 1 of the main request defines a sheetlike element abutting (but not necessarily adhering to) the semiconductor chip surface. Such a non-adhered sheetlike element goes beyond the definition of a layer, and hence claim 1 of the main request defines arrangements falling outside the scope of claim 1 as granted, contrary to the requirements of Article 123(3) EPC.

VIII. The appellant-proprietor argued essentially as follows:

The term "sheetlike element" did not extend the scope of protection with respect to the term "spacer layer" of granted Claim 1. The Opposition Division:

- "considered only one term in Claim 1, isolated from its context within the claim set and isolated from the Patent as a whole. The Opposition Division applied its own meaning to that term, alleging that meaning - without evidence - to be "generally accepted and applied in the technical field". Then the Opposition Division quoted in a selective and misleading manner from the Patent in an attempt to support its interpretation of the term. By this wholly improper technique of claim construction, the Opposition Division arrived at a meaning for Claim 1 in contradiction to the teaching of the Patent."

There is, in particular, no justification for the view that a layer must necessarily be *adhered* to a substrate, and no evidence of any such special meaning

in the relevant technical field. In addition, a layer does not necessarily imply a single layer.

Claim 1 should be construed "not by an over-meticulous linguistic analysis of terms taken in isolation" but in the light of the description and considering Article 69 EPC. The opponent's analysis is flawed as it conflates considerations which are relevant for Article 123(3) EPC with those relevant for Article 123(2) EPC.

Furthermore, the claims of the main request "do not contain subject-matter that extends beyond the content of the application as filed or beyond the content of its parent application as filed", and "the subject matter of Main Request is novel and inventive over the documents admitted into the Opposition proceedings."

IX. The respondent-opponent argued essentially as follows:

Claim 1 as granted included a "spacer layer", and the "common sense interpretation is that a layer is a single layer. This is entirely in line with the teaching of the Parent Application." Moreover, "the part of the Patent that is not contrary to A76 (1) teaches that a layer is a single layer and if there is more than one layer, they are separate layers. There is no teaching of a single layer being provided by more than one layer."

However, in relation to claim 1 of the main request, "the sheet-like element as interpreted in light of the specification can comprise more than one layer". Hence, embodiments in which the sheetlike element comprises multiple layers would be protected by the main request, but were not protected by the granted patent, which

defined only a single "spacer layer". The requirements of Article 123(3) EPC are therefore not met.

For example, there are embodiments where the sheetlike element comprises a flexible top layer and a compliant bottom layer (such as shown in figure 13). Such an arrangement would not have been protected by claim 1 as granted, which "specified an arrangement where the spacer layer abutted one of the plurality of the surfaces of the semi-conductor chip and the terminals were arranged on that same spacer layer." However, such an arrangement "would now be covered by this claim and as such, the amendment proposed in the Main Request is inadmissible under Article 123(3)." (Emphasis in the original.)

Neither a "spacer layer" nor a spacing function have any basis "in the original PCT application", which disclosed a "flexible sheetlike element", an "interposer" and similar terms.

In the preliminary opinion of the Board, an attempt was made "to consider the issue of A 123(3) in isolation, at least in respect of the Main Request". However, "Added matter and extension of protection must be considered together. Consideration of one without the other provides inequitable outcomes." Hence, the three criteria (Article 123(2) EPC, Article 123(3) EPC and Article 76(1) EPC) "are relevant and should be considered together or at least should be taken into account before reaching any final decision." The "interaction between Article 123(2) and Article 123(3) is well known and to consider one without the other is problematic."

Similarly, material which is not supported by the application as filed or the parent application as filed should not be used when interpreting the claims using Article 69 EPC and the Protocol on the Interpretation of Article 69 EPC. "Only the description and drawings which comply with the requirements of the EPC and in particular A 123(2) and A76(1) should be used when considering A69."

For this reason, it is not permissible to use passages of the granted patent (*inter alia* paragraph 25 and dependent claims 2 to 6) to interpret the term "spacer layer", as "There is no teaching in the Application or the Parent Application as to what is meant by spacer layer", and hence such passages constitute added subject-matter, which should not be used to interpret the scope of protection of the patent.

The approach to applying Article 123(3) EPC taking into account the requirements of Article 123(2) EPC and Article 76(1) EPC was supported by following passages from the decision of the Enlarged Board of Appeal G 1/93 (OJ EPO 1994, 541): Order, point 1; Reasons, points 8, 9 and 11. Hence, "It is clear that a patent as a whole should comply with A123 (2) and A76 (1) before making any judgement as to the extent of protection provided by that patent.

The reliance of the proprietor "on the reference numerals to support their argument that the claims do not contain added matter" had no relevance as reference numerals "do not limit the claims (Rule 43(7))."

Reasons for the Decision

1. *Main Request: Article 123(3) EPC*

1.1 *The meaning of Article 123(3) EPC*

1.1.1 In maintaining the objection that the main request would extend the protection conferred by the patent, the respondent-opponent has relied, at least in part, on arguments concerning the correct methodology to be applied in determining whether the requirements of Article 123(3) EPC have been met. The appellant-proprietor contested the opponent's approach. It is therefore necessary to address this general issue before examining the details of the present main request.

1.1.2 The Board understands the position of the opponent to be as follows:

Before deciding whether an amendment made in opposition complies with the requirements of Article 123(3) EPC, it must be established whether the text of the granted patent comprises subject-matter which extends beyond the content of the application as filed and/or the parent application as filed.

Any subject-matter comprised in the patent as granted but found to extend beyond the content of the application as filed or the parent application as filed must be excluded for the purposes of determining the extent of the protection conferred by the European patent according to Article 69(1) EPC.

There is thus a mutual interaction between the examination for added subject-matter and the determination of compliance with Article 123(3) EPC.

1.1.3 The Board does not share this view of the meaning of Article 123(3) EPC.

It is not considered necessary to enter into a lengthy analysis of the passages of G 1/93 cited by the opponent; it suffices to note that in a passage which the opponent omitted to cite, the notion that the result of examination under Article 123(3) EPC is dependent on the result of an examination under Article 123(2) EPC is flatly contradicted:

- *"The Enlarged Board agrees with the opponent that there is no support under the EPC for the idea expressed by the Board of Appeal in case T 231/89, that there is a mutual relationship between paragraphs 2 and 3 of Article 123 EPC, the one to be applied as primary and the other as subsidiary depending on the facts of the individual case. This interpretation is not in line with the mandatory character of Article 123(2) EPC, as explained by the Enlarged Board in its opinion in case G 3/89 (OJ EPO 1993, 117). Paragraphs 2 and 3 of Article 123 EPC are mutually independent of each other."* (G 1/93, op. cit., Reasons, point 13.)

By analogy with the above, Article 76(1) EPC and Article 123(3) EPC must be regarded as mutually independent of each other.

Under point 13 the Enlarged Board notes that "it must be admitted that Article 123(2) in combination with

Article 123(3) EPC can operate rather harshly against an applicant, who runs the risk of being caught in an inescapable trap". However, the use of the word "combination" here does not imply that these provisions are to be employed together in a mutually dependent manner (something already ruled out by the Enlarged Board in the same paragraph). The reference is clearly to a case in which it may be impossible allow a request to maintain a patent as granted in the light of Article 123(2) EPC, but equally impossible to allow a further request to maintain the patent in amended form with the undisclosed subject-matter excised, due to the quite separate requirement of Article 123(3) EPC.

1.1.4 The Board also disagrees with the opponent's view on the manner in which Article 69(1) EPC is to be applied in this respect. Article 69(1) EPC states:

- *"The extent of the protection conferred by a European patent or a European patent application shall be determined by the claims. Nevertheless, the description and drawings shall be used to interpret the claims."*

Hence, in the case of a European patent, the extent of the protection conferred is clearly to be determined by the claims of the patent, with the description and drawings of the patent being used to interpret the claims. The wording of Article 69(1) EPC leaves no room for the opponent's interpretation that "Only the description and drawings which comply with the requirements of the EPC and in particular A123(2) and A76(1) should be used when considering A69".

1.1.5 The importance of Article 69(1) and its protocol

in determining questions of compliance with Article 123(3) EPC was set out by the the Enlarged Board as follows:

- *When considering whether a proposed amendment to the claims is such as to extend the protection conferred, a first step must be to determine the extent of protection which is conferred by the patent before the amendment: it is necessary to be quite clear as to what is the protection conferred by the patent without amendment, before one can decide whether a proposed amendment is such as to extend it.*

- *Determination of the extent of protection has to be carried out in accordance with Article 69(1) EPC and its Protocol ...*

- *The object of the Protocol is clearly to avoid too much emphasis on the literal wording of the claims when considered in isolation from the remainder of **the text of the patent** in which they appear; and also to avoid too much emphasis upon the general inventive concept disclosed in **the text of the patent** as compared to the relevant prior art, without sufficient regard also to the wording of the claims as a means of definition.*

- *This approach to interpretation of claims must be adopted by the EPO when determining the protection conferred for the purpose of Article 123(3) EPC." (See G 2/88, OJ EPO 1990, 93, point 4, emphasis added by the Board).*

It is therefore confirmed that the claims, description and drawings of the patent are to be used to determine

the scope of protection in accordance with Article 69(1) EPC and its Protocol.

1.1.6 It would be tedious and superfluous to cite extensively from the many cases in which the boards have further confirmed this interpretation. Merely as one specimen among these cases, decision T 971/02 (not published in OJ EPO) may be mentioned, in which the question arose whether an amended version of claim 1 met the requirements of Article 123(3) EPC. Finding that claim 1 as granted was not clear, the Board noted that "In this case the claim needs to be interpreted in the light of the description and the drawings *of the patent as granted*, according to Article 69 EPC and its Protocol." (Reasons, point 2.6, emphasis added by the present Board.)

1.1.7 This interpretation is also consistent with the object and purpose of Article 123(3) EPC, which may be summarized as follows:

- *"In accordance with the general intention of Article 123(3) EPC there should be legal certainty for the activities of third parties trusting that the protection conferred by a patent can only be restricted, but not extended."* (see T 1149/97, OJ EPO 2000, 259, Reasons point 6. 1. 10.)

Article 123(3) EPC is therefore intended to provide third parties with an assurance that the patent, even if amended in opposition proceedings, will never confer protection on subject-matter which did not fall within the scope of protection of the granted patent. Third parties may then rely on the granted patent in assessing its impact on their own activities or in

deciding whether to file an opposition. This guarantee of legal certainty presupposes that it must be possible to determine definitively the scope of protection of a patent on the basis of the text as granted.

According to the approach advocated by the opponent, however, the scope of protection of a patent determined according to the claims, description and drawings as granted would only be provisional and could not be relied upon. If the patent were opposed on the ground of Article 100(c) EPC, the scope of protection of the granted patent might shift depending on the outcome of the opposition. If an appeal were filed, the scope of protection of the granted patent might shift again. Clearly, this interpretation would lead to the very opposite of legal certainty.

- 1.1.8 In summary, in determining whether amendments made in opposition proceedings comply with the requirements of Article 123(3) EPC, the protection conferred by European patent is determined by the claims of the granted patent, the description and drawings of the granted patent being used to interpret the claims in accordance with Article 69(1) EPC and its Protocol.

For the purpose of examination under Article 123(3) EPC it is irrelevant whether the granted patent meets the requirements of Article 123(2) EPC or Article 76(1) EPC.

1.2 *Alleged extension of protection in the present case*

- 1.2.1 The term "spacer layer" appeared in claims 1 and 29 of the granted patent; in the main request this term has been amended to "sheetlike element". Objections were not raised against other minor differences (e.g. the

adoption of the one-part form), and hence it falls to the Board to decide whether the consequence of this amendment is that embodiments fall within the scope of the independent claims of the main request which did not fall within the scope of the independent claims of the patent as granted.

1.3 *Arguments alleging a "layer" must be a "single layer"*

1.3.1 There is general agreement with the opponent's stated view that "A sheet-like element can have more than one layer".

However, in relation to the opponent's position that the "common sense interpretation is that a layer is a single layer", the Board does not believe that the generally-understood meaning of the word "layer" is restricted in this manner. Accepting that a layer must always be a single layer, thereby excluding any form of composite or multi-strata structure, would mean that an expression such as "sub-layer" would be effectively a contradiction in terms, when in fact it is a widely-used and well-understood expression.

In addition, the Board sees no reason to believe that in the technical field of semiconductor chip assemblies the word "layer" is understood in this restricted sense.

The application of Article 69(1) EPC to the present case is dealt with fully under point 1.6, below. It suffices to note here that the opponent's arguments in this regard are based on an interpretation of Articles 69(1) EPC and 123(3) EPC which, for the reasons given above, the Board does not share. Consequently, these arguments also fail to persuade the Board that the

restrictive interpretation of the word "layer" advocated by the opponent is justified.

The term "spacer layer" in claim 1 as granted is therefore considered to include layers having only a single stratum, as well as spacer layers having multiple strata, and the same may be said for the term "sheetlike element". This argument does not, therefore, convince the Board that an extension of protection has occurred.

The opponent's argument that certain embodiments (e.g. that of figure 13) would not have been covered by granted claim 1 but are covered by claim 1 of the main request is based on the interpretation that the spacer layer must be a single non-composite layer, and hence this argument also fails to convince the Board.

1.4 Arguments alleging a "layer" implies adhesion

- 1.4.1 In the contested decision it was argued that a layer must, by definition, *adhere* to a larger entity. Hence, "a spacer layer (42) abutting..." implies adhesion by virtue of the word "layer", whereas "a sheetlike element (42) abutting [sic]" includes embodiments where there is abutment but no adhesion. Claim 1 of the main request therefore comprises non-adhesive embodiments which do not fall within the scope of claim 1 as granted.

This argument clearly stands or falls on whether the concept of *adhesion* to a substrate or other larger entity is actually inherent in the term "layer".

Even if a "layer" always implies attachment to a larger entity - which is debatable - the Board is not

persuaded that the word "layer" in everyday use (for example, in relation to insulating layers, fabric layers, waterproof layers etc.) invariably signifies attachment by means of adhesion.

According to the Opposition Division the term "layer" has a particular connotation in the context of the present invention, which is "generally accepted and applied in the technical field concerned". As evidence for this assertion, the Opposition Division pointed to paragraph [0052] of the granted patent, according to which a "sheet of copper 304" is adhered to a larger structure via adhesive 302, and is then referred to as "conductive layer 304".

However, even if this single example were considered to be an accurate guide to the terminology generally used in the field - which is doubtful - it would seem to establish only that a sheet, when incorporated into a larger structure, is - or at least may be - referred to as a layer. There is nothing to indicate that adhesion is critical to this terminological usage.

In the absence of any convincing evidence that within the field of packaging of semiconductor assemblies a "layer" always implies adhesion to a surface, this argument fails to persuade the Board.

1.5 *The spacing function of the spacer layer*

- 1.5.1 Arguments about the meaning of the term "layer" notwithstanding, the replacement of "spacer layer" by "sheetlike element" also means that the functional adjective "spacer" is absent from claim 1 of the main request, and it is necessary to consider whether this has implications in relation to Article 123(3) EPC.

In claim 1 as granted, the spacing aspect is defined not only by reference to a "spacer layer", but also more particularly by defining what precisely is "spaced" by the layer ("so that the terminals are insulated and spaced from the chip by the spacer layer"). The spacing function defined in this manner has been retained in claim 1 of the main request ("so that the terminals are insulated and spaced from the chip by the sheetlike element"), hence it is explicitly clear that the sheetlike element performs precisely the same "spacer" function as the spacer layer of granted claim 1. Dropping the adjective "spacer" therefore has no effect on the resulting scope of protection.

1.6 Application of Article 69 EPC and its Protocol

1.6.1 From the foregoing the Board concludes that, based on a comparison of claim 1 of the main request and claim 1 of the patent as granted, and having regard to the normal meanings of the terms used in these claims, the protection conferred by the granted patent has not been extended. The Board also finds no evidence of any generally accepted special meanings of the terms of the claims in the technical field concerned which would invalidate this conclusion.

However, in determining the extent of protection of the granted patent, due weight must also be given to the description and drawings in interpreting the claims in accordance with Article 69(1) EPC and its Protocol.

In particular, it is necessary to ask whether the description of the patent attaches a special meaning to one or both of the terms "spacer layer" and "sheetlike element", such that replacement of the former by the

later would result in an extension of the protection conferred.

- 1.6.2 In paragraph [0029] of the patent it is explicitly stated that "The spacer layer desirably is a thin, flexible sheet of a polymeric material...".

Moreover, the terms "spacer layer" and "interposer" are acknowledged to be synonymous (paragraph [0025]), and the interposer is described as being sheetlike:

- "the flexible sheet-like member or interposer" (paragraph [0034]);
- "A flexible sheetlike dielectric interposer 42 is disposed between the chip and the substrate" (paragraph [0047]);
- "the sheetlike interposer" (paragraph [0051]).

From the disclosed manufacturing method (see paragraph [0056] and figure 6) it is also apparent that the interposer may be a sheetlike element.

- 1.6.3 Hence, according to the description of the granted patent, the spacer layer generally is - or at least may be - in the form of a sheetlike element. Claim 1 as granted is therefore to be interpreted as conferring protection on embodiments in which the spacer layer is in the form of a sheetlike element. Replacing "spacer layer" with "sheetlike element" does not therefore enlarge the scope of protection.

The opponent's argument that at least some of the passages quoted above have no basis in the PCT (parent)

application as filed is irrelevant for the reasons given above under point 1.1.

In summary, claim 1 of the main request does not extend the scope of protection of the patent, and consequently does not contravene the requirements of Article 123(3) EPC. A similar conclusion is reached for independent claim 29 for the same reasons, *mutatis mutandis*.

2. *Further procedure*

2.1 Both parties have requested remission to the Opposition Division according to Article 111(1) EPC 1973 in the event that the decision is set aside, and the Board agrees that this would be the most sensible way to proceed.

2.2 In the interests of procedural efficiency, the Board considered whether it might be possible to decide on the objections raised under Article 76(1) EPC 1973 and Article 123(2) EPC, at least in relation to the main request.

In the notice of opposition, however, objections under Article 100(c) EPC were raised against claim 1 as granted not only in relation to the term "spacer layer" (which has now been deleted from the main request), but also in relation to several other features which remain in claim 1 of the present main request. These features were said to have "no support in the PCT application as originally filed" (i.e. the parent application).

Similar objections were raised against dependent claims 5, 6, 8-11, 15, 20 and 23-25, and against method claims 29 and 38.

These objections under Article 100(c) EPC have not been withdrawn, and were not addressed in the contested decision (apart from in relation to the term "spacer layer").

For the Board to decide on these issues would therefore effectively deprive the parties of two instances on an extensive list of objections, which would not be appropriate.

To avoid any doubt, therefore, the Board wishes to state that it has decided only that the claims of the main request filed with the notice of appeal satisfy the requirements of Article 123(3) EPC. All other issues are left open to be decided in the remitted procedure.

Order

For these reasons it is decided that:

1. The decision under appeal is set aside.
2. The case is remitted to the first instance for further prosecution.

The Registrar:

The Chairman:



S. Sánchez Chiquero

G. Eliasson

Decision electronically authenticated