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Datasheet for the decision of 16 January 2013

Case Number: T 0567/10 - 3.2.07

Application Number: 03788950.8

Publication Number: 1556286

IPC: B65D 5/74

Language of the proceedings: EN

Title of invention:
Sealed package for pourable food products

Patentee:
Tetra Laval Holdings & Finance S.A.

Opponent:
SIG Technology AG

Headword:
-

Relevant legal provisions:
EPC Art. 56

Keyword:
"Inventive step (all requests): no"

Decisions cited:
G 0007/95

Catchword:
-

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Beschwerdekammern | Boards of Appeal | Chambres de recours

Case Number: T 0567/10 - 3.2.07

D E C I S I O N
of the Technical Board of Appeal 3.2.07
of 16 January 2013

Appellant: (Opponent)
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Decision under appeal: **Decision of the Opposition Division of the European Patent Office posted 14 January 2010 rejecting the opposition filed against European patent No. 1556286 pursuant to Article 101(2) EPC.**

Composition of the Board:

Chairman: H. Meinders
Members: K. Poalas
E. Kossonakou

Summary of Facts and Submissions

I. The appellant (opponent) lodged an appeal against the decision of the opposition division rejecting the opposition against European patent No. 1 556 286.

II. Opposition had been filed against the patent as a whole based on Article 100(a) EPC (lack of inventive step).

The Opposition Division found that the ground of opposition under Article 100(a) EPC (lack of inventive step) does not prejudice the maintenance of the patent as granted.

III. In the present decision the following documents of the opposition proceedings are referred to:

D1: EP 0 658 480 A,
D2: DE 698 19 679 T2,
D3: US 4 453 646 A.

Reference is also made to

D4: WO 00/56612 A,

filed during the appeal proceedings.

IV. Oral proceedings took place before the Board on 16 January 2013.

(a) The appellant requested that the decision under appeal be set aside and that the European patent No. 1 556 286 be revoked.

(b) The respondent (patent proprietor) requested that the appeal be dismissed and the patent maintained as granted (main request) or on the basis of auxiliary requests 2, 4 and 5 filed with the submission dated 13 December 2012. Auxiliary requests 1 and 3 were withdrawn in the course of the oral proceedings.

V. The independent claim 1 according to the respondent's requests read as follows:

Main request (claim as granted)

"A sealed package (1) for pourable food products, having at least one removable portion (4), and a closable opening device (2) in turn comprising a frame (5) defining a pour opening (6) and fixed to said package (1) about said removable portion (4), a cap (7) fitted to said frame (5) to close said pour opening (6) and movable to free the pour opening (6), and pull-off opening means (8) housed in said frame (5) and comprising a rigid plate (9) attached to said removable portion (4) and extractable from the frame (5), by pulling action, together with at least part of said removable portion (4); characterized by also comprising a pull-tab (16) of sheet material interposed between said removable portion (4) and said plate (9) and attached to both".

Second auxiliary request (amendments over claim 1 as granted have been struck through or are depicted in bold)

"A sealed package (1) for pourable food products, having at least one removable portion (4), and a closable opening device (2) in turn comprising a**n annular, externally threaded** frame (5) fixed to **a wall (3) of** said package (1) about said removable portion (4) and defining a **circular** pour opening (6) **having an axis (A) perpendicular to said wall (3)**, a **removable** cap (7) ~~fitted~~ **screwed** to said frame (5) to close said pour opening (6) and movable to free the pour opening (6), and pull-off opening means (8) housed in said ~~frame (5)~~ **pour opening (6)** and ~~comprising~~ **defined** by a rigid plate (9) **made of plastic material**, attached to said removable portion (4) and extractable from the frame (5), by pulling action, together with at least part of said removable portion (4); characterized by also comprising a pull-tab (16) of sheet material interposed between said removable portion (4) and said plate (9) and attached to both, **said pull-tab (16) comprising a main portion (19) attached to said removable portion (4), and an end portion (20) folded over said main portion (19) and attached to said plate (9)".**

Fourth auxiliary request

Claim 1 according to the fourth auxiliary request has the following additional features over claim 1 according to the second auxiliary request:

"said plate (9) comprising a base portion (21) attached to said pull-tab (16), and a grip portion (22) projecting from said base portion (21) and accessible through said frame (5) when said cap (7) is removed from said pour opening (6); said plate (9) being

connected integrally to said frame (5) by breakable connecting means (23) defining a parting direction in which said plate (9) is parted from the frame (5), and which is parallel to an opening direction (B) of said pull-tab (16)".

Fifth auxiliary request

Claim 1 according to the fifth auxiliary request has the following additional features over claim 1 according to the fourth auxiliary request:

"said breakable connecting means comprising two parallel breakable strips of material (23) connecting opposite sides of said base portion (21) of said plate (9) to mutually facing portions (24) of said frame (5)".

VI. The appellant's arguments can be summarised as follows:

Inventive step - Article 56 EPC

Main request

The sealed package of claim 1 according to the main request does not involve an inventive step since all features of said claim are derivable from the second embodiment of D1. In this respect it concurred with the Board's view as expressed in the preliminary opinion of 15 October 2012.

Second and fourth auxiliary requests

None of the subject-matters of claims 1 according to these requests involves an inventive step over the combination of the teachings of D2 as closest prior art and D4.

Fifth auxiliary request

It is well known to the skilled person in the packaging field that breakable connecting points or breakable connecting strips are interchangeably applicable, without the need of exercising an inventive activity. D3, especially figures 4 to 6 and 8, provides evidence that the use of parallel breakable connecting strips which define a specific parting direction is well known to the skilled person in the field of packaging of food products, see also column 1, line 26 and column 4, line 60 to column 5, line 24 of D3.

VII. The respondent argued essentially as follows:

Inventive step, Article 56 EPC

Main request

Claim 1 of the main request lists the pull-off opening means as an element of the opening device in addition to the frame and the cap; moreover, claim 1 also specifies that its rigid plate can be extracted from the frame by a pulling action.
In addition to that, the whole disclosure of the patent in suit only refers to solutions having the pull-off opening means distinct from the cap and the

description, thus does not suggest that the cap and the rigid plate of the pull-off opening means are incorporated into one single structural element.

Thus the sealed package according to the second embodiment of D1, which has the pull-off opening means integral with the cap, does not disclose all the features present in claim 1.

Second auxiliary request

A sealed package according to the preamble of claim 1 is known from D2, which is the acknowledged closest prior art.

The problem to be solved is the reduction of the force required for opening the package and providing at the same time a clear tearing of the removable portion at the edge of the hole.

Searching for a solution to the above-mentioned problem the skilled person would not take into consideration the teaching of D4, since D4 explicitly refers to a hinged cap, see page 1, line 9 and claim 1, line 8, which differs from D2. Furthermore, D4 is directed to the problem of making the pull-off tab accessible to the user and not to the above-mentioned problem.

D4 refers on page 8, lines 20 to 27 to a membrane 19 and it does not mention any patch being positioned underneath the hole. Thus, the pull-tab of D4 is not attached to the removable portion.

In D4 the cap contributes to the opening of the package, whereby in D2 it does not, since in D2 the opening of the package itself is only made by the plate 12, said last being not connected to the cap.

Fourth auxiliary request

The breakable connecting points 14, 15, 16 in D2 being points and not strips cannot define by themselves a parting direction. If the pull-off tab is not pulled in a balanced way then it results in a jerky opening procedure; the breakable connecting points 14, 15, 16 cannot prevent that. The connecting points 15 and 16 do not define a hinge axis making the point 14 break first.

Fifth auxiliary request

Neither D2 nor D4 discloses parallel breakable connecting strips. The claimed parallel strips guide the removable plate in the opening direction B of the tab, thus enabling smooth, linear detachment of the removable portion material from the package, see paragraph [0041] of the patent specification. The parallel breakable connecting strips shown in D3 are circular and thus not applicable to the opening device known from D2.

Reasons for the decision

1. *Inventive step - Article 56 EPC*

1.1 *Background Art*

As recognised in paragraph [0002] of the patent in suit many pourable food products are sold in packages made of sterilized packaging material. A **typical example** of such a package is the parallelepiped- shaped package produced by folding and sealing a web of laminated packaging material. The packaging material as a standard has a multilayer structure comprising a base layer, which may be defined by a layer of fibrous material, e.g. paper, or mineral-filled polypropylene material, said layer being covered on both sides with layers of thermoplastic material, e.g. polyethylene films; and, in the case of aseptic packages for long-storage products, the packaging material comprises a layer of oxygen-barrier material, e.g. aluminium foil, which is superimposed on a layer of thermoplastic material, and is in turn covered with another layer of thermoplastic material eventually forming the inner face of the package contacting the food product, see paragraph [0003]. The preferred embodiment of the patent in suit uses exactly the same packaging material, see paragraph [0023].

Such packages are produced on fully automated packaging machines, on which a continuous tube is formed from the web-fed packaging material. The web of packaging material is sterilized on the packaging machine and it is then folded and sealed longitudinally to form a vertical tube, see paragraph [0004]. The packages are

individualised in that they are sealed and cut along equally spaced cross sections to form pillow packs, which are then folded mechanically to form the finished, e.g. substantially parallelepiped-shaped packages, see paragraph [0006].

The tube is filled with the sterilized or sterile-processed food product during this process, when the bottom seal has been made.

Such packages are normally fitted with closable opening devices to protect the food product in the package from contact by external agents, and to enable withdrawal of the product, see paragraph [0007].

The most commonly marketed opening devices at present comprise a frame defining a pour opening which is applied about a removable or pierceable portion of the top wall of the package; and a **cap hinged or screwed** to the frame and which can be removed to open the package. Alternatively, **other types** of opening devices, e.g. **sliding** types, are also used (emphasis added by the Board), see paragraph [0008].

The removable portion of the package may be defined, for example, by a so-called "prelaminated" hole, i.e. a hole formed in the base layer of the packaging material before the base layer is covered with the thermoplastic layers and with the barrier layer, which closes the hole to ensure aseptic airtight sealing, while at the same time being easily pierced, see paragraph [0009].

From the above-mentioned paragraphs of the patent in suit it follows that for the person skilled in the art

a **typical** sealed package for pourable food products, to which also the patent in suit relates, has a hole formed in the base/fibrous material layer which is covered with at least one inner thermoplastic layer contacting the food product.

1.2 *Main request*

1.2.1 All figures of D1 show an opening device 1 applied on a packaging container 2 of the type which is manufactured from a continuous laminated web material, with a core of paper or paperboard to which thermoplastic layers and possibly aluminium are laminated, see column 1, lines 38 to 46.

1.2.2 In column 2, line 54 to column 3, line 7 of D1 it is further stated that "[o]n the upper side of the packaging container 2, a hole 3 or a hole indication has been made. This hole 3 or hole indication is normally covered from beneath by a thermoplastic strip for purposes of realising a liquid-tight package. At the same time, the outer side of the package is provided with a corresponding outer strip 4. Normally, these work stages are already carried out on production of the packaging material and the packaging material is delivered ready to the filling machines, provided with the above described hole 3 with each respective covering strip".

1.2.3 The above-mentioned passage of D1 defines that when the packaging material is delivered to the filling machines the hole 3 is already provided with an inner thermoplastic strip covering said hole 3 from the inside and with an outer strip 4 covering said hole 3

from the outside. This means that the two strips have to be fixed to each other so that when pull is exerted on the outer strip 4 in order to unseal the hole 3 said outer strip 4 detaches from the outside of the packaging material removing at the same time the thermoplastic strip covering the hole 3 on the inside. Otherwise an additional tearing action for the lower thermoplastic strip would be needed for freeing the hole 3, which is nowhere described in D1 and would not make any sense.

1.2.4 The outer strip 4 further has a free unsealed portion 5 which is attached to the surface area 11 of the heel 10, see column 3, lines 8 to 11 and column 4, lines 10 to 30. Through this attachment the inner thermoplastic strip covering the hole 3 on the inside is connected via the free unsealed portion 5 and the outer strip 4 to the surface area 11 of the heel 10. In the closed stage shown in figure 9 the surface area 11 of the heel 10 is positioned within the space defined by the pouring element/frame 7. In the nearly complete opening stage shown in figures 11 and 12 the heel 10 is extracted from the element/frame 7 with the main portion of the strip 4, obviously together with the main portion of the inner thermoplastic strip attached to it.

1.2.5 Accordingly, D1 discloses in its embodiment shown in figures 8 to 12 (using the terminology of claim 1 of the patent in suit) a sealed package (packaging container 2 and opening arrangement 1) for pourable food products, having at least one removable portion (the thermoplastic strip covering the hole 3 from the inside), and a closable opening device (1) in turn

comprising a frame (7) defining a pour opening and fixed to said package about said removable portion, a cap (9) fitted to said frame to close said pour opening and movable to free the pour opening, and pull-off opening means (10) housed in said frame and comprising a rigid plate (11) attached to said removable portion and extractable from the frame by pulling action, together with at least part of said removable portion, and also comprising a pull-tab (4,5) of sheet material interposed between said removable portion and said plate and attached to both.

1.2.6 The Board cannot follow the respondent's arguments, that since

a) in claim 1 of the main request the pull-off opening means is listed as an element of the opening device in addition to the frame and the cap,

b) the whole disclosure of the patent in suit only refers to solutions having the pull-off opening means separate from the cap, and

c) the description does not contain any information hinting that the cap and the rigid plate of the pull-off opening means could be incorporated into one single structural element,

the person skilled in the art would not understand the subject-matter of claim 1 of the main request to be also encompassing a solution having the rigid plate as an integral part of the cap, for the following reasons.

1.2.7 Neither claim 1 of the main request nor the description of the patent in suit excludes the pull-off opening means being part of the cap. Moreover, the fact that in claim 1 the pull-off opening means, the frame and the cap are listed as three distinct elements does not

exclude that these elements may be interconnected with each other or even that they may be integral with each other. Only the specific embodiment depicted in the figures shows specific pull-off opening means 8 being non-integral with the cap. This, however, cannot have a limiting effect as far as it concerns the pull-off opening means claimed in claim 1.

1.2.8 Since according to point 1.2.5 above the sealed package according to the embodiment of D1 shown in its figures 8 to 12 discloses all the features of the sealed package of claim 1, the sealed package according to claim 1 cannot involve an inventive step.

1.2.9 The Board has to take recourse to the above unusual formulation since the original opposition was only based on the ground of opposition of lack of inventive step based on D1 with application of the teaching of D2 being obvious. In application of decision G 7/95 (OJ EPO 1996, 626), reasons point 7.2, the Board had to decide the question whether D1 is disclosing or not all the features of claim 1 as a question of inventive step, since the respondent did not give its consent to the introduction of the ground of lack of novelty, raised by the appellant for the first time on appeal.

1.3 *Second auxiliary request*

1.3.1 It is undisputed that the preamble of claim 1 of the second auxiliary request is known from D2.

1.3.2 Accordingly, the features distinguishing the subject-matter of claim 1 from the sealed package known from D2 are that

a pull-tab of sheet material is interposed between the removable portion and the plate and attached to both, and that said pull-tab comprises a main portion attached to the removable portion, and an end portion folded over said main portion and attached to the plate.

1.3.3 The respondent argued that in D2 the claimed removable portion was constituted by the tab 3, there being no disclosure in D2 of the presence of a patch on the inside of the package, covering the pouring hole. The Board concurs, however, with the appellant in this respect that it is standard practice in these packages to foresee such patches or inner layers covering the pouring hole from the inside. This is further evidenced by EP 331 798 A, mentioned not only in paragraph [0010] of the patent in suit, but also in D2, paragraph [0002] as exemplary opening devices. This document shows such a patch/inner layer 34 as removable portion. The document was also referred to in the oral proceedings as an alternative manner of opening the package, with a separate screw cap.

The above has the result that the features distinguishing the subject-matter of claim 1 from D2 are that tab 3 of sheet material interposed between the removable portion (implicitly present in the opening arrangement of D2) and the plate 12 is now a pull-tab comprising, other than its main portion attached to the removable portion, an end portion folded over the main portion, the former now forming the attachment to the plate 12.

1.3.4 The effect of these distinguishing features is a gradually opening action in which the peak of the force

exerted by the user is reached only after a given portion of the opening movement, providing thereby reliable opening of the packaging container due to the application of a defined tearing force which allows the removable portion to be torn neatly. The pull-tab with the removable portion is "peeled off" the packaging container, instead of its material being torn, itself, as in D2.

1.3.5 The technical problem based on the effects of the distinguishing features can thus be formulated as how to reduce the opening effort while allowing the removable portion to be torn neatly, see paragraphs [0016] and [0019] of the patent in suit.

1.3.6 The person skilled in the art seeking to solve the above-mentioned problems will take into consideration the teaching of D4, said last seeking to provide an opening arrangement which enables *inter alia* a simple and reliable rupturing of the openable region of the packaging container, see page 4, lines 21 to 24.

1.3.7 D4 recognises further that there is a general need in the art to realise an opening arrangement for drink packages of consumer size, the opening arrangement including a prefabricated portion injection moulded from thermoplastic material and disposed over a prefabricated pouring hole in the packaging container, just as in D2. The pouring hole in these packages is sealed by means of a covering strip or a membrane and thereby forms an openable region which, in connection with the initial opening of the packaging container, is ruptured in a manner which is obvious to the consumer and thereby not only serves as a liquid (and possibly

gas-) tight seal of the packaging container, but also as a guarantee seal which ensures that the package has not previously been tampered with or opened, see page 3, lines 21 to 31.

1.3.8 D4 states, moreover, that such prior art packaging containers are well known to the skilled person *inter alia* from D1, see page 2, lines 4 to 10 and page 8, lines 15 to 18 of D4. The pouring hole of such a packaging container as known from D1 is normally covered from the inside by a thermoplastic strip for the purpose of realising a liquid-tight package, see column 2, line 54 to column 3, line 7 of D1. Since the material of such known packaging containers normally consists of a supporting paperboard, said last should not come into contact with the liquid product and this is prevented by the thermoplastic strip. Given this reference it means in the context of D4 that in order to unseal the pouring aperture 18 of the container by pulling off the membrane 19, said membrane has to be fixedly connected to said thermoplastic strip lying underneath the aperture 18. Otherwise pulling off the membrane 19 would not open the aperture, since said last would still be closed by the internal thermoplastic strip.

This arrangement of D4 is mentioned (page 3, lines 9 to 20) as solving the problem of unreliable opening of the packaging container, preventing parts of the membrane to remain at the pouring aperture, and offering a simple opening (page 4, lines 1 to 4). The skilled person will see the advantages of this solution and replace the combination of tab 3 and patch/inner layer

of the opening device of D2 with the arrangement proposed by D4.

The covering of the pouring hole 18 as proposed by D4 (figure 2) consists of the membrane 19 corresponding to the claimed pull-tab of sheet material, attached with its main portion to the thermoplastic strip covering the pouring hole from the inside (corresponding to the claimed removable portion). This pull-tab 19 would at its other end be attached to the plate 8 of the pull-off opening means 9. This other end 20 is folded over said main portion.

1.3.9 According to the respondent the skilled person starting from the sealed package with a screw cap known from D2 and confronted with the problem mentioned under point 1.3.5 above would not take into consideration D4 and its teaching, since D4 explicitly refers to a hinged cap.

This argument cannot be followed. In the first place, whether the cap is hinged or separate, this does not affect the manner of opening of the pouring hold of the packaging container. Secondly, in the field of packing pourable products the closable opening systems are, as concerns their closing means, all equivalent. The patent in suit evidences this fact by stating in its paragraph [0008] that "[t]he most **commonly marketed opening devices** at present comprise a frame defining a pour opening and applied about a removable or pierceable portion of the top wall of the package; and a **cap hinged or screwed** to the frame and which can be removed to open the package. Alternatively, **other types**

of opening devices, e.g. **sliding** types, are also used (emphasis added by the Board)".

1.3.10 According to a further argument of the respondent the skilled person starting from the sealed package known from D2 and confronted with the above-mentioned problem would not take into consideration D4 and its teaching, since in D4 the cap contributes to the unsealing of the package, whereby in D2 it does not.

This argument is not convincing since this contribution is only in lifting the gripping member 9 so that it can more easily be gripped; it is not functional in the actual unsealing action. Further, it is immediately recognisable for the skilled person that D4's solution to the problem of a ragged tearing of the membrane/thermoplastic strip sealing the pouring hole is related only to the way the pull-off force is applied via the gripping member 9 and the pull tab 20, 19 to the membrane/thermoplastic strip. It is not related to the interaction between cap and the pull-off opening means. As a consequence, the skilled person will see that this teaching can be applied on its own, as this is the decisive factor for transmitting the tearing force to the opening means.

1.3.11 For the above-mentioned reasons the skilled person starting from the sealed package known from D2 and confronted with the problem mentioned under point 1.3.5 above would take into consideration D4 and its teaching and by doing so would arrive at the subject-matter of claim 1 without exercising an inventive activity.
The subject-matter of claim 1 of the second auxiliary

request thus cannot be considered as involving inventive step (Article 56 EPC).

1.4 *Fourth auxiliary request*

1.4.1 Claim 1 according to the fourth auxiliary request differs from claim 1 according to the second auxiliary request in that:
a1) the plate comprises a base portion attached to the pull-tab,
a2) the plate comprises a grip portion projecting from the base portion and accessible through the frame when said cap is removed from the pour opening,
b) the plate is connected integrally to the frame by breakable connecting means defining a parting direction in which the plate is parted from the frame, and which is parallel to an opening direction of the pull-tab.

1.4.2 Since according to figures 2 and 3 of D2 the sheet material 3 is connected to a base portion of the plate 12 and according to figure 2 of D4 the end portion 20 is attached to a base portion of the opening portion 8, feature a1) is the automatic result of the application of the teaching of D4 to the sealed package of D2 as discussed above. Therefore the realisation of feature a1) does not demand from the person skilled in the art the exercise of an inventive activity. This finding was not disputed by the respondent.

1.4.3 As shown in figure 2 of D2 the grip portion 17.1 projects from the base portion 12 and is accessible through the frame 5 when the cap 9 is removed from the pour opening. Accordingly, feature a2) is known from D2 and it will remain present after the application of

D4's teaching as discussed above, otherwise there is no means to open the package. This feature therefore cannot provide support for inventive step. This finding was also not disputed by the respondent.

1.4.4 According to figure 1 of D2 the plate 12 is connected integrally to the frame (these closable opening devices are generally produced by injection moulding) by breakable connecting means 14, 15 and 16. As the plate is closed in between two parallel ridges 18 and 19 (see figures 1 and 3) and the lengthwise direction of the pull-off tab 5 is also parallel to those ridges, the user will normally operate the opening means of D2 in that same direction, which is the same as the claimed "parting direction". Applying the teaching of D4 to this opening device of D2 will not change anything in this respect and the feature b) cannot therefore provide support for inventive step either.

1.4.5 Consequently, the subject-matter of claim 1 of the fourth auxiliary does not involve an inventive step either.

1.5 *Fifth auxiliary request*

1.5.1 Claim 1 according to the fifth auxiliary request differs from claim 1 according to the fourth auxiliary request in that:

c) the breakable connecting means comprise two parallel breakable strips of material connecting opposite sides of said base portion of said plate to mutually facing portions of said frame.

1.5.2 As discussed under point 1.4.4 above D2 has three breakable connecting means 14, 15 and 16, whereby the breakable connecting means 15 and 16 shown in figures 1 and 2 of D2 connect opposite sides of the base portion of the plate 12 to mutually facing portions 18, 19 of the frame 5.

This means that the claimed breakable connecting means differ from the connecting means known from D2 only in that they are in the form of strips instead of points.

1.5.3 The effect of having two parallel breakable connecting strips is that they define by their elongated form the parting direction.

Since the arrangement of D2 with the three breakable connecting points already defines a parting direction in which the plate is parted from the frame the problem to be solved can thus be seen in the provision of an alternative breakable connecting means providing the same effect.

1.5.4 The Board follows in this respect the appellant's argumentation that it is well known in the packaging field that breakable connecting points or breakable connecting strips are equivalent connecting means applicable depending on the particular requirements. D3, especially figures 4 to 6 and 8, lend credence to the appellant's argument that the use of parallel breakable connecting strips for defining a specific parting direction is well known to the skilled person in the field of packaging of food products, see also column 1, lines 4 to 10 and line 26 and column 4, line 60 to column 5, line 24 of D3.

1.5.5 The respondent's argument that the skilled person would not take into consideration the teaching of D3, since it discloses connecting strips running along a curved line cannot be followed by the Board.

The function of the parallel breakable connecting strips in D3 is to guide the strip portions 52 and 58 in their parting direction. Their function does not depend on whether they run in straight or curved lines. In actual fact, strip position 52 is torn along a straight line. This will be recognised by the skilled person as a usable alternative to the connecting points 15, 16 of D2.

1.5.6 Accordingly, the use of two parallel breakable connecting strips instead of the two breakable connecting points 15, 16 known from D2 does not require from the person skilled in the art the exercise of an inventive activity and thus the subject-matter of claim 1 of the fifth auxiliary does not involve an inventive step either.

1.6 Since none of the subject-matters of the claims 1 according to all respondent's request satisfies the requirement of Article 56 EPC the patent has to be revoked.

Order

For these reasons it is decided that:

1. The decision under appeal is set aside.

2. The patent is revoked.

The Registrar: The Chairman:

G. Nachtigall H. Meinders